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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

199, 200, 201, 202 U. S.

BOOK 50,

LAWYERS' EDITION.

CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

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THE PUBLISHERS' EDITORIAL STAFF

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,
HON. DAVID JOSIAH BREWER,
HON. HENRY BILLINGS BROWN,*
HON. EDWARD DOUGLASS WHITE,
HON. RUFUS W. PECKHAM,
HON. JOSEPH MCKENNA,
HON. OLIVER WENDELL HOLMES,
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MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

*Retired May 28, 1906.

126052

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

March 9, 1903.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 47 L. ed., Appendix IX. p. 1201.†

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1902–1903.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice RUFUS W. PECKHAM, New York.	President Cleveland.	Second. Vermont, Conn., New York.	1895. (Dec. 9.)	1896. (Jan. 6.)
Associate Justice HENRY B. BROWN, Michigan.	President Harrison.	Third. New Jersey, Pa., Del.	1890. (Dec. 29.)	1891. (Jan. 6.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Seventh. Ind., Ill., Wis.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., New Mex.,* Okla.*	1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

†For Change of Allotment, made May 29, 1906, see Appendix VI., *post*, p. 1180.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1904.

[1]*PEOPLE OF THE STATE OF NEW YORK *ex rel.* METROPOLITAN STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

STATE BOARD OF TAX COMMISSIONERS.

(See S. C. Reporter's ed. 1-47.)

1. Contracts—impairment of obligation—tax on special franchises.—The special franchise tax imposed by N. Y. Laws 1899, chap. 712, does not impair the obligation of the contracts by which the state or municipality granted the right to construct, operate, and maintain street railways in the city of New York in consideration of the payment of a gross sum or of the annual payment of a fixed amount or fixed percentage of earnings, where such payments are nowhere declared to be in lieu of, or as the equivalent or substitute for, taxes.

2. Constitutional law—due process of law—equal protection of the laws—tax on special franchises.—The reduction, on account of annual payments "in the nature of a tax" covered by existing agreements, which is made by N. Y. Laws 1899, chap. 712, from the amount of the special franchise tax provided for by that statute, does not render the statute invalid either as denying the equal protection of the laws to street railway companies who agreed to pay a lump sum for their franchises, or as depriving such companies of their property without due process of law.

3. Constitutional law—equal protection of the laws—tax on special franchises—exemptions.—The exemption of the subsurface street railway in New York city from the operation of the special franchise tax authorized by N. Y. Laws 1899, chap. 712, does not make that statute invalid, as denying the owners of the surface street railways in that city the equal protection of the laws, or as depriving them of their property without due process of law.

[No. 74.]

Argued April 17, 18, 19, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of New York to review a judgment sustaining an assessment of a street railway franchise, entered pursuant to the mandate of the Court of Appeals of that state, which had reversed a judgment of the Appellate Division of the Supreme Court for the Third Department, which had in turn reversed the judgment of the Supreme Court entered at a special term held in and for the county of Albany on a writ of certiorari to review the action of the state board of tax commissioners. *Affirmed.*

See same case below in Appellate Division of Supreme Court, 79 App. Div. 183, 80 N. Y. Supp. 85; in Court of Appeals, 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

Statement by Mr. Justice **Brewer:**

On May 26, 1899, the legislature of New

NOTE—*On taxation of corporate franchises in the United States*—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

As to corporate taxation in United States as affected by the contract clause in the Federal Constitution—see note to Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33.

On constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

As to what constitutes due process of law—see Kuntz, v. Sumption, 2 L.R.A. 655, and note; and *Re* Gannon, 5 L.R.A. 359, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; and Gilman v. Tucker, 13 L. R. A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see State v. Goodwill, 6 L.R.A. 621, and note; and State v. Loomis, 21 L.R.A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579, and note.

York passed an act amending the tax law of the state. N. Y. Laws 1899, chap. 712, p. 1589. The first section reads:

"Section 1. Subdivision 3 of § 2 of the tax law is hereby amended to read as follows:

"3. The terms 'land,' 'real estate,' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under, or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage, or dockage thereon; all bridges, all telegraph lines, wires, poles, and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon. above, and under ground; all surface, underground, or elevated railroads, *including the value of all franchises, rights, or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places;* all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches, and other fixtures permitted or authorized to be made, laid, or placed in, upon, above, or under any public or private road, street, or ground; all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting [3] steam, heat, water, oil, electricity, *or any property, substance, or product capable of transportation or conveyance therein or that is protected thereby, *including the value of all franchises, rights, authority, or permission to construct, maintain, or operate, in, under, above, upon, or through any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other, substance, or electricity for telegraphic, telephonic, or other purposes;* all trees and underwood growing upon land, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state. *A franchise, right, authority, or permission specified in this subdivision shall, for the purpose of taxation, be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association, or corporation situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax."*

The portions in italics are the new matter introduced by the amendment. Other sections were added to the tax law, of which § 46 is as follows:

"§ 46. *Deduction from special franchise tax for local purposes.*—If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town, or village in which the tangible property is located, it shall appear that the person, copartnership, association, or corporation affected has paid to such city, town, or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for *the exclusive use [4] of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town, or village purposes. The chamberlain or treasurer of a city, the treasurer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership, association, or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town, or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver, or other officer shall immediately credit on the tax roll to the person, copartnership, association, or corporation affected the amount stated in such certificate, on any tax levied against any person, copartnership, association, or corporation on an assessment of a special franchise for city, town, or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town, or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax, as required by law."

Other sections provide the machinery for assessment. This assessment was to be made

by the state board of tax commissioners, and one section authorized certiorari to review their proceedings.

Under this law an assessment was made of the franchises belonging to the plaintiff in error, a corporation created by the consolidation of several corporations, having franchises for the maintenance and opera-
[5] tion of street railroads in the city *of New York. A certiorari to review this assessment was finally decided by the court of appeals of the state, which, on April 28, 1903 (174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69), sustained the assessment, and remanded the case to the special term of the supreme court, by which court a final judgment was entered, June 22, 1903. Thereupon this writ of error was sued out. Plaintiff in error makes three assignments of error:

"I. Error in declining to hold that the act of the legislature of the state of New York, approved May 26th, 1899 (chap. 712, Laws 1899), entitled 'An Act to Amend the Tax Law in Relation to the Taxation of Public Franchises as Real Property,' in so far as it authorizes the assessment imposed by the state board of tax commissioners on March 20, 1900, upon the franchises of the [plaintiff in error] relator above named, deprives said relator of its property without due process of law, in contravention of the 14th Amendment of the Constitution of the United States.

"II. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment denies to said relator the equal protection of the laws, in contravention of the 14th Amendment to the Constitution of the United States.

"III. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of contracts, in contravention of § 10, article 1, of the Constitution of the United States."

Prior to 1874 the legislature of New York made direct grants of franchises, rights, or privileges to use the streets of the city of New York. In that year the following amendment to the Constitution was adopted (Constitution 1846, as amended, art. 3, § 18):

"The legislature shall not pass a private or local bill in any of the following cases: . . .

"Granting to any corporation, association, or individual the right to lay down railroad tracks. . . .

"But no law shall authorize the construc-
[6] tion or operation *of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or, in case the consent of such property owners cannot be obtained, the general term of the supreme court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In 1884 an act was passed (Laws 1884, chap. 252, p. 309) giving to the local authorities power to grant franchises for street railroads. This act provided:

"Sec. 7. The local authorities of any incorporated city or village to whom application, under the provisions of this act, may be made for consent to the construction, maintenance, use, operation, or extension of a street surface railroad upon any street, road, avenue, or highway, may, at their option, provide for the sale of and sell at public auction the franchise, subject to all the provisions of this act, to so construct, maintain, use, operate, or extend such street surface railway. . . .

"Sec. 8. Every corporation incorporated under, or constructing or operating a railroad constructed or extended under, the provisions of this act, within the cities of the state having a population of two hundred and fifty thousand or more, as aforesaid, shall, for and during the first five years after the commencement of the operation of any portion of its railroad, annually, on the 1st day of November, pay into the treasury of said respective cities in which its road is located to the credit of the sinking fund thereof, 3 per cent of its gross receipts for and during the year ending the next preceding 30th day of September, and after the expiration of *said five [7]
years make a like annual payment into the treasury of said respective cities for the credit of said sinking funds, of 5 per cent instead of 3 per cent of said gross receipts: *Provided, however,* That every corporation now existing and operating a street-surface railroad which shall extend its tracks or construct branches therefrom, and operate such extensions or branches under the provisions of this act, or the corporation operating such branches or extensions, shall pay such percentages as aforesaid only upon such portions of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension and branches shall bear to the entire length of its tracks."

"Sec. 4. The consent of the local authorities shall, in all cases, be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with, and shall be filed in the office of the county clerk of the county in which said railroad is located."

In 1886 an act amending a prior act of the same year was passed (Laws 1886, chap. 642, p. 919), which contained the following terms:

"Sec. 1. The local authorities of any incorporated city or village, to whom application may be made for consent to the construction, maintenance, use, operation, or extension of a street railroad, or a railroad or railway for the transportation of passengers, mails, or freight, over, upon, under, or through any of the streets, roads, avenues, parks, or public places in such city or village, must provide, as a condition of the said consent to the use of said street, road, avenue, park, or public place, that the right, franchise, and privilege of using the said street, road, avenue, park, or public place shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company or corporation, with adequate security, as hereinafter provided, for the fulfilment of said agreement, and for the commencement and completion of such
[8] road according to the *plan or plans, and on the route or routes, fixed for its construction, within the time or times hereinafter designated and prescribed therefor; but this agreement shall not release any such road from the percentages required to be paid by chapter 252 of the Laws of 1884. The legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway. . . .

"And in the event of the failure or refusal of the party or corporation operating or using the railroad to be constructed as aforesaid, to pay the rental or percentage of gross earnings agreed upon, then, upon notice to the said party or corporation,—of not less than sixty days,—the said consent and right to operate such railroad may be declared forfeited, and the same may be resold to the highest bidder in the manner above provided."

The special acts passed before the amendment of 1874, which are claimed to constitute contracts, the obligations of which are impaired by this tax legislation, are found, first, in chap. 625 of the Laws of 1868, which granted to certain persons the right to construct, maintain, and operate and use a street railroad, with a provision that "the said persons, or their assigns, shall pay to the sinking fund commissioners of the city of New York the sum of $1,000 per annum, to be applied by them in the same manner as moneys received on account of rentals and leases;" second, in chap. 19 of the Laws of 1871, which, granting the privilege of occupying certain streets with street railroad tracks, provided that the company should "make compensation to the mayor, aldermen, and commonalty of said city of New York for the value of the rights and privileges herein granted or authorized," and also prescribed the mode of ascertaining that compensation by three commissioners, whose decision should be final and conclusive as to the company and the mayor, aldermen, and commonalty of said city, adding "the amount so fixed and determined shall *be paid to the commissioners of the [9]
sinking fund of said city, by the said company, within thirty days after the same becomes payable, according to the decision aforesaid, and applied to the reduction of the debt of said city;" third, in chap. 508 of the Laws of 1874, which granted the right to "construct, operate, maintain, and use railways" in certain streets in the city of New York, and provided that "the said persons, or their assigns, shall annually, on the first day of November, pay into the treasury of the city of New York 1 per cent of the gross receipts of the road herein provided for, the amount of which gross receipts shall be determined by the sworn statement of the president and treasurer of said railway, but subject to the inspection of its books by the comptroller of the city of New York."

Subsequent to the law of 1884, above referred to, fifteen other franchises now belonging to the relator were granted by the common council of the city of New York. Most of them provided for annual payment to the city of New York of either a fixed amount or a fixed percentage, varying from 2 to 8 per cent of the gross earnings.

Mr. **William D. Guthrie** argued the cause and filed a brief for plaintiff in error:

There is now presented to the court for interpretation a long series of contracts entered into by the city of New York with the plaintiffs in error or their predecessors, under direct authority of the legislature, which specifically fix the amount to be annually paid for the special franchises now sought to be further taxed, and which contracts have been fully performed by the railway companies. Under the settled law of the state, these contracts constitute irrevocable agreements, which the legislature itself cannot annul, even under the reserved power to alter or amend charters.

People v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

And it has also long been the settled law of the state, in the light of which the agreements clearly were made, that an ordinance duly accepted constitutes a contract, and that, if it provides for a fixed tax, such as a license fee, the amount thereof cannot be increased by the city without impairing the obligation of the contract, although the ordinance may not have stipulated that the particular tax provided for should not be increased.

New York v. *Second Ave. R. Co.* 32 N. Y. 261; *New York* v. *Third Ave. R. Co.* 33 N. Y. 42.

These two cases established the doctrine in New York that a city could not exact additional compensation or payments by subsequent ordinance beyond what was reserved or stipulated for at the time, without violating the contract rights of the grantee of a franchise; and in this respect the cases have not been overruled in that state, and have been frequently cited in other jurisdictions.

Stein v. *Mobile*, 49 Ala. 362, 20 Am. Rep. 283; *Los Angeles* v. *Los Angeles City Water Co.* 61 Cal. 65.

If the legislature had itself granted the franchise by a statute providing that the grant was upon condition that the grantee should pay a fixed amount per annum or a fixed percentage in consideration of the grant, and had required the express acceptance by the grantee of such terms and conditions, no one for a moment would think of suggesting that the statute did not evidence and constitute a valid and binding contract as between the grantee and the state, or that the contract was not protected against impairment, by the Constitution of the United States.

Langdon v. *New York*, 93 N. Y. 129.

It is, of course, elementary that what is implied is as much a part of a contract or statute as what is expressed; and therefore that whatever by correct legal reasoning is fairly contemplated by the parties, and fairly within the obligation assumed on the one side or the other, is as binding and effectual as if stated in express language.

United States v. *Babbit*, 1 Black, 55, 61, 17 L. ed. 94; *Jones* v. *Kent*, 80 N. Y. 585.

Indeed, it is a cardinal rule, in drafting contracts and statutes, not to express what is implied in law. *Expressio eorum quæ tacite insunt nihil operatur.*

Broom, Legal Maxims, 8th Am. ed. p. 669.

The expression of what is implied in law is denominated by Lord Bacon *clausula inutilis.*

See also 2 Parsons, Contr. 9th ed. *514.

The general rule undoubtedly is that contracts with states or municipalities are so to be construed that an exemption from future taxation or regulation of rates is not to be implied unless in reason necessary to give effect to the agreement, or, as it has been authoritatively stated, "unless within the express letter or the necessary scope of the exempting clause."

Ford v. *Delta & P. Land Co.* 164 U. S. 662, 666, 41 L. ed. 590, 592, 17 Sup. Ct. Rep. 230.

But if a contract specifically provides for a fixed tax or rate, is it not implied in law that such express stipulation is exclusive and covers the present and future as fully as if the contract expressly so recited? Has it ever been seriously intimated that, where a particular tax has been the subject-matter of a valid contract fixing it, such tax could be increased without impairing the contract? Has it ever been held that, where a charter provides for the right to collect an agreed and fixed amount of toll or rate, the legislature or city could modify that provision at will, and change the toll or rate?

The rule as to strict construction of charters arose in connection with grants, which were donations "flowing from the bounty of the Crown." But when the grant is upon valuable consideration, imposing pecuniary and other obligations upon the grantee, to which he is bound by a valid contract, good sense and justice require that the grant should be construed according to the rules of legal reasoning which govern all contracts, and which the experience and wisdom of generations have shown to be just as between man and man.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420, 597, 611, 9 L. ed. 773, 844, 849, dissenting opinion; *Hyman* v. *Read*, 13 Cal. 444; *Richmond, F. & P. R. Co.* v. *Louisa R. Co.* 13 How. 71, 86, 14 L. ed. 55, 62; *Thompson* v. *People*, 23 Wend. 537; *Langdon* v. *New York*, 93 N. Y. 129; *Huidekoper* v. *Douglass*, 3 Cranch, 1, 70, 71, 2 L. ed. 347, 369; *Davis* v. *Gray*, 16 Wall. 203, 232, 21 L. ed. 447, 457.

The mere fact that the original statute or contract does not call a fixed annual payment or exaction a tax can make no difference. The substance, and not the nomenclature, determines the legal nature of the payment to be made. If the statute in the present case had called the obligation a tax, it would not have constituted it such had its nature been otherwise. The name, in a word, is wholly immaterial.

People ex rel. Western U. Teleg. Co. v. *Dolan*, 126 N. Y. 166, 12 L. R. A. 251, 27 N. E. 269.

Nor does the fact that a specific sum or percentage is payable into the sinking fund of a city change its nature as a tax.

Pacific R. Co. v. *Maguire*, 20 Wall. 36, 44, 22 L. ed. 282, 286.

There can be no reasonable doubt that, according to common understanding, an annual sum paid or exacted for a franchise, right, or privilege, such as the right to use the streets of a city or the highways of a town, is essentially a tax, and that this is particularly true in the state of New York.

Heerwagen v. *Crosstown Street R. Co.* 179 N. Y. 99, 71 N. E. 729, 90 App. Div. 275, 86 N. Y. Supp. 218. See also *State ex rel. Wyatt* v. *Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

The primary definition of a "toll" by Webster is:—"A tax paid for some liberty or privilege, particularly for the privilege of passing over a bridge or on a highway, or for that of vending goods in a fair, market, or the like."

This definition was quoted with approval by the New York court of appeals in the case of *Pennsylvania Coal Co.* v. *Delaware & H. Canal Co.* 3 Abb. App. Dec. 470.

So also in the Century Dictionary the primary meaning of "toll" is stated as "a tax paid, or duty imposed, for some use or privilege or other reasonable consideration."

See also Cooley, Taxn. 3d ed. pp. 110, 111; Cooley, Const. Lim. 7th ed. p. 713.

The payment imposed upon corporations, of a fixed annual percentage on their gross or net receipts or earnings, for the privilege of exercising franchises, is essentially a tax.

Maine v. *Grand Trunk R. Co.* 142 U. S. 217, 227, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Union Bank* v. *State*, 9 Yerg. 490; *Atty. Gen.* v. *Bank of Charlotte*, 57 N. C. (4 Jones, Eq.) 287.

The word "rental" appears for the first time in N. Y. Laws 1886, chap. 642, and is then used in the phrase, "rental or percentage of gross earnings agreed upon." Although, taken by itself, this phrase might indicate that the legislature was expressing alternative and equivalent senses of the same thing, nevertheless, the different terms undoubtedly referred to different things, in view of the fact that they had been treated as such in all the legislation, and are still treated as distinct and separate. "Or" in such a case frequently means "and."

United States v. *Fisk*, 3 Wall. 445, 447, 18 L. ed. 243, 244; *People ex rel. Municipal Gas Co.* v. *Rice*, 138 N. Y. 151, 33 N. E. 846.

The contemporaneous and subsequent practical interpretation by the executive department of the state, from Governor Cleveland in 1884 to Governor Roosevelt in 1899, by the legislature itself in the present statute, and by the highest court of the state in the *Heerwagen Case*, 179 N. Y. 99, 71 N. E. 729, most persuasively shows that it was the intent of the legislature to provide a tax, and nothing else, and that the payments are in fact existing taxes, as Governors Cleveland and Roosevelt called them, or "in the nature of a tax," as the legislature itself denominated them.

As to the force of the legislative characterization of such payments as "in the nature of a tax" see—

Alexander v. *Alexandria*, 5 Cranch, 1, 8, 3 L. ed. 19, 21; *United States* v. *Freeman*, 3 How. 556, 564, 11 L. ed. 724, 727; *Stockdale* v. *Atlantic Ins. Co.* 20 Wall. 323, 331, 22 L. ed. 348, 351; *Cope* v. *Cope*, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222; *People ex rel. Buckley* v. *Benton*, 29 N. Y. 534; *Smith* v. *People*, 47 N. Y. 330; *People ex rel. Westchester F. Ins. Co.* v. *Davenport*, 91 N. Y. 574.

The contemporaneous, practical interpretation by Governor Cleveland in 1884, in the light of which the contracts were made, supplemented, as it is, by the declarations of Governor Roosevelt in 1899, is likewise entitled to almost the force of law.

Citizens' Bank v. *Parker*, 192 U. S. 73, 81, 48 L. ed. 346, 354, 24 Sup. Ct. Rep. 181; *Potter* v. *Hall*, 189 U. S. 292, 298, 300, 47 L. ed. 817, 820, 821, 23 Sup. Ct. Rep. 545; *Southern P. R. Co.* v. *Bell*, 183 U. S. 675, 682, 685, 46 L. ed. 383, 387, 388, 22 Sup. Ct. Rep. 232; *Hewitt* v. *Schultz*, 180 U. S. 139, 156, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309; *United States* v. *Pugh*, 99 U. S. 265, 269, 25 L. ed. 322, 323. See also *Easton* v. *Pickersgill*, 55 N. Y. 310; *People ex rel. Williams* v. *Dayton*, 55 N. Y. 367; *Power* v. *Athens*, 99 N. Y. 592, 2 N. E. 609; *Re Washington Street Asylum R. Co.* 115 N. Y. 442, 22 N. E. 356; *Jennings* v. *Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424; *Babbage* v. *Powers*, 130 N. Y. 281, 14 L. R. A. 398, 29 N. E. 132; Lewis's Sutherland Stat. Constr. § 474.

The true inquiry in all such cases as those at bar is whether the language used would justify the opinion that the power of taxation was in the view of either of the parties, and that an exemption of it was intended, though not expressed.

New Jersey v. *Yard*, 95 U. S. 104, 115, 116, 24 L. ed. 352, 354, 355; *Providence Bank* v. *Billings*, 4 Pet. 514, 560, 7 L. ed. 939, 955.

A franchise from the legislature cannot subsequently be taxed if a price has been paid for it, which the legislature has accepted.

Gordon v. *Appeal Tax Court*, 3 How. 133, 11 L. ed. 529.

Although this case has been distinguished and limited, it has never been criticized upon the points now involved.

West River Bridge Co. v. *Dix*, 6 How. 507, 542, 12 L. ed. 535, 549; *Planters' Bank* v. *Sharp*, 6 How. 301, 332, 12 L. ed. 447, 460;

Ohio L. Ins. & T. Co. v. *Debolt*, 16 How. 416, 429, 14 L. ed. 997, 1002; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 438, 19 L. ed. 495, 498; *East Saginaw Salt Mfg. Co.* v. *East Saginaw*, 13 Wall. 373, 376, 20 L. ed. 611, 613; *Erie R. Co.* v. *Pennsylvania*, 21 Wall. 492, 498, 22 L. ed. 595, 598; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. Mfg. Co.* 115 U. S. 650, 664, 665, 29 L. ed. 516, 521, 522, 6 Sup. Ct. Rep. 252; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 608, 45 L. ed. 679, 692, 21 Sup. Ct. Rep. 493, dissenting opinion; *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 149, 159, 40 L. ed. 650, 655, 16 Sup. Ct. Rep. 558; *Pearsall* v. *Great Northern R. Co.* 161 U. S. 646, 662, 40 L. ed. 838, 843, 16 Sup. Ct. Rep. 705; *Citizens' Bank* v. *Parker*, 192 U. S. 73, 90, 48 L. ed. 346, 358, 24 Sup. Ct. Rep. 181, dissenting opinion; *Grand Lodge, F. & A. M.* v. *New Orleans*, 166 U. S. 143, 146, 41 L. ed. 951, 952, 17 Sup. Ct. Rep. 523.

Where a fixed and specific tax has been stipulated for and agreed upon, that particular tax may not be increased by subsequent legislation, although such particular tax does not prevent the imposition of other taxes.

Union Bank v. *State*, 9 Yerg. 490. See also *Atty. Gen.* v. *Bank of Charlotte*, 57 N. C. (4 Jones, Eq.) 287; *New Orleans* v. *Southern Bank*, 11 La. Ann. 41; *State* v. *Southern Bank*, 23 La. Ann. 271; *New Orleans* v. *People's Bank*, 32 La. Ann. 82; *Penrose* v. *Chaffraix*, 106 La. 250, 30 So. 718; *Detroit Citizens' Street R. Co.* v. *Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809; *Los Angeles* v. *Los Angeles City Water Co.* 61 Cal. 65, 177 U. S. 558, 577, 578, 44 L. ed. 886, 895, 20 Sup. Ct. Rep. 736; *St. Louis* v. *Western U. Teleg. Co.* 63 Fed. 68; *Los Angeles* v. *Southern P. R. Co.* 67 Cal. 433, 7 Pac. 819; *Sebastian* v. *Covington & C. Bridge Co.* 21 Ohio St. 451; *Covington & C. Bridge Co.* v. *Mayer*, 31 Ohio St. 317.

The closest analogy exists between the two governmental powers or functions of taxation and regulation of rates and tolls. The reasoning and rules of construction and the principles of law and public policy which should be applied have been declared to be the same. In both cases nothing is to be presumed in limitation or restriction of legislative power, except what is expressed or implied.

Stanislaus County v. *San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 211, 48 L. ed. 406, 412, 24 Sup. Ct. Rep. 241; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578, 587, 41 L. ed. 560, 563, 17 Sup. Ct. Rep. 198; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 325, 29 L. ed. 636, 642, 6 Sup. Ct. Rep. 334, 388, 1191; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548, 9 L. ed. 773, 824.

But in both cases the elementary rule of legal reasoning, that what is implied is as much a part of a contract or statute as what is actually expressed, has never been disregarded.

Wilson County v. *Third Nat. Bank*, 103 U. S. 770, 778, 26 L. ed. 488, 491; *Wood County* v. *Lackawana Iron & Coal Co.* 93 U. S. 619, 624, 23 L. ed. 989, 991; *First Nat. Bank* v. *Graham*, 100 U. S. 699, 703, 25 L. ed. 750, 752; *Pine Grove Twp.* v. *Talcott*, 19 Wall. 666, 676, 22 L. ed. 227, 233; *Western U. Teleg. Co.* v. *Eyser*, 19 Wall. 419, 427, 22 L. ed. 43, 44; *Davis* v. *Gray*, 16 Wall. 203, 223, 21 L. ed. 447, 454; *Lynde* v. *Winnebago County*, 16 Wall. 6, 13, 21 L. ed. 272, 274; *United States* v. *Hodson*, 10 Wall. 395, 406, 19 L. ed. 937, 939; *Butz* v. *Muscatine* (*United States ex rel. Butz* v. *Muscatine*) 8 Wall. 575, 581, 19 L. ed. 490, 493; *Croxall* v. *Shererd* (*Doe ex dem. Croxall* v. *Sherrerd*) 5 Wall. 268, 283, 18 L. ed. 572, 578; *United States* v. *Babbit*, 1 Black, 55, 61, 17 L. ed. 94, 96; *Rogers* v. *Kneeland*, 10 Wend. 219.

Thus it is settled by the adjudications of this court that a grant of power to a corporation to fix or collect tolls or rates does not of itself imply any exclusion of the power of the legislature thereafter to declare what shall be prima facie reasonable compensation for the services to be rendered; but it has never been intimated by this court that, where the charter of a corporation, or the agreement between a corporation and the state or a municipality, has expressly provided for a fixed rate of toll or charge, such rate could be varied by the legislature or municipality without impairing the obligation of the contract.

See *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 393, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Cleveland* v. *Cleveland City R. Co.* 194 U. S. 517, 526, 48 L. ed. 1102, 1104, 24 Sup. Ct. Rep. 756; *Cleveland* v. *Cleveland Electric R. Co.* 194 U. S. 538, 48 L. ed. 1109, 24 Sup. Ct. Rep. 764; *Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594. To the same effect see *Western Paving & Supply Co.* v. *Citizens' Street R. Co.* 128 Ind. 525, 10 L. R. A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; *State ex rel. Kansas* v. *Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 361; *Billings* v. *Chicago*, 167 Ill. 340, 47 N. E. 731; *West Chicago Street R. Co.* v. *Chicago*, 178 Ill. 344, 53 N. E. 112; *Coast Line R. Co.* v. *Savannah*, 30 Fed. 646; *Pensacola* v. *Northrup*, 14 C. C. A. 59, 30 U. S. App. 762, 66 Fed. 689.

The legislature cannot in one breath insist that the terms of its grant shall be performed by the grantee according to the letter, and in another breath say that it may, under the reserved power, release itself from any reciprocal duty, and impose an additional tax while holding to the contract.

Stearns v. *Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

This court will determine for itself the scope and effect and true meaning of any contract the legislature has seen fit to make in consideration of the grant of rights and privileges.

Douglas v. *Kentucky*, 168 U. S. 488, 500, 501, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, 17 L. ed. 173, 177; *Maine C. R. Co.* v. *Maine*, 96 U. S. 499, 510, 511, 24 L. ed. 836, 840, 841; *New Jersey* v. *Yard*, 95 U. S. 104, 111, 113, 24 L. ed. 352, 353, 354; *McCullough* v. *Virginia*, 172 U. S. 102, 109, 43 L. ed. 382, 384, 19 Sup. Ct. Rep. 134; *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 149, 151, 40 L. ed. 650, 652, 16 Sup. Ct. Rep. 558; *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66, 67, 44 L. ed. 673, 674, 20 Sup. Ct. Rep. 545.

The reserved power to alter, amend, or repeal does not permit or sanction the destruction of vested property rights.

People v. *O'Brien*, 111 N. Y. 1, 36, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Woodward* v. *Central Vermont R. Co.* 180 Mass. 599, 62 N. E. 1051; *Com.* v. *Essex Co.* 13 Gray, 239; *New York* v. *Twenty-third Street R. Co.* 113 N. Y. 311, 21 N. E. 60.

The present statute seeks to add to the obligations assumed in the various contracts, and at the same time expressly to preserve all the burdens of those contracts. As upheld by the court below, the act is nothing but an arbitrary exercise of power, and comes within the reasoning and the condemnation of the case of *Stearns* v. *Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

And see *Duluth & I. R. R. Co.* v. *St. Louis County*, 179 U. S. 302, 305, 45 L. ed. 201, 203, 21 Sup. Ct. Rep. 124; *San Mateo County* v. *Southern P. R. Co.* 7 Sawy. 517, 13 Fed. 145; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *San Mateo County* v. *Southern P. R. Co.* 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132. See also, to the same effect, *Russell* v. *Croy*, 164 Mo. 69, 63 S. W. 849; *State* v. *Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; *State* v. *Shedroi*, 75 Vt. 277, 63 L. R. A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081; *State* v. *Hoyt*, 71 Vt. 59, 42 Atl. 973; *Dundee Mortg. Trust Invest. Co.* v. *School Dist. No. 1*, 19 Fed. 359; *Fraser* v. *McConway & T. Co.* 82 Fed. 257; *Railroad & Teleph. Cos.* v. *Board of Equalizers*, 85 Fed. 302; *Taylor* v. *Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 172 U. S. 647, 43 L. ed. 1182, 19 Sup. Ct. Rep. 887; *Nashville, C. & St. L. R. Co.* v. *Taylor*, 86 Fed. 168; *Taylor* v. *Nashville, C. & St. L. R. Co.* 44 L. ed. 1219; *Louisville Trust Co.* v. *Stone*, 46 C. C. A. 299, 107 Fed. 305.

If it should be argued that it is proper to deduct the amount of these contract obligations from the tax laid upon the value of the contract rights, for reasons which would sustain deductions of mortgage indebtedness from assessments of real estate for taxation, the answer is obvious. The present deductions are not made from the assessments; on the contrary, under the scheme provided by the present statute, the franchise is to be assessed as real estate; that is to say, not subject to diminution for charges thereon (*Heerwagen* v. *Crosstown Street R. Co.* 179 N. Y. 99, 71 N. E. 729); and, further, under the laws of New York, such obligations are deductible from the personal assessment (*People ex rel. Cornell S. B. Co.* v. *Dederick*, 161 N. Y. 195, 55 N. E. 927; *People ex rel. Manhattan R. Co.* v. *Barker*, 165 N. Y. 305, 59 N. E. 151).

It would be a strange doctrine, if the mere manner or method in which legislation reaches a party could avoid the constitutional guaranty against the impairment of the obligation of contracts, which the Constitution intends shall not be impaired in any form or degree or manner, upon any pretext whatever.

Brown v. *Maryland*, 12 Wheat. 419, 444, 6 L. ed. 678, 687.

When the highest court of a state has adjudicated upon the validity and legal scope and effect of a contract, particularly that of a municipality, and subsequent contracts are made on the faith of, and enormous sums are invested in reliance upon, such judicial interpretation, every principle of fairness and justice requires that the contracts shall be construed and given legal effect according to the law as it was authoritatively declared to be at the time the contracts were entered into.

Olcott v. *Fond du Lac County*, 16 Wall. 678, 690, 21 L. ed. 382, 386; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206, 17 L. ed. 520, 525; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71, 26 L. ed. 1008, 1012; *Douglass* v. *Pike County*, 101 U. S. 677, 686, 25 L. ed. 968, 971; *New Buffalo Twp.* v. *Cambria Iron Co.* 105 U. S. 73, 75, 26 L. ed. 1024, 1025; *Stanly County*

v. *Coler*, 190 U. S. 437, 445, 47 L. ed. 1126, 1132, 23 Sup. Ct. Rep. 811; *Burgess* v. *Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Warburton* v. *White*, 176 U. S. 484, 495, 44 L. ed. 555, 559, 20 Sup. Ct. Rep. 404; *Los Angeles* v. *Los Angeles City Water Co.* 177 U. S. 558, 575, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Muhlker* v. *New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; *Lyon* v. *Richmond*, 2 Johns. Ch. 51.

When we speak of obligations or covenants implied in fact, such as the obligation in the cases at bar not to increase the fixed or agreed franchise payments, we are not reading into the contract something that the parties did not contemplate and intend, nor are we adding to the understanding of the parties.

15 Am. & Eng. Enc. Law, 2d ed. 1078; *Ogden* v. *Saunders*, 12 Wheat. 213, 341, 342, 6 L. ed. 606, 650.

The exaction of a percentage of the gross receipts was a tax, and nothing else; that is, an imposition or exaction for the supply of the public treasury,—"a charge, a pecuniary burden, for the support of government."

United States v. *Baltimore & O. R. Co.* 17 Wall. 322, 326, 21 L. ed. 597, 599.

The mere fact that the words "compensation" and "rental" were used by the legislature in any of the acts in question does not in any way tend to change the nature of the payment.

People ex rel. Manhattan F. Ins. Co. v. *Tax & A. Comrs.* 76 N. Y. 64; 2 Tiedeman, State & Federal Control of Persons and Property, p. 619.

Under the reserved power to amend, alter, or repeal a charter, the legislature cannot nullify or impair the obligation of a contract between a corporation and a municipality or other third person.

People v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 690, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565.

The legislature could not impose any new obligation on the owners of franchises granted by the city, without impairing the obligations of the several contracts.

Planters' Bank v. *Sharp*, 6 How. 301, 327, 12 L. ed. 447, 458.

It is difficult to perceive any reason why grants of franchises by the state should be governed by any different rules than grants by a municipality, for in each case every element of contract fully exists.

City R. Co. v. *Citizens' Street R. Co.* 166 U. S. 557, 567, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

The reasons which protect the grantee in the one case equally apply to the grantee in the other. The character of the obligation assumed and of the consideration to be paid is the same. The idea that the grants of a state are revocable has long since been exploded.

Fletcher v. *Peck*, 6 Cranch, 87, 3 L. ed. 162; *Langdon* v. *New York*, 93 N. Y. 129.

It is further argued by defendant that, if there be the slightest doubt as to an exemption from taxation, or as to the validity of a contract for a fixed amount of tax, the case is at once to be resolved against the grantees of these franchises. The old idea seems again presented that, because the state court has overruled the contention of the plaintiffs in error as to the legal effect of the contract, this court must surrender its judgment, abide by the view of the state court, and decide against the grantee. That no such abdication of judicial duty is permissible has been often recognized.

Citizens' Bank v. *Parker*, 192 U. S. 73, 85, 48 L. ed. 346, 356, 24 Sup. Ct. Rep. 181; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 610, 45 L. ed. 679, 693, 21 Sup. Ct. Rep. 493.

There is also to be found in defendant's argument the familiar plea as to the necessity of preserving the taxing power, etc., etc., as if there were any danger to the taxing power in the cases at bar, where the plaintiffs in error and those similarly situated are now paying hundreds of thousands of dollars annually in taxes, not only on their franchises, but on everything else.

Murray v. *Charleston*, 96 U. S. 432, 444, 448, 449, 24 L. ed. 760, 762, 764.

Whatever propriety and justice there may have been in drawing under the general tax laws of the state the numerous franchises which had been granted for no consideration, and the owners of which had never contributed to the taxes of the state, it was fundamentally unfair and unjust to disregard the contract rights of those who had for years been paying enormous taxes on their franchises, and, while preserving to the letter the burden assumed, refuse to recognize any reciprocal obligation to abide by contracts entered into upon the plighted faith of the city and state.

Stearns v. *Minnesota*, 179 U. S. 223, 261, 45 L. ed. 162, 180, 21 Sup. Ct. Rep. 73; *Duluth & I. R. R. Co.* v. *St. Louis County*, 179 U. S. 302, 305, 45 L. ed. 201, 203, 21 Sup. Ct. Rep. 124.

Mr. **Elihu Root** also argued the cause for plaintiff in error. For his contentions see his brief as reported in *New York ex rel. Twenty-third Street R. Co.* v. *State Bd. of Tax Comrs. post*, 85.

Messrs. **Julius M. Mayer** and **Louis Marshall** argued the cause and filed a brief for defendant in error:

Nothing was more remote from the intention of the legislature and of the municipality than to confer immunity from taxation on the grantees of the several franchises upon which the relator has been assessed with respect to the property and property rights granted.

The payments which were required of the grantees were not in the nature of taxation in any sense of the word. They were compensation for the rights conferred, and nothing more. In some of the statutes the payment is referred to as in the nature of a payment of a rental; in others as "compensation;" and while the acts appearing as appendices, under which a large number of the franchises are derived, do not denominate the annual payments required to be made, it is evident that the payment is required as a consideration for the franchise acquired through the action of the local authorities, or purchased at public auction by the successful bidder.

Re New York, 11 Johns. 80; *Roosevelt Hospital* v. *New York*, 84 N. Y. 112; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 664, 22 L. ed. 461; *Lane County* v. *Oregon*, 7 Wall. 80, 19 L. ed. 105; *St. Louis* v. *Western U. Telcg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

It is clear that the legislature did not intend to deal with the subject of taxation, or of exemption from taxation. At all events it cannot be said that an intention to deal with those subjects existed beyond question, and unless the case is thus clear, there can be no implication of a contract.

Providence Bank v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *Farrington* v. *Tennessee*, 95 U. S. 686, 24 L. ed. 560; *Vicksburg R. Co.* v. *Dennis*, 116 U. S. 668, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 328, 29 L. ed. 643, 6 Sup. Ct. Rep. 334, 388, 1191; *Wells* v. *Savannah*, 181 U. S. 539, 45 L. ed. 991, 21 Sup. Ct. Rep. 697; *Skaneateles Water Works Co.* v. *Skaneateles*, 184 U. S. 363, 46 L. ed. 590, 22 Sup. Ct. Rep. 400; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 436, 47 L. ed. 890, 23 Sup. Ct. Rep. 531.

The amount of tax which the relators are required to pay on their special franchises is reduced by the amount of payments made by them in the nature of a tax. It does not, therefore, lie with them to attack for inequality a statute under which they derive a benefit.

Tyler v. *Registration Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 23, 26 L. ed. 965.

The statute creates no inequality. On the contrary, it seeks to place the owners of special franchises on an equal footing. Those who have made no payments in the nature of a tax are required to pay a tax based on the full amount of their assessment. Those who have made such payments receive credit therefor. In other words, there is an equitable classification of the persons or corporations who are subjected to the special franchise tax, similar to that which was recognized as valid in *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orr* v. *Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, Mr. Justice Bradley recognized the right to allow deductions for indebtedness, as within the range of the state's power to regulate taxation.

Mr. Justice **Brewer** delivered the opinion of the court:

The decision of the court of appeals settles that there is nothing in the law or the proceedings in this case in conflict with the Constitution of that state. It is not contended by the plaintiff in error that there is any constitutional objection to the taxation of franchises. The right to subject them to a share in the burden of supporting the government is conceded.

The main contention is that this tax legislation impairs the obligation of contracts. It must be borne in mind that presumptively all property within the territorial limits of a state is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof, and must make it entirely clear that, by contract or otherwise, the *property is [36] beyond its reach. In *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (p. 561, L. ed. p. 955):

"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

In *Vicksburg, S. & P. R. Co.* v. *Dennis*,

116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625, Mr. Justice Gray cited many authorities, quoting the different phraseology in which, by the several writers of the opinions, the same rule was announced. In *Wells* v. *Savannah*, 181 U. S. 531, 45 L. ed. 986, 21 Sup. Ct. Rep. 697, the law was thus stated by Mr. Justice Peckham (p. 539, L. ed. p. 991, Sup. Ct. Rep. p. 700):

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment; and the validity of such contract presupposes a good consideration therefor. If the property be, in its nature, taxable, the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties, and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven, and the exemption does not exist."

In *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386, the same Justice declared (p. 672, L. ed. p. 648, Sup. Ct. Rep. p. 387):

"The rule is that, in claims for exemp-
[37] tion from taxation *under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

See also *Erie R. Co.* v. *Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Ford* v. *Delta & P. Land Co.* 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230.

This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by implication. As said by Mr. Chief Justice Taney, in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 549, 9 L. ed. 773, 824:

"The inquiry, then, is, Does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied."

Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication, and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation, and maintenance of a street railroad. These were all that, in terms, were granted. As consideration for this grant the grantees were to pay something, and such payment is nowhere said to be in lieu of or as an equivalent or substitute for taxes. All that can be extracted from the language used was a grant *of privileges and a pay-[38] ment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation.

In the well-considered opinion of the court of appeals in this case it was stated by Mr. Justice Vann:

"The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year, or a certain percentage of receipts, as a consideration, or 'in full satisfaction for the use of the streets.' There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. . . .

"The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the state. There is no implied covenant that property sold by the state cannot be taxed by the state, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to state grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until, by the act of 1899, amending the tax

law, they were added to the other taxable property of the state. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased, and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force; but, as it is property, it is required to contribute its [39] ratable share, dependent *only upon value, toward the support of government."

It would not be doubted that, if a grant was of specific tangible property, like a tract of land, and the payment therefor was a gross sum, no implication of an exemption from taxation would arise. Whether the amount paid was large or small, greater or less than the real value, if the payment was distinctly the consideration of a grant, that which was granted would pass into the bulk of private property, and, like all other such property, be subject to taxation. Nor would this result be altered by the fact that the payment for the thing granted was to be made annually instead of by a single sum in gross. If it was real estate it would be equivalent to the conveyance of the tract subject to ground rent, and the grantee taking the title would hold it liable to taxation upon its value. If this be true in reference to a grant of tangible property, it is equally true in respect to a grant of a franchise, for a franchise, though intangible, is none the less property, and oftentimes property of great value. Indeed, growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises. We had occasion to review this subject in *Adams Exp. Co.* v. *Ohio*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, where we said (pp. 218, 219, L. ed. pp. 976, 977, Sup. Ct. Rep. p. 605):

"In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. . . . It matters not in what this intangible property consists,—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

*In *State Railroad Tax Cases*, 92 U. S. [40] 575, 603, 23 L. ed. 663, 669, is this language by Mr. Justice Miller, speaking for the court:

"That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the state which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions,' says this court in *Society for Savings* v. *Coite*, 6 Wall. 607, 18 L. ed. 903, 'than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government.' *State Freight Tax Case* (*Philadelphia & R. R. Co.* v. *Pennsylvania*), 15 Wall. 232, 21 L. ed. 146; *State Tax on Gross Receipts* (*Philadelphia & R. R. Co.* v. *Pennsylvania*), 15 Wall. 284, 21 L. ed. 164."

It is urged that when the public grants a privilege on condition of the payment of an annual sum the contract implies that the public shall exact no larger amount for that privilege, that to impose a tax is simply increasing the price which the grantee is called upon to pay for the privilege, and *Gordon* v. *Appeal Tax Court*, 3 How. 133, 11 L. ed. 529, is relied upon as authority. It is true, in the opinion of the court, announced by Mr. Justice Wayne, is this language (p. 145, L. ed. p. 535):

"Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the state? was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject, in his own apprehension, to the great law of necessity, that we must contribute from it and all of our property something to maintain the state. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

But there was in that case an express exemption from taxation, in these words:

"'And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of *this [41] act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'"

There being thus an express stipulation on the part of a state not to impose any further tax or burden, the question decided was really the extent of the exemption, and

it was held to apply not merely to the franchise, but to the property of the bank. The statements of Mr. Justice Wayne were only by way of argument to support the conclusion that the exemption went beyond the franchise alone. Furthermore, that case has been repeatedly qualified and limited by subsequent decisions. In *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406, Mr. Justice Gray, speaking for the court, said (p. 195, L. ed. p. 122, Sup. Ct. Rep. p. 406):

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the state, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property. In *Gordon* v. *Appeal Tax Court*, 3 How. 133, 11 L. ed. 529, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the state was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. *Piqua Branch of State Bank* v. *Knoop*, 16 How. 369, 386, [42] 401, *402, 14 L. ed. 977, 984, 990, 991; *New York* v. *Tax & A. Comrs.* 4 Wall. 244, 259, 18 L. ed. 344, 350; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 446, 17 L. ed. 173, 178; *Farrington* v. *Tennessee*, 95 U. S. 679, 690, 694, 24 L. ed. 558, 561, 562; *Stone* v. *Farmers' Loan & Trust Co.* 116 U. S. 307, 328, 29 L. ed. 636, 643, 6 Sup. Ct. Rep. 334, 388, 1191. The case at bar cannot be distinguished from that of *Memphis Gaslight Co.* v. *Taxing Dist.*, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas works and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: 'The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state Constitutions and state laws.' 109 U. S. 398, 400, 27 L. ed. 976, 977, 3 Sup. Ct. Rep. 205, 206."

Murray v. *Charleston*, 96 U. S. 432, 24 L. ed. 760, is not in point. The city of Charleston, having issued bonds, subsequently passed an ordinance assessing a tax upon all real and personal property in the city, and directed the treasurer to retain out of the interest due on those bonds the amount of the tax. Murray was a resident of Germany, and resisted the reduction of interest, and it was held that the city could not, by way of a tax, reduce the amount of the interest which it had promised to pay to this nonresident holder, the court saying in its opinion (p. 440, L. ed. p. 761): "A nonresident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city; and the city council was authorized to make assessments only upon *the inhabit- [43] ants of Charleston, or those holding taxable property within the same."

Chicago v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594, is also not in point. An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc., of the streets on which its railway was authorized to be constructed. The company, having accepted, and complied with the terms of this ordinance, the city attempted by assessments for special improvements to compel the railway company to pay for further work of the nature required by the original ordinance, and it was held that the obligations assumed by the railway company in respect to street improvements, as provided by the ordinance, could not be increased by special assessments for further improvements. But this involved no question of liability to general taxation, and only held void the effort of the city, under the guise of special

assessments, to increase the obligations specifically assumed by the railway company under the original ordinance.

In *New Jersey* v. *Yard*, 95 U. S. 104, 24 L. ed. 352, there was a contract that a certain tax should "be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this state, or any law thereof," and the decision simply upheld that exemption specifically contracted for.

It is further contended that there has been a recognition and practical construction in respect to the grants of these franchises, and on these grounds: First, no attempt has been made to legislate in respect to their taxation until 1899, although some of them had been in existence for many years; second, Governor Cleveland, in one of his messages, called the amount required to be paid by the contract a tax, and Governor Roosevelt also spoke of existing "taxes;" third, § 46 of the legislation authorizing the tax upon these franchises provided that "any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, as-
[44] sociation, or *corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town, or village purposes;" fourth, the court of appeals of New York in *Heerwagen* v. *Crosstown Street R. Co.* 179 N. Y. 99, 104, 71 N. E. 729, 730, said:

"In the first place, both in statutes and in judicial decisions, the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument, the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights, which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the state is at liberty to grant or to withhold at pleasure."

We are not disposed to undervalue the force of these suggestions, but it would be giving them undue significance to hold that they are potent to displace the power of the state to subject to the burdens of taxation property within its limits. The word "tax" is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of the charge or burden imposed by the state for the purposes of revenue for its support. Undoubtedly the payment for the franchise of an annual sum was a burden, and in that sense it might not unnaturally have been spoken of as a tax. Being recognized as a burden, it may also well be that when the franchise itself was of comparatively little value the legislature did not see fit to subject it to the burdens of ordinary taxation. But the omission of one legislature or a dozen legislatures does
*not destroy the power of the state. The [45]
language quoted from § 46 indicates the desire of the legislature to deal equitably with the corporations holding these franchises. Surely the manifestation of this desire cannot be construed into a repudiation of power. These annual charges are not called taxes, but are spoken of as in the nature of a tax; and the legislature, recognizing the equitable force of the claim based thereon, provided that the corporation be given credit for sums thus payable. In this connection it is well to recall that in § 1 of the act of 1886, *supra*, these annual charges are called "rental or percentage of gross earnings."

The quotation from the court of appeals must be interpreted in the light of the question presented. That was whether the appellee company was entitled to avail itself of the provision of § 46 just quoted, it having been required by its charter to pay a certain percentage of its gross receipts. It was held that it was so entitled, and the argument was to show that the words "in the nature of a tax" were used in a broad and comprehensive sense to include a payment made on account of the privilege granted. No question was made or considered as to the liability of the company to the tax on its franchise. Its only claim was to the deduction on account of the percentage of its receipts already paid. The court, in addition to the language quoted, said (p. 106, N. E. p. 731):

"The statute in question was enacted at a special session of the legislature convened by the governor for that purpose. In his message to the legislature he recommended that 'it should be provided that from the sum assessed by the state authorities as the tax which a corporation must pay because of its local franchise there shall be deducted

the amount already annually paid by it to the locality for such franchise. In no other way is it possible to tax these corporations with uniformity and equity.' It may be that this view is erroneous, and that the more accurate and equitable way would be to determine the value of the franchise, not as free and clear, but as burdened by the charges to which it might be subject. Never-
[46] theless, *it is plain that this view was accepted by the legislature, for under the scheme provided by the present statute the franchise is to be assessed as real estate; that is to say, not subject to diminution for charges thereon, and the allowance for such charges is made only by deducting them from the tax."

We are of opinion that no contract right of the relator was impaired by the legislation in question.

It is further insisted that the special franchise tax law denies the relator the equal protection of the laws and due process in three separate and distinct aspects, "namely: (1) in that it adds to the obligations of their various contracts while preserving all the burdens of those contracts; (2) in that it provides for the deduction of annual payments covered by existing contracts from the amount of tax levied, by reason of which deduction those who agreed to pay for their franchises lump sums or annual amounts less than the new tax are discriminated against; and (3) in that it discriminates against them and subjects them to taxation, while their competitors, operating under the surfaces of many of the same streets, are to be exempted."

The first specification is answered by the conclusion that we have reached in respect to the claim of an impairment of contract obligations; for if there was no such impairment, the fact that the companies have escaped the burden for these many years is their good fortune, and in no manner discharges them from the ordinary burdens of taxation which the present law imposes.

With respect to the second, it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land,—part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the government. Further, this whole matter of allowing a reduction on account of that which is spoken of as "in
[47] the nature of *a tax," is a matter of grace on the part of the legislature. The franchises granted were, as we have held, subject to taxation, and the fact that, upon equitable considerations, the state has consented that a certain reduction shall, in some cases, be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the Federal Constitution to prevent a state from granting exemptions from taxation. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

With regard to the third contention, it may be said that there is a difference between surface and subsurface street railroads sufficient to justify a diversity in the mode and extent of taxation. In *Savannah, T. & I. of H. R. Co.* v. *Savannah*, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690, just decided, taxation of a street railroad was challenged on the ground that a steam railroad which ran into the city and along its streets, and there did some of the same kind of work as the ordinary street railroad, was not subject to the same tax, and, referring to this contention, is this declaration by Mr. Justice Holmes: "The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation." Further, the condition of the title to the only subsurface road in the city of New York clearly puts it in a class by itself.

These are all the questions we deem it important to consider. *We find no error in the decision of the Supreme Court of New York, and it is affirmed.*

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*PEOPLE OF THE STATE OF NEW YORK *ex rel.* BROOKLYN CITY RAILROAD COMPANY, *Plff. in Err.*, [48]

v.

STATE BOARD OF TAX COMMISSIONERS.

(See S. C. Reporter's ed. 48-52.)

1. Contracts—exemption from taxation—validity of tax on special franchises.—The contract arrangement for the payment to a municipality of a license fee on each street car, modified as to the amount of such fees under the authority of a statute accepted by the street railway company, stating that such fees should be taken "in full satisfaction for the use of the streets or avenues," does not exempt the company from the tax imposed, under N. Y. Laws 1899, chap. 712, on its franchise.

NOTE.—*On taxation of corporate franchises in the United States*—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

As to corporate taxation in United States as affected by the contract clause in the Federal

2. Constitutional law—tax on special franchises—due process of law in valuation.—A street railway company cannot claim to have been denied due process of law in the valuation of its franchise for the purpose of the special franchise tax imposed by N. Y. Laws 1899, chap. 712, on the theory that it was ascertained by speculation and guesswork, where such valuation is required to be made by the state board of tax commissioners, to which the owner of the franchise is required to furnish a written report, and notice and hearing are accorded such owner, and a review of the assessment by certiorari is afforded.

[No. 79.]

Argued April 17, 18, 19, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of New York to review a judgment sustaining an assessment of a street railway franchise, entered pursuant to the mandate of the Court of Appeals of that state, which had reversed a judgment of the Appellate Division of the Supreme Court for the Third Department, which had, in turn, reversed the judgment of the Supreme Court entered at a special term held in and for the county of Albany on a writ of certiorari to review the action of the state board of tax commissioners. *Affirmed.*

See same case below in Appellate Division of Supreme Court, 79 App. Div. 183, 80 N. Y. Supp. 85; in Court of Appeals, 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

Statement by Mr. Justice **Brewer:**

This case, like the preceding, involves the special franchise tax law of New York. The facts are these: On December 22, 1853, the relator was authorized by the city of Brooklyn to construct, maintain, and operate street surface railroads upon specified streets, and required to enter into a good and sufficient bond conditioned for the faithful performance of all the terms and stipulations in the resolutions granting the authority. On December 30 of that year a bond in the sum of $200,000 was duly executed by the relator, and has ever since been kept in force. The terms and stipulations as to the construction and operation of the railroad need not be mentioned. The resolutions contained these further provisions:

"The rates of fare for each passenger and the license fee for *each car to be paid [49] annually into the city treasury shall be on the respective lines above mentioned:

"1. Furnam street route, fare not to exceed 5 cents, license fee, $50. 2. Court street route, fare not to exceed 4 cents, license fee, $20. 3. Powers street route, fare not to exceed 5 cents, license fee, $20. 4. Flatbush avenue route, fare not to exceed 5 cents, license fee, $20. 5. Fulton avenue route, fare not to exceed 4 cents, license fee, $20. 6. Myrtle avenue route, fare not to exceed 4 cents, license fee, $20. 7. Sands street route, fare not to exceed 5 cents, license fee, $10. 8. Front street route, fare not to exceed 5 cents, license fee, $10."

This action of the city of Brooklyn was validated by the state legislature. Other contracts were made by the city of Brooklyn with other companies. Those companies were subsequently consolidated with the relator, which, on the 1st of January, 1900, held forty-five similar contracts with the municipalities for the construction, maintenance, and operation of street surface railroads in the present boroughs of Brooklyn and Queens. Some of these contracts required the annual payment of a certain percentage of the gross receipts. Subsequently, under due legislative authority, the contract arrangements between the relator and the city were modified in respect to the amount of the annual license fee. The statute authorizing the modification contains this clause:

"The said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not release said company from any obligations required by law to keep such streets or avenues, or any part thereof, in repair, which said obligations and the contracts, laws, or ordinances creating and enforcing the same, are hereby continued in full force and operation."

Mr. **Charles A. Collin** argued the cause, and, with *Mr. William F. Sheehan*, filed a brief for plaintiff in error:

Two propositions are well established and well settled:

(1) A duly authorized municipal ordinance or resolution assenting to the construction, maintenance, and operation, by a street railroad corporation, of its railroads

Constitution—see note to Adams v. Yazoo & M. Valley R. Co. 60 L. R. A. 33.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L. R. A. 655, and note; *Re* Gannon, 5 L. R. A. 359, and note; Ulman v. Baltimore, 11 L. R. A. 224, and note; and Gilman v. Tucker, 13 L. R. A. 304, and note. And see notes to People v. O'Brien, 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L. R. A. 657; Chauvin v. Valiton, 3 L. R. A. 194; and Ulman v. Baltimore, 11 L. R. A. 225.

on the streets of a municipality, when accepted by the railroad corporation, becomes a contract which neither the state nor the municipality can afterward modify without the consent of the railroad corporation.

(2) The terms of such contract regulate the whole subject of matters properly involved in and being a part of the contract; and as to such matters all additional provisions made by state legislation or municipal ordinance, to the detriment of the railroad company and without its consent, are void as impairing the obligation of the contract.

Chicago v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Coast-Line R. Co.* v. *Savannah*, 30 Fed. 646; *Cleveland* v. *Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, 94 Fed. 385; *Cleveland* v. *Cleveland Electric R. Co.* 194 U. S. 538, 48 L. ed. 1109, 24 Sup. Ct. Rep. 764, 94 Fed. 385; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Los Angeles* v. *Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Rochester* v. *Rochester R. Co.* 98 App. Div. 521, 91 N. Y. Supp. 87; *Worcester* v. *Worcester Consol. Street R. Co.* 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The so-called license fees which the Brooklyn City Railroad Company agreed to pay, in and by its franchise contract of 1853, as well as the increased license fees which the city and company afterward, in pursuance of the amendment of 1880, agreed should be paid in lieu thereof, were not license fees properly so called, but were taxes; and both the original and subsequent agreements to pay such license fees were agreements to pay taxes. It is also clear that the provisions of other franchise contracts of the Brooklyn City Railroad Company, requiring payment of percentages of gross receipts, were, in like manner, agreements to pay taxes.

New York v. *Second Ave. R. Co.* 32 N. Y. 261, 34 Barb. 41; *New York* v. *Third Ave. R. Co.* 33 N. Y. 42.

The franchise contracts in question fixed, and therefore necessarily limited, the amount of burdens in the nature of taxes which the Brooklyn City Railroad Company could thereafter be compelled to pay on account of its property consisting of the intangible rights created by such franchise contracts.

Ibid.; *Stein* v. *Mobile*, 49 Ala. 362, 20 Am. Rep. 283; *Los Angeles* v. *Los Angeles City Water Co.* 61 Cal. 65, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *New York* v. *Broadway & S. Ave. R. Co.* 97 N. Y. 275; *New York* v. *Twenty-third Street R. Co.* 113 N. Y. 311, 21 N. E. 60; *People ex rel. Cayadutta Pl. Road Co.* v. *Cummings*, 166 N. Y. 110, 59 N. E. 703; *Re Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406, 40 La. Ann. 587, 4 So. 512; *Detroit* v. *Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The failure of the special franchise tax law to indicate any principle or method for ascertaining the value of the intangible property included in the special franchise; the failure of the state board to attempt any separate valuation of the intangible property; and its failure to adopt or proceed upon any principle or method of valuing the totality of intangible and tangible property together constituting the special franchise; and, necessarily, the substitution therefor of speculation and guesswork in place of judgment in making such valuation,—amounted to such an absence of quasi judicial action as to constitute the taking of property without due process of law, and so far as the statute contemplates such a procedure, the statute itself is unconstitutional for the same reason.

People v. *San Francisco Sav. Union*, 31 Cal. 132.

Messrs. **Julius M. Mayer** and **Louis Marshall** argued the cause and filed a brief for defendant in error:

The decision of the court of appeals of New York, which sustains the act under review, is conclusive in this court as to any question of conflict between it and the state Constitution.

Merchants' & M. Bank v. *Pennsylvania*, 167 U. S. 462, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *West River Bridge Co.* v. *Dix*, 6 How. 507, 12 L. ed. 535; *Spencer* v. *Merchant*, 125 U. S. 352, 31 L. ed. 766, 8 Sup. Ct. Rep. 921; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 582, 31 L. ed. 795, 798, 8 Sup. Ct. Rep. 974; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Lewis* v. *Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Hodge* v. *Muscatine County*, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237; *Re Tyler*, 149 U. S. 187, 37 L. ed. 696, 13 Sup. Ct. Rep. 785.

It follows from these authorities that this court will not interfere with the construction given by the state courts to the laws regulating the taxation of property within the state, or review findings of fact or the conclusions of assessing officers as to the value of property sought to be assessed. In

other words, decisions based on local laws, not involving a Federal constitutional question, or resting on pure questions of fact, are not reviewable.

Hibben v. *Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Seneca Nation* v. *Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; *Tripp* v. *Santa Rosa Street R. Co.* 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655; *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Lewis* v. *Campau*, 3 Wall. 106, 18 L. ed. 211; *Dower* v. *Richards*, 151 U. S. 659, 38 L. ed. 306, 14 Sup. Ct. Rep. 452; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 639, 42 L. ed. 878, 887, 18 Sup. Ct. Rep. 488; *Smiley* v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

A special franchise, as defined in the act, is properly subject to taxation.

People ex rel. Metropolitan Street R. Co. v. *State Tax Comrs.* 174 N. Y. 435, 63 L. R. A. 884, 67 N. E. 69; *People* v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 398, 46 L. ed. 610, 22 Sup. Ct. Rep. 410; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381; *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N. Y. 528, 47 N. E. 787; *Ingersoll* v. *Nassau Electric R. Co.* 157 N. Y. 453, 43 L. R. A. 236, 52 N. E. 545; *Ghee* v. *Northern Union Gas Co.* 158 N. Y. 510, 53 N. E. 692; *Wilmington & W. R. Co.* v. *Reid*, 13 Wall. 264, 20 L. ed. 568; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 328, 329, 37 L. ed. 463, 468, 469, 13 Sup. Ct. Rep. 622; *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U. S. 219, 41 L. ed. 977, 17 Sup. Ct. Rep. 604; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *New Mexico* v. *United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128.

The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestionable.

Western U. Teleg. Co. v. *Taggart*, 163 U. S. 14, 41 L. ed. 54, 16 Sup. Ct. Rep. 1054; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607.

The state may from time to time bring within the purview of its taxing power new subjects which had not been covered by previous legislation,—as, for example, mortgages owned by citizens of other states on property within the state (*Savings & Loan Soc.* v. *Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392); the right of succession to the property of one dying (*Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594); debts owing by a resident debtor to a nonresident creditor (*Blackstone* v. *Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277); the right given to a foreign corporation to carry on business within the state (*Horn Silver Min. Co.* v. *New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403); the amount of capital employed by a foreign corporation within the state (*New York* v. *Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58).

Hence, if the franchises of a public service corporation are property, they may likewise become the subject of taxation,—especially when united with tangible property designed to utilize such franchises.

Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *State ex rel. Milwaukee Street R. Co.* v. *Anderson*, 90 Wis. 550, 63 N. W. 746; *Detroit Citizens' Street R. Co.* v. *Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 88 N. W. 809; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Central P. R. Co.* v. *California*, 162 U. S. 126, 40 L. ed. 915, 16 Sup. Ct. Rep. 766.

The power to tax being essential to the very existence of the state, there can be no presumption that it has been either abandoned or restricted; and whoever claims that it has been must show that the intent to grant immunity was conferred in express and unambiguous terms, which will not be extended by implication beyond their fair import. Exemption from taxation will not be wrested from unwilling words.

Cooley, Taxn. 3d ed. 112; *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *Philadelphia, W. & B. R. Co.* v. *Maryland*, 10 How. 376, 13 L. ed. 461; *Erie R. Co.* v. *Pennsylvania*, 21 Wall. 497, 22 L. ed. 598; *Farrington* v. *Tennessee*, 95 U. S. 686, 24 L. ed. 560; *Memphis Gaslight Co.* v. *Taxing District*, 109 U. S. 399, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Stone* v. *Bank of Commerce*, 174 U. S. 412, 43 L. ed. 1028, 19 Sup. Ct. Rep. 747; *People ex rel. Cunningham* v. *Roper*, 35 N. Y. 629; *People ex rel. Westchester* v. *Davenport*, 91 N. Y. 574; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 294, 36 L. ed. 978, 13 Sup. Ct. Rep. 72; *Ford* v. *Delta & P. Land Co.* 164 U. S. 666, 41 L. ed. 592, 17 Sup. Ct. Rep. 230.

In the absence of any express statutory authority the state alone cannot grant exemption from taxation; and an attempt on the part of a municipality to confer such immunity would be *ultra vires* and ineffectual.

Minturn v. *Larue*, 23 How. 435, 16 L. ed.

574; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 181, 5 L. R. A. 546, 22 N. E. 381; *Water Comrs.* v. *Westchester County Waterworks Co.* 176 N. Y. 239, 68 N. E. 348; *Richmond County Gaslight Co.* v. *Middletown*, 59 N. Y. 228; *Norwich Gaslight Co.* v. *Norwich City Gas Co.* 25 Conn. 19; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

Even where the state undertakes to restrict its power of taxation, the rule applicable to the interpretation of public grants applies; namely, that the instrument by which restriction is claimed to have been created must be so strictly construed as to operate as a surrender of the sovereign power no further than is expressly declared by the terms of the grant, the grantee taking nothing in that respect by inference.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Lehigh Water Co.* v. *Easton*, 121 U. S. 391, 30 L. ed. 1060, 7 Sup. Ct. Rep. 916; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381; *Tennessee* v. *Whitworth*, 117 U. S. 148, 149, 29 L. ed. 836, 6 Sup. Ct. Rep. 649; *Phoenix F. & M. Ins. Co.* v. *Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Skaneateles Waterworks Co.* v. *Skaneateles*, 184 U. S. 362, 46 L. ed. 590, 22 Sup. Ct. Rep. 400; *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 672, 47 L. ed. 648, 23 Sup. Ct. Rep. 386; *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *United States* v. *Arredondo*, 6 Pet. 736, 8 L. ed. 564; *Perrine* v. *Chesapeake & D. Canal Co.* 9 How. 192, 13 L. ed. 100; *Richmond F. & P. R. Co.* v. *Louisa R. Co.* 13 How. 71, 14 L. ed. 55; *Pennock* v. *Coe*, 23 How. 117, 16 L. ed. 436; *People ex rel. Westchester F. Ins. Co.* v. *Davenport*, 91 N. Y. 586; *Tucker* v. *Ferguson*, 22 Wall. 575, 22 L. ed. 816; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666, 24 L. ed. 1036, 1038; 1 Morawetz, Priv. Corp. 2d ed. § 323.

This court should follow the decision of the state court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a state, regulating its exercise of the taxing power, or relating to the state's disposition of its public lands.

Wilson v. *Standefer*, 184 U. S. 411, 412, 46 L. ed. 617, 618, 22 Sup. Ct. Rep. 384.

Assuming that a contract of exemption from general taxation can be implied from the language of the ordinance; that the city had the power to grant such exemption, and that it intended to do so; that there was a consideration for the contract, which is essential, but which nowhere appears (*Grand Lodge, F. & A. M.* v. *New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523),—nevertheless the right to tax the relator's special franchises was properly exercised under the power reserved to the legislature by the Constitution and statutes of New York.

Miller v. *New York*, 15 Wall. 478, 21 L. ed. 98; *New York ex rel. Schurz* v. *Cook*, 148 U. S. 397, 410, 37 L. ed. 498, 503, 13 Sup. Ct. Rep. 645; *Holyoke Water-Power Co.* v. *Lyman*, 15 Wall. 500, 21 L. ed. 133; *Tomlinson* v. *Jessup*, 15 Wall. 454, 21 L. ed. 204; *Sherman* v. *Smith*, 1 Black, 587, 17 L. ed. 163; *Maine C. R. Co.* v. *Maine*, 96 U. S. 499, 24 L. ed. 836; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *Covington* v. *Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359, 365, 25 L. ed. 185, 187; *Hodge* v. *Richmond & D. R. Co.* 99 U. S. 348, 353, 25 L. ed. 303, 304; *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. ed. 496, 501; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13, 21, 26 L. ed. 961, 965; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267; *Spring Valley Waterworks Co.* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 400, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98, 108, 34 L. ed. 898, 902, 11 Sup. Ct. Rep. 226; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 270, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; *Looker* v. *Maynard*, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21; *Corry* v. *Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; *Adirondack R. Co.* v. *New York*, 176 U. S. 345, 44 L. ed. 498, 20 Sup. Ct. Rep. 460.

This court is not concerned with the correctness of the valuation of the relator's special franchises, or with the soundness of the rules of evidence or of the opinions adopted by the tax commissioners, the referee, or the several state courts which sat in review of the assessment. When the parties to a controversy—and especially those whose property has been assessed for purposes of taxation—have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court cannot be said to deprive the unsuccessful litigant of his property without due process of law.

Walker v. *Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220,

226, 6 Sup. Ct. Rep. 1064; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Bergemann* v. *Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Palmer* v. *McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Merchants' & M. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Bauman* v. *Ross*, 167 U. S. 590, 42 L. ed. 288, 17 Sup. Ct. Rep. 966; *King* v. *Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *Bellingham Bay & B. C. R. Co.* v. *New Whatcom*, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205; *Turpin* v. *Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *Glidden* v. *Harrington*, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; *Hibben* v. *Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Corry* v. *Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; *Hodge* v. *Muscatine County*, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237.

Equally unfounded is the claim that this legislation deprives the relator of the equal protection of the laws.

Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 114; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 354, 35 L. ed. 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 228, 41 L. ed. 697, 17 Sup. Ct. Rep. 305; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Cook* v. *Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; *Coulter* v. *Louisville & N. R. Co.* 196 U. S. 608, 49 L. ed. 617, 25 Sup. Ct. Rep. 342; *California* v. *California P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

If there were even a doubt as to the constitutionality of the legislation now attacked, it should be determined in favor of the validity of such legislation, since it affects the revenues of a sovereign state, and is designed to promote a just distribution of the burdens of taxation among its citizens.

King v. *Mullins*, 171 U. S. 436, 43 L. ed. 226, 18 Sup. Ct. Rep. 925.

Mr. Justice **Brewer** delivered the opinion of the court:

Do these license fees stand as an equivalent for property taxes so that a stipulation in respect to them relieves the property from liability to ordinary taxation? This certainly would not be the general rule. A license fee is understood to be a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax. Take the vast volume of occupations which are subject to licenses from either the nation or the states. Who supposes that, in the absence of some express stipulation, the fees charged for those licenses operate to relieve the property employed in the business from the ordinary burdens of property taxation? The precise question as to the effect of an ordinance imposing a license fee for cars used on a street railroad was before the court of appeals in *New York* v. *Broadway & S. Ave. R. Co.* 97 N. Y. 275, in which, on page 282, the court said:

"The contract of the defendant arises from the provisions of its charter by which it agrees to pay a certain sum reserved therein in consideration of the privileges conferred thereby. It is neither a tax nor is it a penalty; and hence the technical rules as to penal actions or suits to recover a tax which are invoked by the appellant have no application."

Further, in the statute modifying the license fees, which was accepted by the relator, it was expressly stated that they should "be taken in full satisfaction for the use of the streets or avenues." Clearly, therefore, the fees being imposed for a specific purpose, they cannot exempt the relator's property from the tax imposed by the special franchise tax law.

It is further objected that there was a failure of due process of law in that the special franchise tax law did not indicate *any principle or method for ascertaining[51] the value of the intangible property included in the special franchise, and that the state board did not make any separate valuation of the tangible property, and did not adopt or proceed upon any principle or method in valuing the totality of the tangible and intangible property, but necessarily indulged in mere speculation and guesswork instead of exercising judgment in making the valuation.

We are of opinion that this objection is without merit. The sections relating to the taxation of special franchises were enacted

as amendments to and part of the general tax law of the state, and are to be construed accordingly. By one section the valuation is to be determined by the state board of tax commissioners. By another the owner of every such franchise is required to make a written report to the state board, containing a full description of the franchise, a copy of the special grant, ordinance, or contract under which it is held, or, if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon the franchise, together with such other information as the state board may require; and that board is authorized to require, from time to time, further reports containing information upon such matters as it may specify. Not only that; after making the valuation the state board is required to give notice in writing to the owner of the franchise, stating the valuation, and that on a day specified, not less than twenty nor more than thirty days thereafter, it will meet to hear and determine any complaint against such assessment, and this notice must be served at least ten days before the day fixed for the hearing. At the hearing the owner may file a statement under oath, specifying the respect in which the valuation is incorrect; testimony may be taken and a full investigation had. Another section provides for a review of the assessment by writ of certiorari. These provisions were all complied with. Notice was given to the relator, and on the day fixed for the hearing it appeared and filed
[52] its objections. *Thereafter it took out a writ of certiorari to review the proceedings of the tax board. Surely by this due process of law was secured. It will not do to say that the valuation of a piece of property is mere guesswork. True, it is often largely a matter of opinion, and mathematical exactness is not always possible. Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that can be required is that the assessing board exercise an honest judgment, based upon the information it possesses or is able to acquire. That valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it, and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value. We are of the opinion that the relator was not denied due process of law in the valuation and assessment of its franchise.

We see nothing else in the record calling for notice, and *the judgment of the Supreme Court of New York is affirmed.*

*PEOPLE OF THE STATE OF NEW [53]
YORK *ex rel.* TWENTY-THIRD STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

STATE BOARD OF TAX COMMISSIONERS. (No. 75.)

PEOPLE OF THE STATE OF NEW YORK *ex rel.* CENTRAL CROSSTOWN RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE BOARD OF TAX COMMISSIONERS. (No. 76.)

PEOPLE OF THE STATE OF NEW YORK *ex rel.* CONSOLIDATED GAS COMPANY, *Plff. in Err.*,

v.

STATE BOARD OF TAX COMMISSIONERS. (No. 77.)

PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW AMSTERDAM GAS COMPANY, *Plff. in Err.*,

v.

STATE BOARD OF TAX COMMISSIONERS. (No. 78.)

PEOPLE OF THE STATE OF NEW YORK *ex rel.* CONEY ISLAND & BROOKLYN RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE BOARD OF TAX COMMISSIONERS. (No. 80.)

(See S. C. Reporter's ed. 53, 54.)

These cases are governed by the decisions in *New York ex rel. Metropolitan Street R. Co.* v. *State Board of Tax Comrs.* and *New York ex rel. Brooklyn City R. Co.* v. *State Board of Tax Comrs. ante*, 65, 79.

[Nos. 75, 76, 77, 78, 80.]

Argued April 17, 18, 19, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of New York to review a judgment sustaining assessments of special franchises entered pursuant to the mandate of the Court of Appeals of that state, which had reversed a judgment of the Appellate Division of the Supreme Court for the Third Department, which had, in turn, reversed the judgment of the Supreme Court entered at a special term held in and for the county of Albany on a writ of certiorari to review the

action of the state board of tax commissioners. *Affirmed.*

See same cases below in Appellate Division of Supreme Court, 79 App. Div. 183, 80 N. Y. Supp. 85; and in Court of Appeals, 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

Mr. **Elihu Root** argued the cause, and, with *Mr. Frank H. Platt,* filed a brief for plaintiffs in error in Nos. 77, 78:

A legislative enactment which requires or authorizes the taxation of a certain class of property upon the basis of a sum arbitrarily fixed by the assessing officers, without reference to the value of the property, constitutes a deprivation of property without due process of law, and a denial of the equal protection of the laws.

New York v. *Weaver,* 100 U. S. 539, 544, 546, 25 L. ed. 705, 706, 707; Cooley, Const. Lim. 7th ed. p. 705; 1 Cooley, Taxn. 3d ed. p. 419; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Turpin* v. *Lemon,* 187 U. S. 51, 57, 47 L. ed. 70, 73, 23 Sup. Ct. Rep. 20; *Re Kemmler,* 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; *Hodgson* v. *Vermont,* 168 U. S. 262, 273, 42 L. ed. 461, 464, 18 Sup. Ct. Rep. 80; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 599, 39 L. ed. 825, 15 Sup. Ct. Rep. 673; *McMillen* v. *Anderson,* 95 U. S. 37, 41, 24 L. ed. 335, 336; *Stuart* v. *Palmer,* 74 N. Y. 183, 30 Am. Rep. 289; *People ex rel. Edison Electric Illuminating Co.* v. *Barker,* 139 N. Y. 55, 34 N. E. 722; *People* v. *Equitable Trust Co.* 96 N. Y. 387; *Nehasane Park Asso.* v. *Lloyd,* 167 N. Y. 431, 60 N. E. 741; *People ex rel. Griffin* v. *Brooklyn,* 4 N. Y. 419, 55 Am. Dec. 266; *Ryerson* v. *Utley,* 16 Mich. 269; *Taylor* v. *Chandler,* 9 Heisk. 349, 24 Am. Rep. 308; *Chicago, B. & Q. R. Co.* v. *Cole,* 75 Ill. 591; *Merrill* v. *Humphrey,* 24 Mich. 170; *People ex rel. Detroit & H. R. Co.* v. *Salem Twp.* 20 Mich. 452, 4 Am. Rep. 400; *San Mateo County* v. *Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Russell* v. *Croy,* 164 Mo. 69, 63 S. W. 849; *Chicago Union Traction Co.* v. *State Board,* 114 Fed. 557; *Railroad & Teleph. Cos.* v. *Board of Equalizers,* 85 Fed. 302; *Albany City Nat. Bank* v. *Maher,* 20 Blatchf. 341, 9 Fed. 884; *Woodbridge* v. *Detroit,* 8 Mich. 274; *Board of Assessment* v. *Alabama C. R. Co.* 59 Ala. 551; *Marsh* v. *Clark County,* 42 Wis. 502; *State ex rel. White House Dist. No. 7* v. *Readington Twp.* 36 N. J. L. 66; *Nashville, C. & St. L. R. Co.* v. *Taylor,* 86 Fed. 168, 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350.

The market value of share stock is not relevant as showing the value of the corporate property.

People ex rel. Union Trust Co. v. *Coleman,* 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818; *People ex rel. Bank of Commonwealth* v. *Tax & A. Comrs.* 23 N. Y. 192.

Taxable assets of a corporation cannot be determined by the amount of outstanding mortgage bonds.

People ex rel. Manhattan R. Co. v. *Barker,* 146 N. Y. 304, 40 N. E. 996.

It cannot be argued that a deduction from the aggregate market value of the corporate securities as representing the total value of the corporate property, of the value of the real estate, securities of other companies, equipment, and all other tangible property, will give the value of the special franchise. Such a method would be clearly untenable. Even if the market price of securities were a true measure of actual value, the deduction of the value of all the tangible property would leave a remainder which must represent numerous items of intangible property; namely, contracts with customers, patents, good will, and the general franchises of the corporation. There is no method or rule by which this remainder can be apportioned to the different items of intangible property. Any attempt to do so would necessarily be pure guesswork and imagination. And under the laws of the state the general franchises and good will are not taxable for local purposes.

People ex rel. Union Trust Co. v. *Coleman,* 126 N. Y. 437, 12 L. R. A. 762, 27 N. E. 818; *People ex rel. Cornell S. B. Co.* v. *Dederick,* 25 Misc. 539, 55 N. Y. Supp. 40, 161 N. Y. 195, 55 N. E. 927; *People ex rel. Manhattan R. Co.* v. *Barker,* 165 N. Y. 305, 59 N. E. 151; *People ex rel. National Surety Co.* v. *Feitner,* 166 N. Y. 129, 59 N. E. 731.

A valuation of a single item of corporate property by a consideration of the earnings of the whole corporate property has been universally condemned by the courts of the state of New York.

People ex rel. Delaware, L. & W. R. Co. v. *Clapp,* 152 N. Y. 490, 39 L. R. A. 237, 46 N. E. 842; *People ex rel. Western U. Teleg. Co.* v. *Dolan,* 126 N. Y. 166, 12 L. R. A. 251, 27 N. E. 269; *People ex rel. Panama R. Co.* v. *Tax Comrs.* 104 N. Y. 240, 10 N. E. 437; *People ex rel. Delaware & H. Canal Co.* v. *Ganley,* 29 N. Y. S. R. 130, 8 N. Y. Supp. 563; *Re Gilroy,* 26 App. Div. 314, 49 N. Y. Supp. 798; *Syracuse* v. *Stacey,* 45 App. Div. 249, 61 N. Y. Supp. 165.

The allegation of the return that there was investigation by the board's agents, who formed opinions as to the value, if it could have any effect whatever, would be equivalent to an allegation that the state tax commissioners had delegated their quasi judicial powers to others, and that these unnamed

agents, and not the commissioners themselves, had determined the assessment. Such an assessment would be void.

Lee v. *Parry*, 4 Denio, 125; *Doughty* v. *Hope*, 3 Denio, 594; *Powell* v. *Tuttle*, 3 N. Y. 396; *People ex rel. Mygatt* v. *Chenango County*, 11 N. Y. 563; *Middletown* v. *Berlin*, 18 Conn. 189; *Woodman* v. *Auditor General*, 52 Mich. 28, 17 N. W. 227; *People* v. *Hastings*, 29 Cal. 449.

The taxing officers cannot sustain an erroneous assessment by alleging that there was other evidence which it does not produce.

People ex rel. Edison Electric Illuminating Co. v. *Barker*, 139 N. Y. 55, 34 N. E. 722.

There was no fact before the state board, upon its own admission, or before the referee, which had the slightest tendency to prove the value of a special franchise, or from which such a value could possibly be ascertained. This question the court can undoubtedly examine.

Dower v. *Richards*, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452; *Merchants' Mut. Ins. Co.* v. *Allen*, 121 U. S. 67, 71, 30 L. ed. 858, 859, 7 Sup. Ct. Rep. 821; *The Francis Wright* (*Duncan* v. *The Francis Wright*) 105 U. S. 381, 387, 26 L. ed. 1100, 1101; *The City of New York*, 147 U. S. 72, 77, 37 L. ed. 84, 87, 13 Sup. Ct. Rep. 211; *Dooley* v. *Pease*, 180 U. S. 126, 132, 45 L. ed. 457, 460, 21 Sup. Ct. Rep. 308; *Runkle* v. *Burnham*, 153 U. S. 216, 225, 38 L. ed. 694, 697, 14 Sup. Ct. Rep. 837; *Hathaway* v. *First Nat. Bank*, 134 U. S. 494, 33 L. ed. 1004, 10 Sup. Ct. Rep. 608.

A presumption exists at the outset in favor of the correctness of an assessment, but that presumption is destroyed, either by proof of the true value of the property, or by showing that some erroneous method has been adopted, or arbitrary assumptions made, or improper elements of valuation taken into account.

People ex rel. New York C. & H. R. R. Co. v. *Morgan*, 168 N. Y. 1, 60 N. E. 1041; *People ex rel. Edison Electric Illuminating Co.* v. *Barker*, 139 N. Y. 55, 34 N. E. 722; *People ex rel. Union Trust Co.* v. *Coleman*, 126 N. Y. 433; 12 L. R. A. 762, 27 N. E. 818; *People ex rel. Manhattan R. Co.* v. *Barker*, 146 N. Y. 304, 40 N. E. 996; *People ex rel. Cornell S. B. Co.* v. *Dederick*, 161 N. Y. 195, 55 N. E. 927; *People ex rel. Delaware, L. & W. R. Co.* v. *Clapp*, 152 N. Y. 490, 39 L. R. A. 237, 46 N. E. 842.

The provision imposing the tax of 3 per cent of gross earnings per annum, as one of the terms on which the East River Gas Company of Long Island City accepted its charter and invested its capital in a plant for public service, when accepted, constituted a contract.

Gordon v. *Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Union Bank* v. *State*, 9 Yerg. 490; *Farrington* v. *Tennessee*, 95 U. S. 679, 689, 24 L. ed. 558, 561; *Atty. Gen.* v. *Bank of Charlotte*, 57 N. C. (4 Jones, Eq.) 287; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

Mr. **William D. Guthrie** argued the cause and filed a brief for plaintiffs in error in Nos. 75 and 76. For his contentions see his brief as reported in *New York ex rel. Metropolitan Street R. Co.* v. *State Tax Comrs. ante*, 65.

Messrs. **Julius M. Mayer** and **Louis Marshall** argued the cause and filed a brief for defendants in error. For their contentions see their briefs as reported in *New York ex rel. Metropolitan Street R. Co.* v. *State Tax Comrs. ante*, 65, and *New York ex rel. Brooklyn City Railroad Co.* v. *State Board Tax Comrs. ante*, 79.

Mr. Justice **Brewer** delivered the opinion of the court:

While these cases differ in some details from the two preceding, *in which opinions[54] have just been announced, there are no such differences as put them outside the scope of the reasoning of those opinions. Therefore, *the judgments in them are affirmed.*

WILLIAM H. H. GLEASON, *Plff. in Err.*,
v.
EDWARD L. WHITE.

(See S. C. Reporter's ed. 54–62.)

1. **Error to state court—review of conflicting testimony.**—A judgment of a state court will be affirmed by the United States Supreme Court on a writ of error if there is evidence sufficient to sustain it, although there may be other conflicting testimony, where no special findings of fact were made, and the proceedings in the trial court were approved by the highest state court without an opinion.

2. **Public lands—right of patentee to profit by mistake of Land Department.**—A patentee of a part of a fractional section whose patent, through the carelessness of the Land Department in relying on the description in his homestead entry, refers, for the description of the land conveyed, to the orig-

NOTE.—*On the general subject of writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; *Re* Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be

inal survey, which calls for a water boundary on the east, although a resurvey had then been made at his instance, cannot recover from a subsequent patentee under the second survey any land lying east of the meander line as shown on the earlier survey, since otherwise he would profit by a mistake of the government of which he must have been cognizant.

[No. 188.]

Argued and submitted March 16, 17, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of Florida to review a judgment which affirmed a judgment of the Circuit Court of the Seventh Judicial Circuit in and for Dade County, in that state, in favor of defendant in an action to recover a parcel of land claimed under a patent from the United States. *Affirmed.*

Statement by Mr. Justice **Brewer:**

In 1845 fractional township 53 south, range 42 west, in Dade county, Florida, was surveyed and a plat thereof was approved and filed in the office of the surveyor general in Florida, and also in the office of the Land Department of Washington. By this survey fractional section 19 was divided into two lots, numbered 1 and 2, containing 164.84 acres. In 1875 a resurvey was made of the township, plats of which were also duly approved and filed in the office of the [55]*surveyor general in Florida, and with the Land Department at Washington. By this new survey, said section 19 was divided into 7 lots, containing, in the aggregate, 337.76 acres. The difference between the two surveys of section 19 is shown in the following plats. (See opposite page.)

On June 24, 1878, a patent was issued to William H. Gleason, on a homestead application, for a tract described as lots 1 and 2 of section 19 containing 164.84 acres, according to the official plat of the survey of 1845. Plaintiff in error, who was plaintiff below, claims by deed from the patentee. On May 4, 1885, lot 5 of section 19, according to the survey in 1875, was patented by the United States to Florida as swamp land, and thereafter deeded by the state to the defendant. In 1898 this *action to recover a [56] part of lot 5 was commenced in the circuit court of the seventh judicial circuit of Florida, in and for Dade county. The case was tried by the court without a jury; a judgment rendered for the defendant was affirmed by the supreme court of the state, and thereafter brought to this court on writ of error. Included in the action was lot 1 of section 19, as shown by the plat of 1875, but, as judgment was rendered for the plaintiff in respect to that tract, it is unnecessary to further refer to it. There was a stipulation as to certain facts, with a provision that testimony of further facts might be received, and that the court might view the premises. The findings of the court recite that it viewed the premises, and, upon the stipulated facts, and further testimony incorporated in a bill of exceptions, found generally for the defendant as to lot 5.

Mr. **George M. Robbins** argued the cause and filed a brief for plaintiff in error.

Mr. **Edward L. White,** *in propria persona,* submitted the cause for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The case was tried by the court without a jury. No special findings of fact having been made, and the proceedings in the trial court having been approved by the supreme court of the state, without an opinion, we must affirm the judgment if there be evidence sufficient to sustain it, although there may be other testimony of a contradictory nature. It is not our province to weigh conflicting testimony in a case coming to us as this does.

It is undoubtedly true that the official surveys of the public lands of the United States are controlling. *Stoneroad* v. *Stoneroad,* 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; *Russell* v. *Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; *United States* v. *Montana Lumber & Mfg. Co.* 196 U. S. 573, 49 L. ed. 604, 25 Sup. Ct. Rep. 367; *Whitaker* v. *McBride,* 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530. Here we have two con-

brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L. R. A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L. R. A. 329.

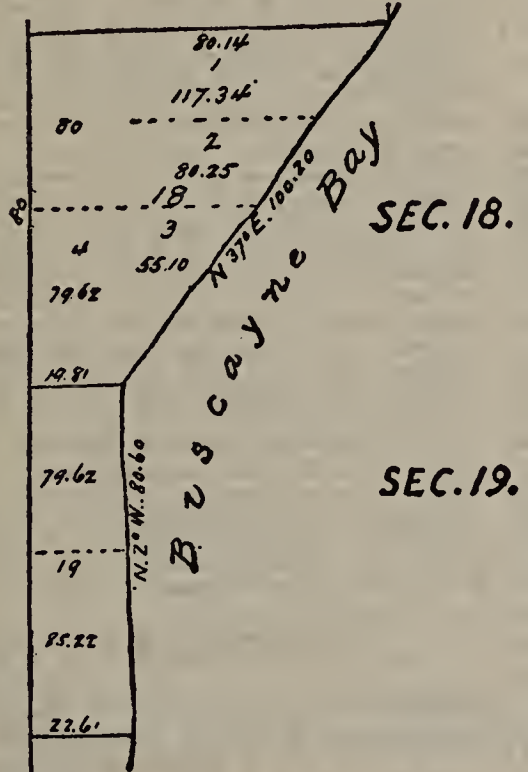
On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts— see note to Missouri *ex rel.* Hill v. Dockery, 63 L. R. A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L. R. A. 833.

flicting official surveys and plats, and, by mistake of the Land Department, two patents have been issued, which, in a certain aspect of the surveys and plats, also conflict. It is one of those unfortunate mistakes which sometimes occur, and which necessarily throw confusion and doubt upon titles. Since it was discovered, the Land Department has wisely refused to extend the confusion by further patents under the survey of 1875.

The patent to Gleason was three years after the last survey, which, in so far as it conflicted with the prior survey, superseded that, and became the official record of the Land Department. Notwithstanding this, the patent purports to convey lots 1 and 2 as shown by the survey of 1845. Undoubtedly the mistake arose because the homestead entry, which must have been five years before the patent, was made before the survey of 1875, and at that time the official record was the plat of 1845, which showed only the two lots. Through care-
[61] lessness, *and not recognizing the change made by the survey of 1875, the patent refers to the survey of 1845, relying upon the description in the homestead entry. The land patented amounted to 164.84 acres. The homestead law allowed one to enter 160 acres, and as the patent covered 4.84 acres more than the amount allowed for a homestead, the patentee paid the government price for the excess,—$6.05. The contract of McKay for the survey of 1845 was a contract to survey the exterior lines of township 53, and, while the field notes of the west line of the township are preserved, his notes of the east and subdivision lines are not to be found in the Land Department. The plat, as will be seen, shows an east line running north 2° west, 80.60 chains, a south line 22.61 chains from the west line, and a north line 19.81 chains, making almost a rectangle, and containing the number of acres described in the patent. East of this township appears Biscayne bay, according to each plat. The plat made in 1875 shows a south line of 22.35 chains, very nearly the same as that of the plat of 1845, but the north line is 59.92 chains, making an almost complete quarter of the N. W. sec. 19. The field notes of the survey of 1875 show that the surveyor found on the line between sections 18 and 19, at a distance of 40.35 chains from the west township line, an old quarter section post, and set a new one in place of it. It would seem a not unreasonable conclusion from this that McKay, in 1845, in fact surveyed a tract of land east of lots 1 and 2, but that when the plat was made either his field notes had disappeared or were ignored in running the lines of the north half of section 19. It further appears that the survey of 1875 was requested by the patentee,

Plat 1845.



Plat 1875.



William H. Gleason, who stated that the survey of the entire township was entirely, or almost entirely, obliterated. It also appears that Gleason, when he received his patent, took title to what was substantially the west half of the northwest quarter and the west half of the southwest quarter of section 19, the east line, as shown by the plat, being almost a straight line, running north and south. It does not seem that he [62] could have *been mistaken as to the land that he was acquiring from the government, for he must have lived on it five years in order to have perfected his homestead. He could not have been ignorant of the large tract lying east of what was described in the plat of 1845 as "lot 1." The official plat at the time of the patent was the plat of the survey of 1875. He was chargeable, as matter of law, with notice of that plat. More than that, as the survey was at his instance, it is a reasonable assumption that he knew in fact what the lines of that survey and plat were. Under those circumstances full justice is done if a patent title to lands outside his lines, as shown by the plat of 1845, is sustained, for he still is protected in the tract bounded by those lines, and amounting to 164.84 acres. To give him twice that amount of land would be enabling him to profit by a mistake of the government,—a mistake of which he was cognizant. Under those circumstances we are of opinion that *the judgment of the Supreme Court of Florida must be and it is affirmed.*

FREDERICK A. HYDE, *Appt.*,
v.
JOHN H. SHINE.

(See S. C. Reporter's ed. 62-88.)

1. **Criminal law—removal to another Federal district for trial.**—A person indicted in the supreme court of the District of Columbia for an offense against the United States may be removed to that District for trial, under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, authorizing the removal for trial of a person charged with such a crime to the Federal district where the trial is to be had.

2. **Courts—jurisdiction of District of Columbia supreme court over conspiracy to defraud United States.**—The jurisdiction of the supreme court of the District of Columbia over a criminal conspiracy charged to have been entered into in the city of Washington is not defeated because such offense was also triable in the states of California and Oregon, on the theory that it was therefore "lawfully triable in any other court," within the meaning of D. C. Comp. Stat. chap. 35, § 23, excluding offenses so triable from the jurisdiction of that court over crimes and misdemeanors committed in the District, and which are, by law, to be prosecuted by indictment or information.

3. **Conspiracy—to defraud United States.**—A conspiracy to obtain school lands from the states of California and Oregon in the names of fictitious or disqualified persons by the use of forged affidavits, assignments, and other documents, and to relinquish them to the United States under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in exchange for other public lands, cannot escape condemnation under U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, forbidding conspiracies to defraud the United States, on the theory that the United States, having received the school lands in lieu of the other lands patented, has not been defrauded, —even assuming that the United States stands in the position of a bona fide purchaser in respect to the school lands.

4. **Habeas corpus—sufficiency of indictment to sustain removal to another Federal district.**—The sufficiency of an indictment charging a conspiracy under U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, "to defraud the United States out of the possession and use of, and the title to, divers large tracts of public lands of the United States," as against objections based on the lack of description of the lands, the uncertainty of the allegations as to the means to be used to carry out the alleged conspiracy, the failure to give the names of the fictitious or disqualified persons through whom the fraud was effected, the indefiniteness and inconsistency of the allegations, and the improper conclusion, will not be determined on habeas corpus to inquire into a detention to await a warrant for the removal of the accused, under § 1014, to the Federal district where the trial is to be had, but such objections are for the trial court to determine.

5. **Habeas corpus—probable cause to sustain removal to another Federal district.**—A Federal court is not required to weigh the evidence of probable cause on habeas corpus to inquire into a detention to await the removal of the accused to another Federal district for trial, although a prisoner may have the right, on habeas corpus, under the state practice, to have the state court consider that question, since the provision of U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, that the usual mode of process adopted in the state shall be pursued, refers to the proceedings in arrest and examination of the accused before the commissioner; and has no bear-

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NOTE.—*On removal to another Federal district for trial of persons there charged with an offense against the United States*—see note to Greene v. Henkel, 46 L. ed. U. S. 177.

On the jurisdiction of United States courts on habeas corpus—see *Re* Reinitz, 4 L. R. A. 236, and note. See also notes to State *ex rel.* Cochran v. Winters, 10 L. R. A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; *Ex parte* Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

ing upon a subsequent independent proceeding on habeas corpus.

6. Appeal—questions reviewable—discretionary orders.—The refusal of a Federal circuit court to grant certiorari as ancillary to a writ of habeas corpus is within its discretion, and cannot be assigned as error.

[No. 406.]

Argued February 21, 23, 1905. Decided May 29, 1905.

APPEAL from the Circuit Court of the United States for the Northern District of California to review the denial of habeas corpus and certiorari to inquire into a detention to await the removal of a person charged with an offense against the United States to the District of Columbia, where the trial is to be had. *Affirmed.*

Statement by Mr. Justice **Brown:**

This is an appeal from an order of the circuit court, denying the appellant's application for writs of habeas corpus and certiorari, and dismissing his petition therefor.

The proceedings which culminated in the arrest and remanding of the appellant originated in an indictment found in the supreme court of the District of Columbia
[64] against the appellant *and John A. Benson, Henry P. Dimond, and Joost H. Schneider, charging them with a conspiracy, under Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, "to defraud the United States out of the possession and use of, and the title to, divers large tracts of the public lands of the United States." All of the defendants except Schneider are residents of San Francisco, California. Upon a complaint made, based upon such indictment, before a United States commissioner for the northern district of California, Hyde was arrested under Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, taken before a commissioner, and held to bail to answer the indictment in the sum of $50,000, and in default thereof was committed to the custody of the defendant, Shine, to await the order of the district judge for his removal to the District of Columbia, or until he should be discharged by due course of law. Upon such order of removal being issued (*United States* v. *Hyde*, 132 Fed. 545), appellant presented his petition to the circuit court for the northern district of California, praying for writs of habeas corpus and certiorari, and for his discharge from imprisonment, which were denied, and this appeal taken.

Messrs. **Charles C. Cole** and **William B. Hornblower** argued the cause and filed a brief for appellant:

The statute under which the proceeding referred to in the petition was prosecuted does not authorize a removal from a United States judicial district in a state to the District of Columbia.

Hornbuckle v. *Toombs*, 18 Wall. 648, 655, 21 L. ed. 966, 967; *Good* v. *Martin*, 95 U. S. 90, 98, 24 L. ed. 341, 344; *Reynolds* v. *United States*, 98 U. S. 145–154, 25 L. ed. 244–246; *McAllister* v. *United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *United States* v. *Guiteau*, 1 Mackey, 563, appx.

The conspiracy is the offense, and the overt acts are no part thereof, but the offense is complete as soon as the conspiracy is entered into.

United States v. *Hirsch*, 100 U. S. 33, 25 L. ed. 539; *United States* v. *Britton*, 108 U. S. 192, 27 L. ed. 703, 2 Sup. Ct. Rep. 525; *Dealy* v. *United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680; *Bannon* v. *United States*, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467; *McKenna* v. *United States*, 62 C. C. A. 88, 127 Fed. 88; *Conrad* v. *United States*, 62 C. C. A. 478, 127 Fed. 799; *Gantt* v. *United States*, 47 C. C. A. 210, 108 Fed. 61; *United States* v. *Watson*, 17 Fed. 145; *United States* v. *Lancaster*, 44 Fed. 896; *United States* v. *Gardner*, 42 Fed. 829; *United States* v. *Greene*, 115 Fed. 343.

Even if it should be held that an overt act was necessary to complete the crime of conspiracy, that would not aid the jurisdiction of the supreme court of the District of Columbia in this case; for if an overt act is necessary to complete the crime, then the first overt act performed in pursuance of the conspiracy completes the offense.

This position is sustained by the holding of the courts upon the question of the statute of limitations, the rule being that the statute of limitations begins to run from the time of the commission of the first overt act, and that subsequent overt acts do not constitute a new conspiracy.

United States v. *Owen*, 32 Fed. 534; *United States* v. *McCord*, 72 Fed. 159.

Upon application for warrant of removal, or upon habeas corpus while the party is in custody under such warrant or the warrant of the commissioner, it is the duty of the court to look into the indictment; and if it charges no offense against the United States, or is so essentially and fundamentally defective that a conviction could not be sustained thereon, or the court in which it was found has not jurisdiction of the offense, it is the duty of the court to discharge the petitioner.

Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Terrell*, 51 Fed. 213; *Stewart* v. *United States*, 55 C. C. A. 641, 119 Fed. 89; *Re*

Greene, 52 Fed. 104; *Horner* v. *United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

It is also to be remembered that the question of jurisdiction is always an open one upon habeas corpus, even where the party is held pursuant to a final judgment of a court.

Callan v. *Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301.

And even in civil cases, wherever a judgment of a court is presented as a cause of action or ground of defense, it may be impeached collaterally on the ground of the want of jurisdiction in the court rendering it, and facts may be pleaded and proved which contradict the finding of the record upon jurisdictional questions.

Thompson v. *Whitman*, 18 Wall. 457, 21 L. ed. 897.

The removal of the appellant to the District of Columbia for trial would be in violation of his constitutional right to be tried in the district where the alleged offense was committed.

3 Story, Const. chap. 28, § 1775; *Beavers* v. *Henkel*, 194 U. S. 83, 48 L. ed. 886, 24 Sup. Ct. Rep. 605.

The doctrine of constructive presence in the locality of the alleged commission of a crime, when the party was actually not present, was always an odious doctrine in England and also in this country, and by the Federal Constitution was eliminated from the administration of criminal justice.

Burr's Case, 4 Cranch, 470, appx., Fed. Cas. No. 14,693.

It is not only the settled doctrine of this court, but also of the supreme court of California, that a patent granting public lands, although procured by irregularities or fraud, cannot be questioned collaterally, but only by a direct proceeding on behalf of the government to avoid the patent because of the fraud of irregularities, and that such a proceeding cannot be maintained against any party who stands in the position of a purchaser for value without notice.

O'Connor v. *Frasher*, 56 Cal. 499; *Doll* v. *Meador*, 16 Cal. 295; *Thomas* v. *Lawlor*, 53 Cal. 405; *Gale* v. *Best*, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550; *Turner* v. *Donnelly*, 70 Cal. 597, 12 Pac. 469; *Moore* v. *Wilkinson*, 13 Cal. 478; *Yount* v. *Howell*, 14 Cal. 465; *Miller* v. *Dale*, 44 Cal. 562; *Kentfield* v. *Hayes*, 57 Cal. 409; *Plummer* v. *Brown*, 70 Cal. 544, 12 Pac. 464; *Chapman* v. *Quinn*, 56 Cal. 278; *Irvine* v. *Tarbat*, 105 Cal. 242, 38 Pac. 896; *Dreyfus* v. *Badger*, 108 Cal. 58, 41 Pac. 279; *Standard Quicksilver Co.* v. *Habishaw*, 132 Cal. 115, 64 Pac. 113; *Phillips* v. *Carter*, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031; *Saunders* v. *LaPurisima Gold Min. Co.* 125 Cal. 159, 57 Pac. 656; *Harrington* v. *Goldsmith*, 136 Cal. 169, 68 Pac. 594; *Marshall* v. *Farmer's Bank*, 115 Cal. 330, 42 Pac. 418, 47 Pac. 52; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States* v. *California & O. Land Co.* 1 C. C. A. 330, 7 U. S. App. 128, 49 Fed. 496, 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458; *United States* v. *Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; *United States* v. *Chicago, M. & St. P. R. Co.* 195 U. S. 524, 49 L. ed. 306, 25 Sup. Ct. Rep. 113.

If a person by false and fraudulent representations obtains the consent of a defendant to the entry of a judgment in his favor in an action then pending, and the payment of a sum of money in satisfaction of that judgment, he cannot be convicted of obtaining the money by false pretenses.

7 Am. & Eng. Enc. Law, p. 713; *Com.* v. *Harkins*, 128 Mass. 79.

A party cannot maintain an action of damages against another for procuring a judgment against him by fraud, or for issuing execution thereon while the judgment remains valid of record.

Huffer v. *Allen*, L. R. 2 Exch. 15; *Castrique* v. *Behrens*, 30 L. J. Q. B. N. S. 163, 3 El. & El. 709; *Engstrom* v. *Sherburne*, 137 Mass. 153; *Dunlap* v. *Glidden*, 31 Me. 435, 52 Am. Dec. 625; *Smith* v. *Abbott*, 40 Me. 442; *Lyford* v. *Demerritt*, 32 N. H. 234; *Hillsborough* v. *Nichols*, 46 N. H. 379; *Nicholson* v. *Nicholson*, 113 Ind. 131, 15 N. E. 223; *Peck* v. *Woodbridge*, 3 Day, 30; *Kimball* v. *Newport*, 47 Vt. 38; *Stackhouse* v. *Keiger*, 25 W. N. C. 436.

Where the facts stated in the indictment, if true, might show a conspiracy to defraud or to commit an offense against a state, the offense cannot, by a mere allegation to that effect, be converted into a conspiracy to defraud or commit an offense against the United States.

United States v. *Crafton*, 4 Dill. 145, Fed. Cas. No. 14,881; *Pettibone* v. *United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

The allegations of the indictment are uncertain, inconsistent, insensible, and repugnant, and insufficient to inform the appellant of the nature and cause of the accusation against him.

United States v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States* v. *Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *United States* v. *Milner*, 36 Fed. 890; *Dealy* v. *United States*, 152 U. S. 547, 38 L. ed. 548, 14 Sup. Ct. Rep. 680; *Haynes* v. *United States*, 42 C. C. A. 34, 101 Fed. 817; *United States* v. *Glover*, 32 Fed. 142; *United States* v. *Simmons*, 96 U. S. 360, 24 L. ed. 819; *United States* v. *Pope*, Fed. Cas. No. 16,069;

1 Bishop, New Crim. Proc. 281; 2 Hawk. P. C. p. 325; *Lehman* v. *United States*, 61 C. C. A. 577, 127 Fed. 45; *People* v. *Myers*, 20 Cal. 76; 10 Enc. Pl. & Pr. p. 532, note 2; *Stewart* v. *United States*, 55 C. C. A. 641, 119 Fed. 89.

It was the right of the prisoner to have the court consider the question of probable cause upon the writ of habeas corpus.

People v. *Smith*, 1 Cal. 9; *Re Troia*, 64 Cal. 152, 28 Pac. 231; *Ex parte Palmer*, 86 Cal. 631, 25 Pac. 130; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657.

The same rule prevails in the Federal courts. It is common practice for those courts to bring before them the evidence produced before the committing magistrate, upon which the commitment is founded, and where the evidence is reduced to writing in the form of a deposition, whether by the committing magistrate or by other competent authority; this is frequently done by certiorari in aid of habeas corpus.

Re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; *Greene* v. *Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218.

It is not contended that the court below, or this court, should weigh the evidence if it be conflicting, but that it should consider it for the purpose of determining whether there was any sufficient evidence before the commissioner from which he might reasonably have found probable cause.

Re Oteiza y Cortes (*Oteiza y Cortes* v. *Jacobus*), 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Bryant* v. *United States* (*Ex parte Bryant*), 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744.

Solicitor General **Hoyt** and *Mr.* **Francis J. Heney** argued the cause, and, with *Mr. Arthur B. Pugh*, filed a brief for appellee:

It is well settled that, wherever conspirators act, there they renew or continue their illegal agreement; and such agreement is renewed or continued as to all wherever and whenever any one of them does an act in furtherance of the common design. The law regards the illegal agreement itself, existing and in force, as the crime; and if the conspirators, or any of them, commit an act in furtherance of the conspiracy in a different jurisdiction from that in which the illegal agreement was originally formed, such act operates as a renewal or continuance of the agreement.

People v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Com.* v. *Bartilson*, 85 Pa. 482; 6 Am. & Eng. Enc. Law, p. 844; *United States* v. *Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *Fire Ins. Cos.* v. *State*, 75 Miss. 24, 22 So. 99; *People* v. *Willis*, 23 Misc. 568, 52 N. Y. Supp. 808.

Is it competent for the court upon habeas corpus proceedings to determine whether or not the scheme set forth in the indictment constitutes a conspiracy to defraud the United States within the meaning of § 5440 of the Revised Statutes?

Horner v. *United States*, 143 U. S. 570, 577, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522; *Ex parte Rickelt*, 61 Fed. 203.

Moreover, in this case the commissioner and the district judge, having jurisdiction both of the subject-matter and of the persons, have determined the question against the defendants; and it is well settled that the writ of habeas corpus cannot be used as a writ of error.

Horner v. *United States*, 143 U. S. 570, 577, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522; *Stevens* v. *Fuller*, 136 U. S. 468, 477, 34 L. ed. 461, 463, 10 Sup. Ct. Rep. 911; *Re Oteiza y Cortes* (*Oteiza y Cortes* v. *Jacobus*) 136 U. S. 330, 334, 34 L. ed. 464, 466, 10 Sup. Ct. Rep. 1031; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Ex parte Parks*, 93 U. S. 18, 23, 23 L. ed. 787, 788; *Ex parte Rickelt*, 61 Fed. 203.

It seems to be well settled by the authorities that if the indictment or the complaint under which a person is imprisoned does not charge any offense whatever, or if the action of the committing magistrate is wholly without his jurisdiction, the remedy by habeas corpus will lie. But this is when it is clear and manifest that the matter is wholly without the jurisdiction of the court or committing magistrate, or that the acts charged are necessarily innocent in themselves and such as the legislature could not properly declare to constitute a crime.

Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; *Ex parte Parks*, 93 U. S. 18, 20, 23 L. ed. 787, 788; *Ex parte Siebold*, 100 U. S. 371, 376, 25 L. ed. 717, 719.

The courts of general jurisdiction in the District of Columbia have always been regarded and treated as courts of the United States, even prior to the enactment of the new Code of the District.

Moss v. *United States*, 23 App. D. C. 475; *Embry* v. *Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

Territorial courts are "courts of the United States," as that designation is applied in § 33 of the judiciary act, to wit, § 1014 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 716.

United States v. *Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322.

All laws must be construed, if possible, to prevent absurd or mischievous results.

Maxwell, Interpretation of Statutes, 179; Sutherland, Stat. Const. §§ 323, 324; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517.

Mr. Justice **Brown** delivered the opinion of the court:

The petitioner assigns as error—

1. That Rev. Stat. § 1014, does not authorize a removal from a judicial district in a state to the District of Columbia;

2. That the supreme court of the District of Columbia has no jurisdiction over the alleged offense charged in the indictment;

3. That the indictment charges no offense against the United States;

4. That the evidence introduced before the commissioner proved that there was no probable cause for believing him guilty of the offense, and that the writ of certiorari should have been issued to bring the record before the court, and upon its inspection the appellant should have been discharged.

1. The first assignment is practically disposed of by the recent case of *Benson* v. *Henkel*, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569, in which one of the codefendants of the petitioner in this case, who had been arrested in Brooklyn, was held to be prop-
[76] erly removed to the *District of Columbia under Rev. Stat. § 1014. No additional considerations being presented, that case must be treated as controlling.

2. The second assignment, that the supreme court of the District of Columbia had no jurisdiction of the alleged offense, is based upon the proposition that the conspiracy, if any existed, was entered into either in the northern district of California or the district of Oregon; and that nothing but overt acts in pursuance of the conspiracy were done in the District of Columbia. Granting that the *gravamen* of the offense is the conspiracy, and that, at common law, it was neither necessary to aver nor prove an overt act (*Rex* v. *Gill*, 2 Barn. & Ald. 204; *Bannon* v. *United States*, 156 U. S. 464–468, 39 L. ed. 494–496, 15 Sup. Ct. Rep. 467), an overt act is necessary, under Rev. Stat. § 5440, to complete the offense. The language of the section is, "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

It was aptly said by Mr. Justice Woods in *United States* v. *Britton*, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531, that the offense consisted in the conspiracy, and that the overt act afforded a *locus penitentiæ*, so that, before the act done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. As the indictment in this case charges that the conspiracy was entered into in the city of Washington, it becomes unnecessary to consider whether an indictment will lie within the jurisdiction where the overt act was committed, though there are many authorities to that effect. *King* v. *Brisac*, 4 East, 164; *People* v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Com.* v. *Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Noyes* v. *State*, 41 N. J. L. 418; *Com.* v. *Corlies*, 3 Brewst. 575.

We have ourselves decided that, if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there, though the overt act is shown to have been committed *in another jurisdic-[77] tion, or even in a foreign country. *Dealy* v. *United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680; *Re Palliser* (*Palliser* v. *United States*), 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; *King* v. *Brisac*, 4 East, 164; Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585.

In this connection it is also suggested that, as the conspiracy is alleged in all the counts to have been entered into prior to January 1, 1902, as well as the overt act charged in fifteen of the counts, the supreme court of the District of Columbia cannot take cognizance of the case under the new code which took effect upon that date, and that we must look to the law prior thereto to determine the jurisdiction of that court. By § 23, chap. 35, of the Compiled Statutes of the District of Columbia, it was enacted that "the criminal court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said district, *not lawfully triable in any other court*, and which are required by law to be prosecuted by indictment or information."

The argument is made that, as the conspiracy in this case was triable in California or Oregon, as well as in the District of Columbia, it was lawfully triable in another court, and hence the supreme court of the District of Columbia has no jurisdiction. We are not impressed with the force of this contention. Chapter 35 provides for the organization of the judiciary of the District of Columbia, and relates exclusively to the jurisdiction and powers of the several courts of the District, providing that one of the justices may hold a criminal court, and that such court shall have jurisdiction of all crimes and misdemeanors *committed in said District* not lawfully triable in any other court, and which are required by law to be prosecuted by indictment or information. It is entirely clear that this has reference only to other courts within the District, and was not intended to change the law with respect to the general jurisdiction of courts having jurisdiction of the same offense.

Although it involves a seeming hardship

to commit an accused person in San Francisco for trial in the District of Columbia, the terms of Rev. Stat. § 1014, are as applicable to such a case as they would be if
[78] the arrest were made in Baltimore. *The section makes no discrimination based upon distance, and requires the commitment to be made for trial before the court having cognizance of the offense, wherever that court may sit. Where the statute contains no exception, the courts cannot create one. Indeed, the Constitution itself requires that the trial of all crimes shall be held in the state where the crimes have been committed, and the power of Congress to order the surrender of accused persons from other states is a necessary complement to the duty of trying offenses in the jurisdiction where the crime was committed. But we do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this District, where an indictment will lie in the state of the domicil of such person, unless in exceptional cases, where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.

3. The third assignment—that the indictment charges no offense against the United States—requires a statement of its substance. As it contains forty-two different counts and covers some ninety-four pages of printed matter, a consideration of each count would unnecessarily prolong this opinion. The conspiracy charged embraced certain false practices by the defendants, whereby school lands were to be obtained fraudulently from the states of California and Oregon by Hyde and Benson, (1) in the names of fictitious persons, and (2) in the names of persons not qualified to purchase the same, whereby the said Hyde and Benson were to cause and require such school lands to be relinquished by means of false and forged relinquishments, assignments, and conveyances to the United States, in exchange for public lands, to be selected, and for titles thereto by patents to be obtained by and on behalf of the said Hyde and Benson. A further element of the conspiracy
[79] *is that defendants were, by bribery, to induce certain United States officials in the General Land Office, at Washington, in the District of Columbia, corruptly, and contrary to their official duties, to aid defendants to secure the approval of their fraudulent selections in advance of their regular order, and to inform defendants of any discovery or investigation by the government of their said fraudulent practices.

To grasp the significance of these somewhat complicated counts, and to appreciate the details of the offense charged, it should be borne in mind that the government had granted to California and Oregon large tracts of lands, many of which were covered with forests, known as school lands. Congress subsequently changed its intention with regard to them, and desired to retain them as forest reserves, and to reacquire the title thereto, and, for that purpose, enacted a law approved June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), as follows:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected."

It seems that both of these states had passed laws by which any citizen of the United States resident in such state, or any person who had declared his intention to become a citizen, might acquire from such states a section or half section of such lands at $1.25 per acre. They were required to make application to the land offices of the state, and to make the necessary affidavits to show that they were qualified to purchase them, and that they were purchasing them for their own use or benefit, and had not sold or agreed to sell the same. Doubtless the intention was that the sale should be made to persons who desired to settle upon the lands; but there was *nothing to [80]
prohibit such persons from afterwards disposing of them by assigning the certificates of purchase, and in this method the assignee might, by purchase from several patentees, acquire title to an unlimited amount of such lands, and might thereafter exchange such lands under the act of June 4, 1897, with the United States, provided he had acquired a valid title from the states, and convey the same to the United States in lieu of the land to be granted by the government.

The argument of the defendants that while the procuring of these school lands from the states through persons who were not qualified to purchase them, and did not desire to purchase them for their own use, and by supporting their application by false affidavits and forged assignments of the cer-

tificates of purchase, might have been a violation of the policy of the states of California and Oregon, and a fraud upon such states, it fails to show that the United States could have in any way been defrauded. The argument assumes that the title acquired by the defendants from the states in question was such a title as, upon conveyance to the United States, would vest in the latter a title good as against all the world, and therefore that the United States were not defrauded.

While it is doubtless true that, by means of these corrupt and fraudulent practices, Hyde and Benson may have obtained titles to these lands, it does not follow that the states might not have disaffirmed such titles, and recovered the lands. In this particular the case is covered by that of *Moffat* v. *United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10. Nor does it follow that, when subsequent conveyances were made to the United States of these lands under the act of June 4, 1897, a good title was vested in the grantee. In the *Moffat Case* it was held that a patent issued to a fictitious person conveys no title which can be transferred to a person subsequently purchasing in good faith from a supposed owner. In delivering the opinion of the court, Mr. Justice Field observed: "The patents, being issued to fictitious parties, could not transfer the title, and no one could derive any right under a conveyance in the name
[81] of the *supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent bona fide purchaser is protected. A subsequent purchaser is bound to know whether there was in fact a patentee,—a person once in being, and not a mere myth,—and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the application of this doctrine of a bona fide purchaser there must be a genuine instrument, having a legal existence, as well as one appearing on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

The argument that this indictment cannot be sustained because the United States, having received the school lands in lieu of the lands patented, were defrauded of nothing, if valid at all, applies equally to the school lands for which the states of California and Oregon must have received a statutory compensation, fixed at $1.25 per acre. Having received this compensation it may be said, with equal propriety, that they were defrauded of nothing. The result of the argument, then, is that, although a gross imposition was practised upon the states by the procuring of patents in favor of fictitious persons or of disqualified persons by the use of forged affidavits, assignments, or other documents, no indictment therefor would lie because the states had received the same consideration they would have received had the patents been issued to persons qualified under the statutes to purchase the lands. The unsoundness of this argument needs no demonstration. The states have a right to punish a violation of a statute enacted as part of their public policy, notwithstanding they may have suffered no pecuniary damage therefrom.

The same argument applies to the United States, whose lands have been procured in plain violation of the spirit, if not the letter, of the statute, and by a further step in the same fraudulent *scheme. By the act [82] of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), it is provided that in any case in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation, the *settler* or *owner* thereof may, if he desires to do so, relinquish the tract to the government, etc. The privilege of the act is therefore reserved to a settler or owner; and as there is no claim that Hyde was a settler upon the lands, it only remains to consider whether he was an "owner" within the act. Although the word "owner" has a variety of meanings, and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title, and we know of no authority for saying that a person in possession of land under a void deed can be regarded as the owner thereof. Ownership may not imply a perfect title, but it implies something more than the possession of land under a title which is void; and when the government holds out to owners of lands an inducement to relinquish such lands in exchange for others, it implies that the persons with whom it is dealing, if not the owners in fee simple, are at least bona fide owners, with authority to dispose of and vest a good title thereto. We are clear that the defendant does not fall within this category, and that the United States may justly claim to have been defrauded out of the land patented to him. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* 190 U. S. 301–308, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; *Johnson* v. *Crookshanks*, 21 Or. 339, 28 Pac. 78; *Fallbrook Irrig. District* v. *Abila*, 106 Cal. 355, 39 Pac. 794.

Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud, and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands, and suffered no pecuniary loss. *MacLaren* v. *Cochran*, 44 Minn. 255, 46 N. W. 408. The law punishes the false practices by which the lands were obtained, and the question whether the government stands in the position of a bona fide pur-
[83] chaser *with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law.

Even if the United States were in a position to claim the rights of a bona fide purchaser to the state lands, the methods by which these lands were acquired from the states, and the lands in exchange therefor procured from the United States, would be none the less a fraud, of which the latter might take advantage in a criminal prosecution. The indictment under § 5440 charges a conspiracy to defraud the United States out of the possession, use of, and title thereto, of divers large tracts of public lands; and if the title to these lands were obtained by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a bona fide purchaser. Under the circumstances it cannot be doubted that the United States might maintain a bill to cancel the patents to the exchanged lands procured by these fraudulent means, notwithstanding their title to the forest reserve lands might be good.

Other minor objections are taken to the indictment: that no description is given of the lands out of which the defendants are alleged to have conspired to defraud the government (*Dealy* v. *United States*, 152 U. S. 539, 543, 38 L. ed. 545, 547, 14 Sup. Ct. Rep. 680); that it is uncertain in its allegations as to the means to be used to carry out the alleged conspiracy; that the names representing the fictitious persons and of those not qualified to purchase, through whom the fraud was effected, are not given; that the allegations of the indictment are indefinite and inconsistent; that the conclusion is improper, etc.

It is sufficient to say of these objections that they are proper to be considered by the trial court, and that we do not feel called upon to express our own opinion in regard to them. Criticisms of this character are completely covered by the recent decision of this court in *Benson* v. *Henkel*, as well as in the cases of *Ex parte Watkins*, 3 Pet. 193–206, 7 L. ed. 650–654, and *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787, in both of which the petitioners sought *by writ of ha- [84]
beas corpus to review the validity of certain indictments under which they had been convicted in the courts below, and in both this court declined to review the action of the court below. It was held that the question whether the act charged was or was not a crime was one which the trial court was competent to decide, and which this court would not review upon a writ of habeas corpus.

Our conclusion is that for the purposes of this case the indictment is sufficient.

4. The fourth assignment—that there was no probable cause for believing the petitioner guilty of the offense charged, and that the writ of certiorari should have been issued to bring the record before the court—is based upon that clause of § 1014, which requires that proceedings for the removal of persons from one district to another shall be "agreeably to the usual mode of process against offenders in such state," and § 1487 of the Code of California is cited to the effect that the petitioner shall be discharged where he has been committed upon a criminal charge without reasonable or probable cause. Certain cases are also cited from the supreme court of California, to the effect that it is the right of the prisoner to have the court consider the question of probable cause upon the writ of habeas corpus. *People* v. *Smith*, 1 Cal. 9; *Ex parte Palmer*, 86 Cal. 631, 25 Pac. 130; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. But see *contra*, *Ex parte Long*, 114 Cal. 159, 45 Pac. 1057.

In the Federal courts, however, it is well settled that upon habeas corpus the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge. In this case, however, the production of the indictment made at least a prima facie case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether, upon the whole testimony, there was proof of probable cause. *Re Oteiza y Cortes* (*Oteiza y Cortes* v. *Jacobus*), 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Bryant* v. *United States* (*Ex parte Bryant*), 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744. The requirement that the usual mode of process adopted in the state shall be pur- [85]
sued refers to the proceedings for the *arrest and examination of the accused before the commissioner; but it has no bearing upon the subsequent independent proceeding before the circuit court upon habeas corpus. In this case the commissioner did receive

evidence on behalf of the appellants, and, upon such evidence, found the existence of probable cause, and committed the defendants, and upon application to the district judge for the warrant of removal he reviewed his action, but did not pass upon the weight of the evidence.

While the circuit court may have had power to issue a writ of certiorari auxiliary to the writ of habeas corpus (*Ex parte Burford*, 3 Cranch, 448, 2 L. ed. 495; *Re Martin*, 5 Blatchf. 303, Fed. Cas. No. 9,151; *Ex parte Bollman*, 4 Cranch, 100, 2 L. ed. 563; Church, Habeas Corpus, § 260), it was under no obligation to do so, and its refusal cannot be assigned as error. Certiorari is a discretionary writ, and is often denied where the power to issue it is unquestionable. *People ex rel. Church* v. *Allegany County*, 15 Wend. 206; *People ex rel. Vanderbilt* v. *Stilwell*, 19 N. Y. 531; *Rowe* v. *Rowe*, 28 Mich. 353. Petitions for habeas corpus are frequently accompanied by applications for certiorari as ancillary thereto, and both are awarded or denied together. Appellant had nothing to complain of in the denial of the writ, and his petition should have set forth the evidence relied upon to show a want of probable cause. *Terlinden* v. *Ames*, 184 U. S. 279, 46 L. ed. 541, 22 Sup. Ct. Rep. 484; *Craemer* v. *Washington*, 168 U. S. 128, 42 L. ed. 408, 18 Sup. Ct. Rep. 1.

There was no error in the action of the Circuit Court, and its judgment is therefore affirmed.

Mr. Justice **Peckham** (dissenting):

I dissent from the opinion and judgment of the court in this case, and wish simply to state the grounds of my dissent, without any attempt to do more. The indictment [86] avers that the *conspiracy was entered into in Washington, District of Columbia, on December 30, 1901, and the opinion holds, in substance (and rightly, as I think), that it is essential to aver its formation in the District in order to give the courts therein jurisdiction of the offense. The indictment constitutes prima facie evidence of probable cause, but evidence may be given to rebut it. It is averred in the application for the writs of habeas corpus and certiorari, in the case of Hyde, that the evidence taken before the commissioner showed indisputably that the petitioner was never in the District of Columbia, except upon one occasion in 1901, and then only for about six hours, and that he was not then guilty of any of the offenses charged in the indictment; and in the case of Dimond, it was said the evidence showed that the transactions complained of as a conspiracy occurred in California or Oregon, of which former state the defendant was, and had been for twenty years, a resident. In other words, it was claimed that the evidence before the commissioner showed conclusively and without contradiction that there was no probable cause to believe the defendants guilty of any offense as charged in the indictment. The writ of certiorari was called for in order that this evidence might be brought before the circuit judge, so that he could see from it that there was affirmative and conclusive proof of the absence of probable cause. The applications for the writs of habeas corpus and of certiorari were both denied. The opinion of the circuit judge, delivered upon refusing the writs, shows that the question of the want of probable cause to believe defendants guilty, based upon the absence of both defendants from the District of Columbia at the time of the alleged formation of the conspiracy, was not touched upon by him, but the objections considered were those based upon the charge contained in the indictment, and whether it charged an offense under the laws of the United States. This court now holds that the refusal of the judge to grant the writ of certiorari was within his discretion.

I think this is not the case for the application of the rule *stated in the cases [87] cited in the opinion of the court. Those from New York were based upon a matter of public policy, where the purpose was to overturn proceedings in assessments and taxation, in which the public was interested, and the courts refused in such cases to grant the writ. The result of the refusal in this case is to prevent the review of the findings of the commissioner before whom the original proceeding was had, upon the question of probable cause. I admit that the weight of evidence will not, in such cases, be reviewed here, but evidence which conclusively rebuts the presumption of probable cause arising from the indictment, and which is uncontradicted, may be looked at, and a finding of probable cause reversed. In order to refer to it the evidence must be part of the record, and in such a case as this the application for a writ of certiorari to bring up the evidence which the petitioner avers shows such fact is not addressed to the discretion of the court, but, on the contrary, the petitioner has the right to demand that it shall be granted. The right is none the less when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there, they could not be guilty of the crime charged in the indictment. This case is an extreme illustration of the very great

hardship involved in sending a man 3,000 miles across the continent, from California or Oregon, to this district for trial, where he is to bring his witnesses, and where on such trial it will appear that the court must direct an acquittal because the averment of the formation of the conspiracy at Washington, D. C., is shown to be false to a demonstration.

The expense to a defendant in his necessary preparation for trial, and in procuring the attendance of witnesses in his behalf from such a distance, must necessarily be enormous; and in many, if not in most, cases, utterly beyond the ability of a defendant to pay. The enforcement of the criminal law should not be made oppressive in such cases, and therefore, when it
[88] *appears there was no probable cause to found the indictment upon, the order of removal should be refused.

I am authorized to say that Mr. Justice **White** and Mr. Justice **McKenna** concur in this dissent.

HENRY P. DIMOND, *Appt.*,
v.
JOHN H. SHINE.

(See S. C. Reporter's ed. 88

This case is governed by the decision in *Hyde* v. *Shine*, *ante*, 90.

[No. 410.]

Argued February 21, 23, 1905. Decided May 29, 1905.

APPEAL from the Circuit Court of the United States for the Northern District of California to review the denial of habeas corpus and certiorari to inquire into a detention to await the removal of a person charged with an offense against the United States to the District of Columbia, where the trial is to be had. *Affirmed.*

Mr. **Frank H. Platt** argued the cause, and, with *Messrs. Charles Page* and *Samuel Knight*, filed a brief for appellant:

No person can in any case be removed to the District of Columbia for trial for any crime whatever.

American Ins. Co. v. Canter, 1 Pet. 516, note, 7 L. ed. 244, Fed. Cas. No. 302a; *Cissel* v. *McDonald*, 16 Blatchf. 150, Fed. Cas. No. 2,729; *McAllister* v. *United States*, 141 U. S. 174, 180, 185, 35 L. ed. 693, 695, 696, 11 Sup. Ct. Rep. 949; *Re Dana*, 68 Fed. 886.

No general act is locally applicable to the District of Columbia when there is a specific act in force on the same subject-matter.

Re Kirk, 3 Mackey, 116.

A person who commits a crime in the District of Columbia may be tried in the district in which he is found, or into which he is first brought.

United States v. *Carr*, 3 Sawy. 302, Fed. Cas. No. 14,730; *Jones* v. *United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Cook* v. *United States*, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268.

The prisoner must be tried in the judicial district where he is arrested.

United States v. *Bird*, 1 Sprague, 299, Fed. Cas. No. 14,597.

Even if applicable at all to the District of Columbia, U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, does not contemplate or authorize removal from a district, the courts of which are competent to try the offense.

Ex parte Baldwin, 69 Iowa, 502, 29 N. W. 428; *Crater* v. *Barlow*, 105 Iowa, 78, 74 N. W. 745; *Re Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735; *Re Twinan*, 5 Best & S. 645; Wharton, 7th ed. §§ 2960, 2961; *Tyler's Case* (1859); *Robbins Case* (1874).

The venue of the alleged conspiracy is improperly laid in the District of Columbia.

United States v. *Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; *Pettibone* v. *United States*, 148 U. S. 202, 37 L. ed. 422, 13 Sup. Ct. Rep. 542; *Dealy* v. *United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680; *Berkowitz* v. *United States*, 35 C. C. A. 379, 93 Fed. 452; *Shaftesbury* v. *Graham* (Term Pasch. 34 Car. 2 R. B.) Skinner, 32; *Smith* v. *Cranshaw* (Term Mich. XX. Jacobi B. R.) 2 Rolle, 258; *Reg.* v. *Best*, 1 Salk. 174.

Mr. Frank H. Platt also filed a separate brief for appellant:

The warrant of removal under color of which appellant is detained, having been issued without jurisdiction, is void, and appellant is deprived of his liberty without due process of law.

Greene v. *Henkel*, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218.

The sufficiency of the charge of a crime is jurisdictional. It has always been held that the writ of habeas corpus is a proper instrument to secure the release of a prisoner held under order or sentence of a tribunal which acted without jurisdiction, and whose process was consequently void.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781; *Re Ayres*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ohio* v. *Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

It has been the practice in all Federal jurisdictions, in removal proceedings, to determine whether the indictment sufficiently charges a crime, and to discharge the prisoner if it does not.

Stewart v. *United States*, 55 C. C. A. 641, 119 Fed. 89; *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Terrell*, 51 Fed. 213; *Re Corning*, 51 Fed. 205; *Re Dana*, 68 Fed. 886; *United States* v. *Lee*, 84 Fed. 626; *Re Greene*, 52 Fed. 104; *Re Belknap*, 96 Fed. 614; *Re Huntington*, 68 Fed. 881; *United States* v. *Conners*, 111 Fed. 734; *Re Doig*, 4 Fed. 193; *Re Palliser* (*Palliser* v. *United States*) 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034.

An indictment which fails to show as the object or means of the conspiracy a scheme or agreement which would result in defrauding the United States is fatally defective.

United States v. *Crafton*, 4 Dill. 145, Fed. Cas. No. 14,881; *United States* v. *Reichert*, 32 Fed. 142; *United States* v. *Taffe*, 86 Fed. 113; *United States* v. *Milner*, 36 Fed. 890; *United States* v. *Barnhart*, 33 Fed. 459.

When the state has issued its patent, the title so obtained by the patentee cannot be attacked collaterally by third parties for frauds practised in obtaining it, even in the hands of a patentee who was a party to the fraud.

O'Connor v. *Frasher*, 56 Cal. 499; *Doll* v. *Meador*, 16 Cal. 295; *Thomas* v. *Lawlor*, 53 Cal. 405; *Gale* v. *Best*, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550; *Turner* v. *Donnelly*, 70 Cal. 597, 12 Pac. 469; *Moore* v. *Wilkinson*, 13 Cal. 478; *Yount* v. *Howell*, 14 Cal. 465; *Miller* v. *Dale*, 44 Cal. 562; *Kentfield* v. *Hayes*, 57 Cal. 409; *Plummer* v. *Brown*, 70 Cal. 544, 12 Pac. 464; *Chapman* v. *Quinn*, 56 Cal. 278; *Irvine* v. *Tarbat*, 105 Cal. 242, 38 Pac. 896; *Dreyfus* v. *Badger*, 108 Cal. 58, 41 Pac. 279; *Standard Quicksilver Co.* v. *Habishaw*, 132 Cal. 115, 64 Pac. 113; *Phillips* v. *Carter*, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031; *Saunders* v. *La Purisima Co.* 125 Cal. 165, 57 Pac. 656; *Harrington* v. *Goldsmith*, 136 Cal. 169, 68 Pac. 594.

The state, if it chooses, can bring an action to cancel the patent in the hands of a patentee who has participated in the fraud; but even the state cannot successfully attack its patent in the hands of a bona fide purchaser for value.

People v. *Swift*, 96 Cal. 165, 31 Pac. 16; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States* v. *California & O. Land Co.* 1 C. C. A. 330, 7 U. S. App. 128, 49 Fed. 496, Affirmed in 148 U. S. 31, 40, 41, 37 L. ed. 354, 359, 360, 13 Sup. Ct. Rep. 458; *United States* v. *Winona & St. P. R. Co.* 165 U. S. 463, 478, 41 L. ed. 789, 796, 17 Sup. Ct. Rep. 368; *Marshall* v. *Farmers' Bank*, 115 Cal. 330, 42 Pac. 418, 47 Pac. 52.

No proposition of law is better settled than that there is no implied warranty of title in a conveyance of land without covenants, and that expressed covenants in the conveyance exclude all implied covenants.

Frost v. *Raymond*, 2 Caines, 188, 2 Am. Dec. 228; Cal. Civ. Code, § 1113; *Bryan* v. *Swain*, 56 Cal. 616; *Peabody* v. *Phelps*, 9 Cal. 213; Bellinger & Cotton's Anno. Codes & Statutes, § 5338; *Taggart* v. *Risley*, 4 Or. 235; *Baldwin* v. *Leroy*, Fed. Cas. No. 800a; *Huntly* v. *Waddell*, 34 N. C. (12 Ired. L.) 32; *Bethell* v. *Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Aiken* v. *Franklin*, 42 Minn. 91, 6 L. R. A. 360, 43 N. W. 839; *Allen* v. *Pegram*, 16 Iowa, 163; *McKesson* v. *Hennessee*, 66 N. C. 473; *McDonough* v. *Martin*, 88 Ga. 675, 18 L. R. A. 346, 16 S. E. 59; *Lamb* v. *Kamm*, 1 Sawy. 238, Fed. Cas. No. 8,017.

It is equally elementary that no contract can be rescinded on the ground of fraud, unless it appears that injury has resulted therefrom or may result to the party claiming the rescission. Fraud without resulting injury is not actionable.

Irons v. *Reyburn*, 11 Ark. 378; *Otis* v. *Raymond*, 3 Conn. 413; *Skrine* v. *Simmons*, 11 Ga. 401; *Sieveking* v. *Litzler*, 31 Ind. 13; *Wharf* v. *Roberts*, 88 Ill. 426; *Hale* v. *Philbrick*, 47 Iowa, 217; *Brown* v. *Blunt*, 72 Me. 415; *Fuller* v. *Hodgdon*, 25 Me. 243; *Morgan* v. *Bliss*, 2 Mass. 111; *Johnson* v. *Seymour*, 79 Mich. 156, 44 N. W. 344; *Alden* v. *Wright*, 47 Minn. 225, 49 N. W. 767; *Lorenzen* v. *Kansas City Invest. Co.* 44 Neb. 99, 62 N. W. 231; *Weaver* v. *Wallace*, 9 N. J. L. 251; *Dung* v. *Parker*, 52 N. Y. 494; *Aron* v. *DeCastro*, 36 N. Y. S. R. 716, 13 N. Y. Supp. 372; *Slaughter* v. *Gerson*, 13 Wall. 379, 20 L. ed. 627; *Marshall* v. *Hubbard*, 117 U. S. 415, 417, 29 L. ed. 919, 920, 6 Sup. Ct. Rep. 806.

Solicitor General **Hoyt** and *Mr.* **Francis J. Heney** argued the cause, and, with *Mr. Arthur B. Pugh*, filed a brief for appellee. For their contentions see their brief as reported in *Hyde* v. *Shine*, *ante*, 90.

Per **Curiam:**

This case is indistinguishable from the last, and *the judgment of the Circuit Court is also affirmed.*

[89]*HANNAH O'CALLAGHAN and Edward Corcoran, *Appts.*,

v.

TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, Deceased; Marie Carrau, W. M. Russell, and S. F. Coombs.†

(See S. C. Reporter's ed. 89–119.)

1. **Appeal from circuit court of appeals—jurisdiction.**—Rights asserted under the Constitution of the United States may be so wholly wanting in merit as not to afford a basis for an appeal to the Supreme Court from a decree of a circuit court of appeals.
2. **Courts—jurisdiction of circuit court—diverse citizenship.**—Diverse citizenship does not give jurisdiction to a Federal circuit court of a bill which seeks a declaration of the nonexistence of a will, and the consequent nullity of its probate in a state court, where the proceeding to contest a will afforded by the laws of that state is but supplementary, or ancillary, to the original probate proceedings, and is not an independent controversy *inter partes*.
3. **Courts—jurisdiction of circuit court—case involving constitutional questions.**—The contention that a state court, in admitting a nuncupative will to probate without giving the statutory notice to the next of kin, violated the due process of law clause of the 14th Amendment to the Constitution of the United States, is too lacking in merit to afford a basis for the jurisdiction of a Federal circuit court of a suit to set aside the probate, even assuming that such notice is essential to the preliminary probate, where the bill proceeds on the theory, which finds support in the law of the state, that, despite the mere preliminary admission to probate, there remained a right to assail the existence of the will and its probate, which was not lost by the failure to give notice.
4. **Courts—jurisdiction of circuit court—case involving constitutional question**—The assertion that, because real estate cannot be devised by a nuncupative will, the attempt of a probate court to exert authority over property of that character by admitting such a will to probate deprived the heirs of such property without due process of law, cannot give a Federal circuit court jurisdiction to pass upon the construction and effect of such will, where this question is wholly subordinate to the determination of another question, of which that court had no jurisdiction, such as the nonexistence of the will and the consequent invalidity of its probate.

[No. 193.]

Argued and submitted April 4, 5, 1905. Decided May 29, 1905.

APPEAL from and Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed a decree of the Circuit Court for the Northern Division of the District of Washington, in favor of complainants in a suit to set aside the probate of a will in a state court, and remanded the cause with directions to dismiss the bill. *Appeal dismissed* and *judgment affirmed* on writ of certiorari.

See same case below, 60 C. C. A. 347, 125 Fed. 657.

Statement by Mr. Justice **White:**

This suit was commenced in the circuit court of the United States for the district of Washington, northern division, by the filing, on June 20, 1901, of a bill on behalf of Hannah O'Callaghan and Edward Corcoran, appellants in this court. The defendants were Terence O'Brien, as administrator of the estate of John Sullivan, and Marie Carrau. W. M. Russell and S. F. Coombs, who are joined as appellees, were the sureties on a bond given by Marie Carrau, on the appeal taken by her to the circuit court of appeals.

It was averred that the complainants, aliens and residents of Ireland, were the first cousins and the sole heirs at law and next of kin of one John Sullivan, who died on September 26, 1900, in the city of Seattle, state of Washington, intestate, leaving a large amount of real and personal property. The appointment by the superior court of King county, state of Washington, of a special administrator, and the subsequent appointment of the defendant O'Brien, and his qualification as general administrator, were next averred. O'Brien and his codefendant were alleged to be citizens of the state of Washington. The remaining averments were, in substance, that the defendant Marie Carrau, confederating with certain named relatives, had manufactured a pretended nuncupative will of John Sullivan, in favor of said Marie Carrau, under which will she was claiming to be the sole legatee and devisee of all his property. The will purported to have been made about 11 o'clock on the night previous to the death of Sullivan, in the presence of Marie Carrau and her relatives, and the testamentary words em-

†This case is reported by the Official Reporter under the title of "Farrell v. O'Brien."

NOTE.—*On probate jurisdiction of the Federal courts*—see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L.R.A. 655, and note; *Re* Gannon, 5 L.R.A. 359, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; and Gilman v. Tucker, 13 L.R.A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L. R.A. 225.

ployed, or the substance thereof, were alleged to be the following:

"I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carrau. I am sick, and we know not what might happen."

[91] *It was averred that, on the application of the defendant Carrau, and after the appointment of O'Brien as general administrator, the alleged nuncupative will was admitted to probate, and, at the time of the filing of the bill, stood, as illegally probated, on the records of the superior court of King county, state of Washington. It was, however, charged that the said superior court, in assuming to probate said nuncupative will, acted wholly without jurisdiction in the premises, for the reason that the estate bequeathed exceeded the value of $200, and because no legal citations had been issued out of said court, and ten days had not elapsed between the filing of the will and the hearing of the proof offered in support of the same. It was further averred that, under the laws of the state of Washington real estate could not be disposed of by a nuncupative will.

Further averring that the state court, on the application of Marie Carrau, was about to make and enter a decree distributing to her the whole of the Sullivan estate upon the execution of a bond conditioned for the payment of her proportion of the indebtedness of the estate, to which decree the defendant O'Brien, administrator, it was averred, would yield obedience, and that said Marie Carrau, on receiving possession, would transfer the estate to others, and alleging that such an order and the action of the administrator thereunder would violate the due process clause of the Constitution of the United States, an injunction and the appointment of a receiver was prayed. It was also prayed that a decree might be made adjudging the alleged nuncupative will to be null and void, and perpetually restraining the defendant Carrau from setting up any title or claim thereunder, and adjudging and decreeing the complainants to be the only heirs at law of the decedent, and entitled to receive his estate, and commanding the defendant administrator to surrender possession thereof to, and account therefor to, the complainants.

On behalf of O'Brien, administrator, there was filed what was termed a "stipulation and answer," signed by the complainants

[92] *and their solicitor and the administrator. In this paper the appointment of O'Brien was recited, and there was also embodied a disclaimer of any interest of said administrator in the subject-matter of the controversy between complainants and the defendant Marie Carrau, or any knowledge in respect thereto other than as shown by the records. It was stipulated that no costs should be taxed against the administrator and that complainants should not be put to proof of the allegations of the bill, so far as the same affected the administrator, and that the stipulation should be taken as and for an answer of said defendant administrator to the bill of complaint.

After other proceedings in the cause, not essential to be stated, an answer was filed on behalf of the defendant Carrau.

Briefly stated, the answer admitted the death of Sullivan, affirmed the validity of the alleged nuncupative will and of the probate thereof, and further averred that, under the laws of Washington, a nuncupative will, duly proved and probated, "devises both real and personal property to any amount in value." After specially answering each of the allegations of the bill, it was, in substance, averred, "by way of defense, and as questioning the jurisdiction of the court," that the court in which the alleged will had been probated had the sole, original, and exclusive jurisdiction of the probation of said will and the management of the estate of the decedent; that in said court various persons, including one Eugene Timothy Sullivan, a resident of the state of Washington, had filed their verified petitions, claiming each to be the sole heir of the decedent; that certain of said claimants (Sullivan not being one of the number), and also the complainants and the state of Washington, had commenced, in the state court, proceedings to contest the validity of the alleged will, and that such proceedings were at issue and were still pending.

Testimony was taken by commission and otherwise, under an agreement providing that the same might be read in evidence in any suit or proceeding which was then or might thereafter be pending in a state or Federal court affecting the estate of *John [93 Sullivan. Both during the taking of the testimony and at the hearing which followed, the objection to the jurisdiction of the court was reiterated and exceptions were reserved.

A decree was entered in favor of complainants. 116 Fed. 934. In substance the decree found the complainants to be the next of kin of the decedent; that O'Brien was the duly qualified administrator; that the alleged nuncupative will was not made; that the Washington court acted wholly without jurisdiction in the probate of the alleged will, and hence the proceedings in respect thereto were void. It was decreed that the complainants, as first cousins of the deceased, were entitled to share equally in the assets of his estate, and the defendant O'Brien was direct-

ed to recognize their right. The defendant Carrau was perpetually restrained from setting up any claim to said estate, under the alleged will or otherwise.

On appeal, the circuit court of appeals reversed the decree of the circuit court for want of jurisdiction in that court over the subject-matter and because of the absence of necessary parties, who, if made parties, would oust the court of jurisdiction; and the cause was remanded, with directions to dismiss the bill, at the cost of complainants. 60 C. C. A. 347, 125 Fed. 657. The cause was appealed to this court. Following the filing of a motion to dismiss such appeal, an application was made on behalf of the complainants below, for the allowance of a writ of certiorari, and the determination of these two motions was postponed to the hearing on the merits.

Mr. **James B. Howe** argued the cause, and, with *Messrs. Samuel H. Piles, George Donworth, Charles H. Farrell,* and *F. D. McKenney,* filed a brief for appellants and petitioners:

To impress the attribute of finality upon a judgment of the circuit court of appeals, it must appear that the original jurisdiction of the circuit court was dependent entirely upon diverse citizenship.

Northern P. R. Co. v. *Soderberg,* 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; *Ayres* v. *Polsdorfer,* 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; *Howard* v. *United States,* 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Loeb* v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Robinson* v. *Caldwell,* 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Colorado Central Consol. Min. Co.* v. *Turck,* 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

The construction to be given to the clause of the act making the decrees of the circuit courts of appeals final is to be determined not by ascertaining whether jurisdiction in the circuit court exists, but whether it is claimed in good faith, and not fictitiously, in the pleading which invokes the jurisdiction of the circuit court. In determining the finality of the decree of the circuit court of appeals, the question is not, Upon what ground can the decree of the circuit court be sustained? but the question is, Upon what ground was the jurisdiction invoked by the party seeking it?

Florida, C. & P. R. Co. v. *Bell,* 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

If, in order to render the decree of the circuit court of appeals final, the word "dependent" is to be interpreted as "attached," the decree in the case at bar was not final, because the court held that the jurisdiction never attached. If the word "dependent" is to be interpreted as synonymous with "invoked," the decree of the circuit court of appeals was not final, because the jurisdiction of the circuit court was invoked not entirely upon the ground of citizenship, but upon that ground and also upon the ground that the case was one involving the construction and application of the Constitution of the United States.

Loeb v. *Columbia Twp.* 179 U. S. 472, 479, 45 L. ed. 280, 285, 21 Sup. Ct. Rep. 174; *American Sugar Ref. Co.* v. *New Orleans,* 181 U. S. 277, 280, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 294, 46 L. ed. 546, 547, 22 Sup. Ct. Rep. 452; *Press Pub. Co.* v. *Monroe,* 164 U. S. 105, 112, 41 L. ed. 367, 369, 17 Sup. Ct. Rep. 40; *Spreckels Sugar Ref. Co.* v. *McClain,* 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

If the rendition of a judgment in a proceeding to which there are parties, without any determination of the issues raised, is depriving the parties against whom the decision is rendered of their property without due process of law (*Fayerweather* v. *Ritch,* 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58), it necessarily follows that the rendition of a judgment without acquiring jurisdiction, either of the subject-matter or of the parties against whom the decision is rendered, is equally a depriving of those parties of their property without due process of law, and when a bill alleges those facts, and, in addition thereto, specifically alleges that the property of the complainants, pursuant to such proceedings, is about to be taken from them without due process of law, in violation of their rights under the 14th Amendment of the Constitution of the United States, it would seem that the case at bar is much stronger in presenting a case involving the application of the Constitution of the United States than *Fayerweather* v. *Ritch,* 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

If an order made without notice to these complainants, which took from them part of the estate, was void because to give it effect would be to deprive them of their property without due process of law (*Corcoran* v. *Bell* [Wash.] 78 Pac. 945), it necessarily follows that a decree of probate rendered without notice to these complainants, although the statute forbade the court rendering the decree to hear any proof until they had been notified, and which deprives them of the entire estate, is void for the same reason.

The sole ground upon which this court obtained jurisdiction on the writ of error to the supreme court of the state of Washing-

ton, in *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, was that the judgment holding that Scott was dead, when he was in fact alive, under which judgment his property had been taken, was void, and that when that judgment was received in evidence as a muniment of title Scott was thereby deprived of his property without due process of law.

If five days' notice in an action *in rem* instituted in Texas did not constitute due process of law as against a person served with process in the state of Virginia (*Roller* v. *Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410), we submit that a judgment devesting the appellants, then residing in Ireland, of their title to property inherited from the deceased, John Sullivan, was not due process of law, when founded on a citation issued by a court 6,000 miles distant, and returnable on the same day, but at an hour already past when the process was issued.

See also *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. ed. 914, 915; *Earle* v. *McVeigh*, 91 U. S. 503, 510, 23 L. ed. 398, 401; *Hovey* v. *Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; *Galpin* v. *Page*, 18 Wall. 350, 21 L. ed. 959; *Ex parte Wall*, 107 U. S. 289, 27 L. ed. 562, 2 Sup. Ct. Rep. 569; *Lavin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641; *Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

That the decree of probate was void is clearly established by the following authorities:

Dolan v. *Jones*, 36 Wash. —, 79 Pac. 640; *Corcoran* v. *Bell* (Wash.) 78 Pac. 945; *National Exchange Bank* v. *Wiley*, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; *Smith* v. *White*, 32 Wash. 414, 73 Pac. 480; *Ball* v. *Clothier*, 34 Wash. 299, 75 Pac. 1099; *Re Leonard* (N. J. Eq.) 47 Atl. 222; *Randolph* v. *Bayue*, 44 Cal. 370; *Charleboise* v. *Bourdon*, 6 Mont. 373, 12 Pac. 775; *Ashurst* v. *Fountain*, 67 Cal. 18, 6 Pac. 849; *Spencer* v. *Houghton*, 68 Cal. 82, 8 Pac. 679; *Haws* v. *Clark*, 37 Iowa, 356; *Boals* v. *Shules*, 29 Iowa, 507; *Jones & M. Lumber Co.* v. *Boggs*, 63 Iowa, 589, 19 N. W. 678; *Sprote* v. *Marshall*, 4 G. Greene, 344; *Hodges* v. *Brett*, 4 Greene, 345; *Milbourn* v. *Fouts*, 4 G. Greene, 346; *Fernekes* v. *Case*, 75 Iowa, 152, 39 N. W. 238; *Joiner* v. *Delta Bank*, 71 Miss. 382, 14 So. 464; *Hunsaker* v. *Coffin*, 2 Or. 107; *Northcut* v. *Lemery*, 8 Or. 317; *Lewis* v. *Bishop*, 19 Wash. 312, 53 Pac. 165; *Everett Water Co.* v. *Fleming*, 26 Wash. 364, 67 Pac. 82.

If, in a suit in ejectment, the admission in evidence of a judgment rendered without jurisdiction for want of notice, and therefore not constituting due process of law, is depriving the person whose rights are affected thereby of his property in a manner forbidden by the 14th Amendment to the Constitution of the United States, can it be denied that to allow such judgment to be used as a muniment of title, to take the property of complainants from the possession of the administrator, who holds it in trust for them, is an act equally forbidden by the Amendment, and therefore one which can be prevented by injunction before it is consummated, instead of being annulled after its execution?

Vicksburg Waterworks Co. v. *Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *Pacific Gas Improv. Co.* v. *Ellert*, 64 Fed. 421; *Nashville, C. & St. L. R. Co.* v. *Taylor*, 86 Fed. 168.

The authorities establish the following propositions:

(1) When the jurisdiction of the circuit court is invoked on the ground of diverse citizenship only, and the jurisdiction is not in issue in the circuit court, the circuit court of appeals has final jurisdiction of all questions in the case of an appeal being taken to that court.

(2) When the jurisdiction of the circuit court is invoked upon the ground of diverse citizenship, and also upon grounds other than those mentioned in § 5 of the act of March 3, 1891, and the jurisdiction of that court is not in issue there, then the court of appeals has appellate jurisdiction, and the Supreme Court has no direct appellate jurisdiction; but the decree of the circuit court of appeals is not final, because the jurisdiction of the circuit court was not dependent entirely upon diverse citizenship.

(3) When the jurisdiction of the circuit court is invoked not on the ground of diverse citizenship, nor upon any ground mentioned in § 5, but upon the ground that the suit arises under the laws of the United States, and the jurisdiction of the circuit court is not in issue there, then the circuit court of appeals has appellate jurisdiction, and the Supreme Court has no direct appellate jurisdiction; but the decree of the circuit court of appeals is not final.

(4) When the jurisdiction of the circuit court is invoked solely upon the ground that the case is one arising under the 4th, 5th, or 6th subdivision of § 5, then the jurisdiction of the Supreme Court is exclusive, and the circuit court of appeals is without jurisdiction.

(5) When the jurisdiction of the circuit

court is invoked both on the ground of diverse citizenship, and also upon one of the grounds mentioned in the 4th, 5th, or 6th subdivisions of § 5, then the case must be taken directly to the Supreme Court, and the circuit court of appeals has no jurisdiction.

(6) When the jurisdiction of the circuit court is invoked solely upon the ground of diversity of citizenship, and in the progress of the case a question arises which, if pleaded in the bill, would have given exclusive jurisdiction on appeal to the Supreme Court, then jurisdiction may be exercised directly by the Supreme Court, or by the circuit court of appeals. If an appeal in such case should be taken to the circuit court of appeals, its decree would be final, because the jurisdiction of the circuit court was dependent entirely upon diversity of citizenship.

(7) When the jurisdiction of the circuit court is in issue in that court, the circuit court of appeals is without jurisdiction to decide that question.

Union & Planters' Bank v. *Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Northern P. R. Co.* v. *Soderberg*, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; *Howard* v. *United States*, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Giles* v. *Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639; *Cummings* v. *Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *Field* v. *Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Holder* v. *Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Penn Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Loeb* v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Chappell* v. *United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Horner* v. *United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Fayerweather* v. *Ritch*, 195 U. S. 276, 299, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; *Davis & F. Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *Cincinnati, H. & D. R. Co.* v. *Thiebaud*, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; *Keyser* v. *Lowell*, 54 C. C. A. 574, 117 Fed. 400; *Owensboro* v. *Owensboro Waterworks Co.* 53 C. C. A. 146, 115 Fed. 318, 191 U. S. 358, 48 L. ed. 217 24 Sup. Ct. Rep. 82; *Illinois C. R. Co.* v. *Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 256; *Wright* v. *MacFarlane*, 58 C. C. A. 570, 122 Fed. 770.

Assuming, for the sake of argument, that the jurisdiction of the circuit court was invoked solely on the ground of diversity of citizenship, still the circuit court of appeals had no jurisdiction to determine the question of the jurisdiction of the circuit court, because the jurisdiction of that court was in issue in the circuit court.

Sun Printing & Pub. Asso. v. *Edwards*, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696; *Fisheries Co.* v. *Lennen*, 130 Fed. 533; *United States* v. *Lee Yen Tai*, 51 C. C. A. 299, 113 Fed. 465; *St. Louis Cotton Compress Co.* v. *American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196.

When a proceeding *inter partes* can be maintained in a state court, by whatever name the proceeding may be called, for the annulment of a will and its probate, a suit for the same relief may be maintained in the circuit court of the United States for the same state, if the other jurisdictional requisites exist.

Richardson v. *Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; *Wart* v. *Wart*, 117 Fed. 766; *Williams* v. *Crabb*, 59 L. R. A. 425, 54 C. C. A. 213, 117 Fed. 193; *Sawyer* v. *White*, 58 C. C. A. 587, 122 Fed. 223; *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Ellis* v. *Davis*, 109 U. S. 485, 496, 27 L. ed. 1006, 1009, 3 Sup. Ct. Rep. 327; *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Cowley* v. *Northern P. R. Co.* 159 U. S. 569, 582, 40 L. ed. 263, 266, 16 Sup. Ct. Rep. 127; *Bardon* v. *Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Smyth* v. *Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Darragh* v. *H. Wetter Mfg. Co.* 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 7; *Sheffield Furnace Co.* v. *Witherow*, 149 U. S. 574, 579, 37 L. ed. 853, 856, 13 Sup. Ct. Rep. 936; *Leighton* v. *Young*, 18 L. R. A. 266, 3 C. C. A. 176, 10 U. S. App. 298, 52 Fed. 439; Woerner, Am. Law of Administration, 2d ed. § 156, p. 357; *Brodhead* v. *Shoemaker*, 11 L. R. A. 567, 44 Fed. 518; *Everhart* v. *Everhart*, 34 Fed. 82; *Kirby* v. *Chicago & N. W. R. Co.* 106 Fed. 551; *McDonnell* v. *Jordan*, 178 U. S. 229, 44 L. ed. 1048, 20 Sup. Ct. Rep. 886; *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. ed. 624, 626.

The proceeding in Washington to contest a will and its probate is a suit in a court of general jurisdiction.

Re Clayson, 26 Wash. 253, 66 Pac. 410; *Reformed Presby. Church* v. *McMillan*, 31 Wash. 643, 72 Pac. 502; *Ball* v. *Clothier*, 34 Wash. 299, 75 Pac. 1099; *Filley* v. *Murphy*, 30 Wash. 1, 70 Pac. 107; *Browder* v. *Phinney*, 30 Wash. 74, 70 Pac. 264; *State ex rel. Stratton* v. *Tallman*, 25 Wash. 295, 65 Pac. 545; *Higgins* v. *Nethery*, 30 Wash. 239, 70 Pac. 489.

A court of the United States has jurisdic-

tion of a suit to enjoin a person from availing himself of a judgment obtained by fraud, based upon false evidence and rendered *ex parte*.

Howard v. *De Cordova*, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817; *Graver* v. *Faurot*, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Marshall* v. *Holmes*, 141 U. S. 590, 35 L. ed. 871, 12 Sup. Ct. Rep. 62; *Cooper* v. *Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; *Huntington* v. *Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *National Surety Co.* v. *State Bank*, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593; *McNeil* v. *McNeil*, 78 Fed. 834; *Davenport* v. *Moore*, 74 Fed. 945; *Johnson* v. *Waters*, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619.

Mr. **Joseph W. Robinson** submitted the cause for appellees and respondents. *Mr. J. P. Houser* was on the brief:

The decree of the United States circuit court of appeals, in reversing Circuit Judge Hanford, was final, and cannot be reviewed in this court.

Carrau v. *O'Calligan*, 60 C. C. A. 347, 125 Fed. 657; *United States* v. *Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; *Loeb* v. *Columbia Twp.* 179 U. S. 483, 45 L. ed. 287, 21 Sup. Ct. Rep. 174; *Ayres* v. *Polsdorfer*, 187 U. S. 589, 47 L. ed. 315, 23 Sup. Ct. Rep. 196.

The Washington statute makes express provision for a contest of any will admitted to probate, for any cause affecting the validity of the will; but this must be done by petition to the superior court having jurisdiction and administering such estate.

State ex rel. Stratton v. *Tallman*, 25 Wash. 295, 65 Pac. 545, 29 Wash. 317, 69 Pac. 1101; *Re Alfstad*, 27 Wash. 175, 67 Pac. 593; *Filley* v. *Murphy*, 30 Wash. 1, 70 Pac. 107.

The Washington Code authorizes the trial and determination, in the probate department of the state court, of all questions of heirship, as well as the right to take under wills; and such a contest necessarily requires that court to determine the question of kinship as an issue incident to the right to contest the will. The probate department has the sole and exclusive jurisdiction so to do.

Webster v. *Seattle Trust Co.* 7 Wash. 651, 33 Pac. 970, 35 Pac. 1082; *Griffin* v. *Warburton*, 23 Wash. 231, 62 Pac. 765; *State ex rel. Stratton* v. *Tallman*, 25 Wash. 295, 65 Pac. 545, 29 Wash. 317, 69 Pac. 1101; *Re Alfstad*, 27 Wash. 175, 67 Pac. 593; *Browder* v. *Phinney*, 30 Wash. 74, 70 Pac. 264; *Filley* v. *Murphy*, 30 Wash. 1, 70 Pac. 107; *Re Murphy*, 30 Wash. 9, 70 Pac. 109; *Reformed Presby. Church* v. *McMillan*, 31 Wash. 643, 72 Pac. 502.

The Federal courts have never assumed to exercise jurisdiction over probate matters, though from the examination of certain decisions in the various Federal courts throughout the United States, in certain instances it might seem that they had; but a careful examination of each of such cases will, we think, show to the court that it was owing to some peculiar statute in the one class of cases, and in the other a clear misapprehension of what had been decided in certain other cases.

Bedford Quarries Co. v. *Thomlinson*, 36 C. C. A. 272, 95 Fed. 208; *Walker* v. *Brown*, 11 C. C. A. 135, 27 U. S. App. 291, 63 Fed. 204; *Wahl* v. *Franz*, 49 L. R. A. 62. 40 C. C. A. 638, 100 Fed. 680; *Re Cilley*, 58 Fed. 977; *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Simmons* v. *Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Broderick's Will* (*Kieley* v. *McGlynn*), 21 Wall. 503, 22 L. ed. 599; *Reed* v. *Reed*. 31 Fed. 53; *Re Aspinwall*, 83 Fed. 852; *Oakley* v. *Taylor*, 64 Fed. 246; *Blythe* v. *Hinckley*, 84 Fed. 250.

A petition to probate a will is the beginning of a special proceeding. The order admitting to probate is not final so long as proceedings may be taken to revoke the probate.

Re Joseph, 118 Cal. 660, 50 Pac. 768.

In all subsequent stages the contest is but a part of the proceeding to probate the will, and is not a new and distinct proceeding.

Higgins v. *Nethery*, 30 Wash. 239, 70 Pac. 489; *Hunt* v. *Phillips*, 34 Wash. 362, 75 Pac. 970; *Zimmerman* v. *So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *Hughes* v. *Green*, 28 C. C. A. 537, 56 U. S. App. 56, 84 Fed. 833; *Nugent* v. *Philadelphia Traction Co.* 87 Fed. 251; *Marks* v. *Marks*, 75 Fed. 322; *Taylor* v. *Taintor*, 16 Wall. 370, 21 L. ed. 290; *Gamble* v. *San Diego*, 79 Fed. 500.

When the statute requires notice of the proceeding to probate or contest a will, the judgment of the court cannot be collaterally attacked for want of notice, if the party not notified may still contest the will by appeal and trial *de novo*, or by a statutory action, suit, or other proceeding.

16 Enc. Pl. & Pr. 1004; *Hall* v. *Hall*, 47 Ala. 290; *Herring* v. *Ricketts*, 101 Ala. 340, 13 So. 502; *Dickey* v. *Vann*, 81 Ala. 425, 8 So. 195; *Wetmore* v. *Parker*, 52 N. Y. 450.

Messrs. **William F. Hays** and **John H. Mitchell** also submitted the cause for appellees and respondents.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The motion to dismiss the appeal, and the application for the allowance of a writ of certiorari, will first be passed upon.

[100] *While the alienage of complainants and the citizenship of respondents was alleged, the jurisdiction of the circuit court was not invoked solely upon that ground. It was asserted in the bill that the requirements of the Code of Washington had not been complied with in respect to the preliminary issue of citations to the next of kin of the decedent; that the hearing on the application to probate the alleged nuncupative will was had before service of citations in the mode prescribed by law, and as, at the time of the filing of the bill, six months had elapsed without lawful probate of the will, the title of complainants to the property as heirs and next of kin of the intestate had become absolute. The use by the defendant Carrau of the decree of probate as a muniment of title, with which to obtain from the administrator, under the authority of the state court, the property of complainants in the custody of the administrator, was, as a consequence, asserted to amount to a deprivation of property without due process of law, in violation of the Constitution of the United States.

The statute which, it was asserted, limited the authority of the Washington court to probate the nuncupative will in question to a lawful probate thereof within six months of the speaking of the testamentary words, is as follows:

"No proof shall be received of any nuncupative will unless offered within six months after speaking the testamentary words nor unless the words or the substance thereof be first committed to writing, and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper." Pierce's Code, 2352.

It is settled that the mere averment of a constitutional question is not sufficient, where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. *Fayerweather* v. *Ritch*, 195 U. S. 276, 299, 49 L. ed. 193, 210, 25 Sup. Ct. Rep. 58. We think that the alleged violations of Federal right based upon the 14th Amendment were so unsubstantial and devoid of merit that they furnish no real support to the contention that the decree of the circuit

[101] court of appeals *was not final. From this it follows that the motion to dismiss must prevail. But we are not thereby relieved of the duty of considering the correctness of the decree of the circuit court of appeals, because, in our opinion, the case is one in which the writ of certiorari should be allowed. We therefore dismiss the appeal, and grant the application for certiorari, treating the record filed on the appeal as a return to that writ. Before coming, however, to dispose of the case, we observe that we do not, at this moment, state the reasons by which we are led to the conclusion that the rights asserted under the Constitution of the United States were so wholly wanting in merit as not to afford a basis for the appeal, because those reasons will be made manifest when we come to consider the question whether the bill was one within the jurisdiction of the circuit court.

The issue first for decision is, Did the circuit court of appeals rightly hold that the circuit court was without jurisdiction of the case made by the bill?

The solution of the question is not free from complexity. Original reasoning is not, however, required, since the subject has been previously considered by this court. We come, therefore, to an analysis of the leading cases. It results from the analysis which we have made of the bill that, by necessary effect, it assailed the previous probate and the existence of the will, and, besides, under the hypothesis that a will and probate might be found to exist, sought to limit the operation and effect of the will. The subject, therefore, has a twofold aspect,—the power of Federal courts to entertain jurisdiction concerning the probate or the revocation of the probate of wills, where the requisite diversity of citizenship exists, and the power of those courts, where such diversity obtains, to adjudicate concerning rights against the estates of decedents. Whilst we shall consider these two subjects separately, to avoid repetition we shall first consecutively analyze the cases concerning both subjects.

In *Hook* v. *Payne*, 14 Wall. 253, 20 L. ed. 887, certain distributees of an estate over which an administrator had been appointed in a court of Missouri, alleging diversity of

[102] citizenship, filed their *separate bills in a circuit court of the United States, for the purpose of annulling releases which they had given as to their distributive shares to the administrator, on the ground of his fraud, and also sought to annul settlements alleged to have been fraudulently made in the probate court, and to have a decree against the administrator for the amount of their distributive shares. The several suits were consolidated. The trial court, by an interlocutory decree, set aside the releases and the settlements made by Hook (the administrator) with the county court, and appointed a master to state an account with Hook as administrator. Moreover, the master was directed to inquire what other persons were interested in the estate, and to report what

payments, if any, had been made to them, and what was due to them, respectively, at the date of the report. The report of the master not only accorded the relief claimed by the complainants, but restated the accounts of the administrator, and in effect reported a scheme of distribution of the estate. The report was approved by the trial court. In this court the decree, in so far as it concerned the rights of the complainants, was affirmed. In so far as it attempted to distribute the estate, and to deal generally with the rights of persons other than the complainants, the decree was reversed, the court saying (p. 255, L. ed. p. 889):

"We are of opinion [therefore] that all that part of the decree which attempts to settle the right of the parties who were neither plaintiffs nor defendants in the original suit must be reversed.

"We do not propose, in this case, to lay down any precise rule on the subject of adjusting administrators' accounts in the Federal courts, or how far certain persons, not made parties in the original suit, or incapable of being made parties by reason of their citizenship, may or may not come in before the master, on a general accounting, and protect their rights; nor do we intend to go into that question."

In *Broderick's Will* (*Kieley* v. *McGlynn*), 21 Wall. 503, 22 L. ed. 599, the case was this: A suit in equity was brought in the circuit court for the district of California by the alleged heirs at law of Broderick to [103] set aside the *probate of his will, to have the same declared a forgery, and to recover the assets of Broderick's estate, much of which consisted of real property. The defendants were the executors, and several hundred persons who were in possession of portions of the real estate, claiming ownership thereof as purchasers at sales made by the executors. The estate had been administered upon, and distribution had been fully made before the institution of the suit. The first contention which the court disposed of was that a court of equity had no jurisdiction of the subject-matter of the suit, the same being vested exclusively in the probate court of the city and county of San Francisco. In sustaining this objection, the court, through Mr. Justice Bradley, said (p. 509, L. ed. p. 602):

"As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Kerrich* v. *Bransby*, decided by the House of Lords in 1727, 7 Bro. P. C. 437, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence is that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings *tainted with mistake, [104] fraud or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief.

"In England after the acts of Parliament had authorized devises of real estate, the same position was assumed by courts of equity in regard to such devises; it being held that any fraud, illegality, or mistake affecting their validity could be fully investigated and redressed in the courts of common law, where also devises were recognizable."

After a full review of authorities holding that a court of equity did not possess power to annul the probate of a will, and in concluding its opinion referring to a statute of the state of California, the court observed (p. 519, L. ed. p. 605):

"The statute of 1862 has been referred to, which gives to the district courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment, or perjury. Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the state. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the

form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties. But the statute referred to cannot affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit."

In *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524, the facts were these: A will of Daniel Clark had been probated in the second dis-[105] trict *court for the parish of Orleans, state of Louisiana. Distribution of the estate had been completed, when certain parties brought an action in the court named to annul the alleged will and to recall the decree by which it was probated. The alleged daughter of Daniel Clark was made a party defendant, and it was averred that suits had been brought by her against the plaintiffs, in a circuit court of the United States, as heir at law of her father, to recover certain property alleged to belong to his estate, and that the existence of the decree of probate was an obstacle to the proper defense of those suits, and made it necessary to sue to annul the will and avoid the decree of probate. Application was made to remove the cause to the circuit court of the United States, which the state court refused, on the ground that the suit involved merely a probate matter, and was therefore not cognizable in the Federal court. From a final decree of the state court in favor of the plaintiffs the cause was brought to this court. It was decided that the state court erred in refusing to permit the removal. In the opening passage of the opinion the court pointed out that, whilst the suit was, in form, one to annul the alleged will of Daniel Clark, and to recall the decree by which it was probated, it was in reality a suit brought against the devisee, and by strangers to the estate, to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity had been established, so far as it affected their property. The court observed:

"It is in fact an action between parties, and the question for determination is whether the Federal court can take jurisdiction of an action brought for the object mentioned, between citizens of different states, upon its removal from a state court."

The decision in the case of *Broderick's Will*, concerning the want of power in a court of equity to probate a will or revoke its probate, was expressly approved. But, referring doubtless to the concluding passage in the opinion in that case, it was observed that, if such equitable power was vested in the state courts, the Federal courts sitting [106] in the states where such statutes *existed might exercise concurrent jurisdiction in a case between proper parties. Considering the want of authority of Federal courts as such, over the probate of wills, it was declared (p. 21, L. ed. p. 528):

"There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered, or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the Federal courts have concurrent jurisdiction with the state courts under the judiciary act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties."

Having decided that the suit was, in all essential particulars, one *inter partes*, for equitable relief to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained by false and insufficient testimony, the court was brought to consider whether the law of Louisiana allowed such equqitable relief, and said (p. 20, L. ed. p. 528):

"There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if, by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained *by original [107] process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states."

In *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, the will of Mrs. Dorsey had been duly proved in a probate court of Louisiana, and the universal legatee named therein had been recognized and put in possession of the estate under the will. Some time after a bill was filed in the circuit court of the United States against him for the twofold purpose of setting aside the probate and annulling the will, on the

ground that it had been made under undue influence; and, for similar reasons, the annulment was prayed of a conveyance which had been made by the deceased to the universal legatee. An account of the rents and profits, etc., was also prayed. A demurrer to the bill was sustained and the case came to this court. It was decided that the court below had rightly sustained the demurrer. In the course of the opinion the court declared (p. 497, L. ed. p. 1010, Sup. Ct. Rep. p. 334):

"The original probate [of wills] of course is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has first been made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties."

The court expressly reaffirmed the want of power in a Federal court of equity to set aside the probate of a will in the absence of a state statute giving the right in the courts of the state to such equitable relief, it being reiterated (p. 494, L. ed. p. 1008, Sup. Ct. Rep. p. 332):

[108] *"It is well settled that no such jurisdiction belongs to the circuit courts of the United States as courts of equity; for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will* (*Kieley* v. *McGlynn*), 21 Wall. 503, 22 L. ed. 599."

Coming to consider whether, by the customary or statute law of Louisiana, there existed power in the courts of that state, as a matter of equitable cognizance, to entertain a suit to annul a will and set aside its probate, it was decided that no such right existed, but that, on the contrary, the Louisiana law, whilst denying such right, afforded relief in an action at law, where the recovery of property was sought, by permitting the validity of a will and its probate, when asserted as a muniment of title, to be collaterally questioned. The court said (p. 499, L. ed. p. 1011, Sup. Ct. Rep. p. 335):

"It remains, therefore, in the present case to inquire whether the complainants are entitled, under the laws of Louisiana, to draw in question in this mode and with a view to the decree sought the validity of the will of Sarah Ann Dorsey and the integrity of its probate.

"An examination of the decisions of the supreme court of Louisiana on the subject will disclose that a distinction is made in reference to proceedings to annul a will and its probate, according to the objects to be accomplished by the judgment and the relation of the parties to the subject. If the administration of the succession is incomplete and *in fieri*, and the object is to alter or affect its course, the application must be made to the court of probates, which, in that case, has possession of the subject, and exclusive jurisdiction over it. If, on the other hand, the succession has been closed, or has proceeded so far that the parties entitled under the will have been put in possession of their rights to the estate, then the resort of adverse claimants must be an action of revendication in the courts of general jurisdiction, in which the legal title is asserted as against the will claimed to be invalid, making an issue involving that question."

*Following this statement the court made [109] an exhaustive review of the decided cases in the state of Louisiana, establishing the proposition just previously quoted; and, as a necessary result of this conclusion, the court declared that in *Gaines* v. *Fuentes* it had been merely assumed that relief in the nature of an equitable remedy was allowed by the law of Louisiana, under which the probate of a will could be set aside, saying (pp. 499, 503, L. ed. pp. 1010, 1012, Sup. Ct. Rep. pp. 335, 338):

In that case "it was assumed, and not decided, that the said suit brought in the state court was one which, under the laws of the state, its courts were authorized to entertain for the purpose of granting the relief prayed for. The point decided was, that if it were, it might properly be transferred to a court of the United States."

"The case of *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524, was such an action of nullity, but, as before remarked, the point decided in that case was not that it would lie, according to the law of Louisiana, but that if it would lie in the state court, it was removable to the circuit court of the United States, because it presented a controversy wholly between citizens of different states."

In *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906, it was decided that a Federal court cannot exercise original jurisdiction in respect to the administration

of the estate of a decedent, and that it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it. It was, however, decided that where the estate of a deceased person is ready for distribution, but no adjudication has been made as to the distributees, the circuit court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate. It is true that the bill filed in the case assailed the validity of the probate of a document which disposed, in favor of two corporations, of a house and lot in the city of Pittsburg. But the trial court [110] gave effect to the document as *a declaration of trust, and the controversy on that branch of the case was not pressed on the appeal.

Let us, then, first deduce the principles established by the foregoing authorities as to the power of a court of the United States over the probate or revocation of the probate of a will. An analysis of the cases, in our opinion, clearly establishes the following:

First. That, as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies.

The only dispute possible under these propositions may arise from a difference of opinion as to the true significance of the expression "action or suit *inter partes*," as employed in the second proposition. When that question is cleared up the propositions are so conclusively settled by the cases referred to that they are indisputable. Before coming to apply the propositions we must, therefore, accurately fix the meaning of the words "action or suit *inter partes*."

The cited authorities establish that the words referred to must relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect. We say the words "action or suit **inter partes*" must have this sig- [111] nificance, because, unless that be their import, it would follow that a state may not allow any question to be raised concerning the right to probate at the time of the application, or any such question thereafter to be made in an ancillary probate proceeding without depriving itself of its concededly exclusive authority over the probate of wills. This may be readily illustrated. Thus, if a state law provides for any form of notice on an application to probate a will, and authorizes a contest before the admission of the writing to probate, then it would follow, if the words "suit or action of *inter partes*" embraces such a contest, the proof of wills, if contested by a citizen of another state or alien, would be cognizable in the courts of the United States, and hence not under the exclusive control of the state probate court. Again, if a state authorized a will to be proved in common form, that is, without notice, and allowed a supplementary probate proceeding by which the probate in common form could be contested, then, again, if such a contest be a suit *inter partes*, it would also be a Federal cognizance.

Having fixed the meaning of the words "action or suit *inter partes*" we come to apply the propositions deduced from the decided cases, in order to test the question of the jurisdiction of the circuit court over the relief prayed for in the bill, so far as relates to the annulment of the probate. This requires us to determine whether, by custom or by the statute law of the state of Washington, the courts of that state had the power of administering the relief prayed for on that subject in the bill by an independent suit, as distinguished from the exercise of probate jurisdiction originally or merely ancillary. There is no pretense of any custom in the state of Washington beyond the scope of authority conferred upon the courts of the state by the laws thereof. The question, therefore, reduces itself to a narrow compass; that is, what remedies do the laws of Washington create for the purpose of the probate of wills and the revocation of a probate, and are those remedies exclusively probate in their character or necessarily merely *ancillary thereto, or do they [112] confer upon the state courts general legal or equitable authority on the subject merely because of the existence of a controversy? That is to say, Is a will contest under the laws of Washington an ordinary action or suit between parties or a special probate proceeding directly ancillary to or concerning the probate of the will?

By § 5 of article 4 of the Constitution of Washington it was provided that there should be in each of the organized counties

of the state a superior court, and by § 6 of the same article original jurisdiction was conferred upon such court in equity cases and cases at law, and over specified crimes, etc., and it was vested with original jurisdiction "of all matters of probate." By such statute such courts, in the exercise of their jurisdiction over matters of probate, were authorized:

"1. To take proofs of wills, and to grant letters testamentary and of administration. . . .

"2. To settle the estates of deceased persons, and the accounts of executors administrators, and guardians.

"3. To allow or reject claims against the estates of the deceased persons as hereinafter provided. . . .

"5. To award process and cause to come before them all persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be intrusted with or in any way accountable for any property belonging to a minor, orphan, or person of unsound mind, or estate of any deceased person.

"6. To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction." Ballinger's Anno. Codes and Stat. of Washington, § 6075.

Applications for the probate of a will or for letters testamentary are required to be made to the judge of the superior court having jurisdiction, and he is authorized, in the case of ordinary wills, on the exhibition of
[113] the will, to receive the proof *and grant a certificate of probate, or, if such will be rejected, to issue a certificate of rejection. Hill's Anno. Stat. and Codes, §§ 861, 862; Ballinger's Anno. Codes and Stat. §§ 6099, 6100. Testimony given in support of a will is to be reduced to writing, signed by the witnesses, and certified by the judge of the court, and wills admitted to probate are required to be recorded. Ballinger's Anno. Codes and Stat. §§ 6105, 6106.

After defining a nuncupative will, the statutes of Washington provide as follows:

"No proof shall be received of any nuncupative will, unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, be first committed to writing, and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper." *Id.* § 4606.

Proceedings to contest a will after admission to probate, or to secure probate after a certificate of rejection, are regulated by the following sections of the Code:

"If any person interested in any will shall appear within any one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contests the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried, and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representation, or for any other cause affecting the validity of such will." *Id.* § 6110.

"Upon the filing of the petition referred to in the next preceding section, a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the state, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on
*a day therein specified, to show cause why [114]
the petition should not be granted." *Id.* § 6111.

"If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States, or of unsound mind, a period of one year after their respective disabilities are removed." *Id.* § 6112.

"If, upon the trial of said issue, it shall be decided that the will is, for any reason, invalid, or that it is not sufficiently proved to have been the last will of the testator, the will and probate thereof shall be annulled and revoked." *Id.* § 6114.

These statutory provisions have been decided by the supreme court of Washington to apply as well to a contest of a nuncupative will as to one of an ordinary will. *State ex rel. Stratton* v. *Tallman*, 25 Wash. 295, 65 Pac. 545, 29 Wash. 317, 69 Pac. 1101.

We are of opinion that the sections in question authorize a proceeding for contest only before the court which has admitted the will to probate or rejected the application made for probate, and that the authority thus conferred concerning the contest is an essential part of the probate procedure created by the laws of Washington, and does not, therefore, cause a contest, when filed, to become an ordinary suit between parties. This is plainly indicated by the fact that the proceeding provided by the statute concerns not only revocation of the probate of a will, but also the right to petition for the probate of a will where an application to probate it had been previously rejected. The context of the legislation in question also

clearly establishes that the authorized proceeding is but supplementary to, and a continuation of, the original proceeding in probate. This is indicated both by the form of the petition which is required to be filed and the character of the proof which may be considered on that petition. That the statute does not contemplate a formal suit, but a mere summary and ancillary proceeding, is shown by the circumstance that the petitioner is merely required to state in his [115] petition "his objections and *exceptions to said will, or to the rejection thereof," and on the statement of these objections in the petition, without the formality of the technical pleadings customary in ordinary suits *inter partes*, the statute requires that specified issues be then made up for hearing. And, further, the terms of § 876 treat the contest as not an ordinary suit between parties, since it is made the duty of the court to revoke the probate if, for any reason, the will is invalid, or if "*it is not sufficiently proved* to have been the last will of the testator." Moreover, it is evident that the statute contemplates that the court, when acting on a contest filed under its provisions, is not confined to the exertion of powers which would properly be exerted in an ordinary suit *inter partes*, since the statute causes a decree in favor of the petitioner, revoking a will already admitted to probate, to inure not only to the benefit of the particular contestant, but to be operative as to the whole world. This follows from the provision of the statute saying that if the court finds in favor of the petitioner who sought the revocation of a probate "the will and the probate thereof shall be annulled and revoked."

It is insisted in argument that the supreme court of Washington has referred to a will contest under the statutes of that state as a suit or action, and from this the inference is deduced that the proceeding is one *inter partes*, in the broad sense of the term, and not a part of the probate proceedings. But we do not consider that the cases relied on do more than use the term "suit or action" as a convenient form of expression. The view taken by the supreme court of Washington as to the substantive nature of a will contest is illustrated by its opinion in *Hunt* v. *Phillips*, 34 Wash. 362, 75 Pac. 970, where the court, in opening its opinion, referred to the case before it as "a proceeding in contest of the will," etc.

But the opinion of the supreme court of Washington as to the nature of a will contest under the statute of Washington does not depend upon the mere inference deducible from the characterization which the court has given to that proceeding. In *Montrose* v. *Byrne*, 24 Wash. 288, 64 Pac. 534, it was expressly held *that the statutory [116] proceeding to establish a will was special in its character; so much so that in a contest concerning the same the parties were necessarily limited to the question of the execution or validity of the will and the right to admit the same to probate, and therefore issues concerning the construction of the will or the vesting of property thereunder could not be considered in a contest proceeding.

It follows that as the circuit court of the United States had no jurisdiction to admit a will to probate, or to entertain a pure probate proceeding, and as the remedy afforded by the laws of Washington to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit *inter partes*, the circuit court of appeals correctly decided that the circuit court, although there was diversity of citizenship, was without jurisdiction of the cause so far as the bill sought a declaration of the nonexistence of a will, and the consequent nullity of the probate.

It remains only to consider the bill under its other aspects. The contention that the state court, in admitting the nuncupative will to probate, violated the due process clause of the 14th Amendment to the Constitution of the United States, rests upon two propositions: (*a*) The law of the state, it is contended, required that proof of an alleged nuncupative will should be offered within six months after the speaking of the testamentary words, and that notice should issue to the next of kin as a prerequisite to the power to entertain the application for probate. As here it is said the proof established that the hearing as to probate was had without the notice required by the statute, therefore the admission to probate was a violation of the due process clause of the 14th Amendment to the Constitution of the United States. (*b*) As under the laws of Washington it is asserted real estate could not be devised by a nuncupative will, therefore, the contention is, the probate court had no jurisdiction over such real estate or the rents, issues, and profits thereof, and hence an attempt by that court to exert authority over that character of property *amounted to [117] depriving the heirs at law of such property without due process of law, in violation of the 14th Amendment.

We are of opinion that the proposition resting upon the want of notice did not furnish a basis for the jurisdiction of the circuit court. The contention rests upon the assumption that the failure to give the notice under the state law was so essentially a prerequisite to a hearing on the question of probate that a probate made without the notice was null and void, and could collaterally be

so treated. In *State ex rel. Stratton* v. *Tallman*, 25 Wash. 295, 65 Pac. 545, the contrary doctrine was expressly held. That case concerned a collateral controversy relating to the very estate here in question. The attorney general had filed in the probate court a motion praying for the vacation of the order admitting the will to probate, and to set aside all the proceedings leading up to the probate of the will, upon the grounds that the court acquired no jurisdiction to hear any evidence in support of the will, because no citation was issued as required by law, as the citation was issued on the day it bears date, and was immediately returned by the sheriff without making any effort to find any of the heirs of deceased or any person interested in the estate, and because the deceased never made or attempted to publish and declare the will. The probate court having refused to entertain the motion, for the reason that the state was not an interested party, original proceedings by mandamus were commenced in the supreme court of the state to compel the court to hear and decide the motion. The supreme court, however, refused the writ, on the ground that any appropriate proceeding to contest the probate was provided in the statutes, which gave a year in which to make the contest, and that, conceding the interest of the state, it nevertheless could not, by a mere motion, raise the question of the validity of the probate. But, let us concede, for the sake of the argument only, that under the Washington statutes the requirement of notice was essential to the preliminary probate, [118]*and if, by its omission, the parties were deprived of or lost their right to deny the existence of the will, or to question its probate, that the absence of the notice might afford substantial ground to contend that rights protected by the Constitution of the United States had been violated. These concessions, however, cannot control this case. As the theory of the bill was, and as undoubtedly it was also the law of Washington, that despite the mere preliminary admission to probate, there was full right to assail the existence of the will and its probate, which was not lost by the failure to give notice, it must follow that such omission did not deprive of the right to a hearing, which right was adequately conferred by the statute, wholly irrespective of whether the notice on the preliminary probate had or had not been given. Indeed, the contention made on this subject amounts to asserting that every state law which provides for a probate in common form is repugnant to the due process clause of the Constitution, even although, under the state statutes, full and adequate probate remedies are provided by which interested parties may subsequently, within a time fixed by law, be heard in the probate proceedings to question the existence of a will or its probate. When the result of the proposition is thus ascertained it becomes obvious that it is not only opposed to the theory upon which the bill was framed, but is so in conflict with the adjudications of this court, to which we have previously referred, that it is devoid of all foundation in reason to such an extent as to prevent it from affording a basis for the jurisdiction of the circuit court.

We think also the claim of the want of due process of law arising from the contention that, in the state of Washington, a nuncupative will does not pass title to real estate, and therefore a violation of the due process clause of the 14th Amendment would arise if the probate court acted upon the contrary assumption, was clearly devoid of all reasonable foundation. It is not denied that, under the law of Washington, in cases of intestacy as well as of testacy, both real and personal property is taken into the control of and is administered by the probate *court.[119] And as it is obvious on the face of the bill that the averment referred to was wholly subordinate to the determination of the existence of the alleged nuncupative will and the validity of the probate thereof, a question over which the circuit court did not have jurisdiction, it results that the bill, upon constitutional or other grounds, did not present a case warranting the court in passing upon the construction and effect of the will.

There was no error in the action of the Circuit Court of Appeals, and its judgment is, therefore, affirmed.

THE ELIZA LINES.

(See S. C. Reporter's ed. 119-141.)

Shipping—effect of abandonment on contract of affreightment.—The justifiable abandonment of a vessel in consequence of the dangers of the seas is such a renunciation of the contract of affreightment as entitles the cargo owners to refuse to go on with the voyage, at least, where the master has not rejoined the ship before anyone else has taken possession, or has not obtained the vessel and cargo from the salvors before the cargo owners have announced their decision.

[No. 12.]

Argued April 11, 12, 13, 1905. Decided October 30, 1905.

ON WRIT and Cross Writ of Certiorari to the Circuit Court of Appeals for the First Circuit to review a decree which affirmed, with a slight modification, a decree of the Circuit Court for the District of Massachusetts which, reversing the decision of the District Court for that district, held that the master of an abandoned vessel afterwards rescued by salvors was entitled to complete the voyage and earn the freight. *Reversed.*

See same case below, 52 C. C. A. 195, 114 Fed. 307. On rehearing, 65 C. C. A. 538, 132 Fed. 242.

The facts are stated in the opinion.

Mr. **L. S. Dabney** argued the cause, and, with *Mr. F. Cunningham*, filed a brief for Henry P. Booth:

When the vessel has been abandoned at sea by the master and crew, as was The Eliza Lines in this case, without any intention of returning to her, the owner of the cargo has the right, before the carrier or his agents have regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and to receive his cargo without becoming liable for any freight; and this, although the abandoned ship and cargo are carried by salvors to the original port of destination.

The Arno, 8 Asp. Mar. L. Cas. 5, 72 L. T. N. S. 621; *The Cito*, L. R. 7 Prob. Div. 5; *The Kathleen*, L. R. 4 Adm. & Eccl. 269; *The Leptir*, 5 Asp. Mar. L. Cas. 411, 52 L. T. N. S. 768; *The Argonaut*, Shipping Gazette, 1884, Dec. 5, p. 775; *Lewis* v. *The Elizabeth & Jane*, 1 Ware, 41, Fed. Cas. No. 8,321; *Smith* v. *The Mansanito*, Fed. Cas. No. 13,075; *The James Martin*, 88 Fed. 649; *Dunnett* v. *Tomhagen*, 3 Johns. 154; *Post* v. *Robertson*, 1 Johns. 24.

It is the general rule that, after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damages he has suffered from any breach of it.

Roehm v. *Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780.

If the abandonment, by her master and crew, of The Eliza Lines and cargo, had not been justified by a peril excepted in the contract of affreightment, the cargo owner had an immediate right of action against the carrier; and this right of action could not have been defeated by any subsequent offer or attempt of the carrier, if the cargo afterwards happened to come within his reach, to resume performance of his contract and complete the carriage.

Ibid.

Messrs. **Edward S. Dodge** and **Harrington Putnam** argued the cause, and, with *Mr. Frederic Dodge*, filed a brief for Catherine T. Black, administratrix, and Banque de Genes:

In a case where a vessel, after starting

on the voyage, had returned to her loading port for fear of capture, Chancellor Kent said: "Here was clearly no relinquishment or breaking up of the voyage on the part of the master. He only retired as fast as the impending danger pressed upon him."

Palmer v. *Lorillard*, 16 Johns. 348.

The danger from which the master of The Eliza Lines retired was no less.

The master's intention when he left the vessel goes no further than to establish what no one denies, *viz.*, that the salvors found her derelict, so that they acquired a right to compensation on that basis, and such a possession as was necessary to secure their compensation. No intention on his part to return could, under the circumstances, have prevented her being treated as derelict so far as the salvors were concerned.

The Georgiana, 1 Low. Dec. 91, Fed. Cas. No. 5,355.

It has been said in an English decision upon an insurance policy covering a vessel which had become derelict and afterward had been saved: "Desertion of the ship by the crew does not, of itself, constitute a total loss; and the subsequent taking possession by the salvors was not adverse, but an act done for the benefit of the owners, and therefore did not dispossess them. The custody of the vessel was in the salvors till the salvage was paid; but the legal possession was still in the owners."

Thornely v. *Hebson*, 2 Barn. & Ald. 513.

And by Ware, J., in a decision often cited regarding the rights of salvors of derelict property: "A person undertaking to save derelict goods stands, in relation to the owner, somewhat in the character of a *negotiorum gestor* of the Roman law,—that of a voluntary agent who interferes in the affairs of another without a mandate or authority; and he is bound to act for the interest of the owner as well as his own."

The Amethyst, 2 Ware, 28, Fed. Cas. No. 330.

Derelict is the only case in which salvors gain any right to possession. Even in cases of derelict they are not entitled to insist upon it under all circumstances.

The Lady Worsley, 2 Spinks, Eccl. & Adm. 253.

The possession of the property by the court through its officers is a possession protective of the interests of all concerned, and not displacing the rights or lien of any party.

The Nathaniel Hooper, 3 Sumn. 542, Fed. Cas. No. 10,032.

Once the master had come to Boston, returned on board, and offered to stipulate for vessel and cargo, and to proceed, he had waived all benefit of any possible excuse for nonperformance by reason of sea peril encountered up to that time. That, after such waiver, the cargo owner must have prevailed over any such defense in a suit against the vessel for nonperformance cannot be doubted.

Carver, Carriage by Sea, 3d ed. § 302, p. 352; *Assicurazioni Generali* v. *The Bessie Morris Co.* [1892] 2 Q. B. 652.

The desertion of the ship was an act justified by the necessities of the case, and the subsequent occupation by the salvors, with all the detention arising therefrom, was but an incident to a common calamity.

The Nathaniel Hooper, 3 Sumn. 562, Fed. Cas. No. 10,032.

To turn a justifiable act, excused by the terms of the contract, into a weapon which the cargo owner may, if he chooses, use for the purpose of breaking up the voyage and defeating any obligations to which it may have subjected the cargo, is manifestly unjust and contrary to the principles of maritime law, which distribute the burdens of common disaster proportionally.

The master has a right to carry on the cargo to the port of destination; and, if his ship is capable, either then or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say that he is not entitled to earn a full freight; and the shippers of the cargo cannot insist upon changing the original contract *in invitum*, and cut him off from all freight, or dismiss him with a *pro rata* freight.

Jordan v. *Warren Ins. Co.* 1 Story, 342, Fed. Cas. No. 7,524.

His duties in similar cases are correlative. He is bound to complete the voyage, and is not allowed to abandon it, unless the effect of the excepted peril has made continuance either physically impossible or so clearly unreasonable as to be impossible from a business point of view.

Assicurazioni Generali v. *The Bessie Morris Co. supra.*

The above rights and duties extend even to transhipment and forwarding by another vessel.

Harrison v. *Fortlage*, 161 U. S. 57, 65, 40 L. ed. 616, 619, 16 Sup. Ct. Rep. 488; *The Maggie Hammond* (*The Maggie Hammond* v. *Morland*) 9 Wall. 435, 458, 19 L. ed. 772, 780; 3 Kent, Com. 212.

The salvage and general average claims which had accrued upon the cargo do not at all impair the master's right to complete the voyage according to the ordinary rules.

Jordan v. *Warren Ins. Co. supra.*

Messrs. **James A. Lowell** and **John Lowell** argued the cause and filed a brief for Hans Andreasen, claimant, etc.:

It is the law of England that, when a vessel abandoned by the shipowner, owing

to stress of weather, is brought into harbor by salvors, the cargo owner may elect to treat the contract of affreightment as at an end if the vessel has not come into the possession of the shipowner again.

The Kathleen, 2 Asp. Mar. L. Cas. 367; *The Cito*, 4 Asp. Mar. L. Cas. 468; *The Argonaut*, Shipping Gazette, 1884, p. 775; *The Leptir*, 5 Asp. Mar. L. Cas. 411; *The Arno*, 8 Asp. Mar. L. Cas. 5.

The injustice of this rule in allowing one party to a contract to determine whether the contract shall continue is obvious. The shipowner has not been at fault, as his abandonment of the vessel was caused by the excepted peril of the seas; but he must deliver up the goods without receiving freight if the cargo owner so desires, or he may be compelled to carry them on. The doctrine rests on technical grounds, and it has been suggested by a recent English writer that the shipowner might avoid the harsh consequences of this rule by filing a *caveat* against the arrest of his vessel, with a stipulation to give bail for it.

Saunders, Maritime Law, p. 133.

The English cases do not rest on a sound basis. They overlook the true nature of a contract of carriage. In such a contract the shipowner agrees to carry the goods to their destination; the cargo owner agrees to pay the freight when the goods arrive.

Hunter v. *Prinsep*, 10 East, 378; *The Arno*, *supra*; *Ellis* v. *Willard*, 9 N. Y. 529; *The Tornado* (*Ellis* v. *Atlantic Mut. Ins. Co.*) 108 U. S. 342, 27 L. ed. 747, 2 Sup. Ct. Rep. 746.

Under this contract the perils of the sea are excepted. The law of carriage by sea rests on the basis of this simple contract. The shipowner has the right to carry the cargo, and the cargo owner has the right to have it carried. The shipowner may carry to the destination (*Allen* v. *Mercantile Mut. Ins. Co.* 44 N. Y. 437, 4 Am. Rep. 700); the cargo owner cannot get the goods at an intermediate port except by paying full freight (Schouler, Bailments, 3d ed. § 528; 2 Parsons, Contr. 9th ed. p. 425; *The Teutonia*, 1 Asp. Mar. L. Cas. 32; *Palmer* v. *Lorillard*, 16 Johns. 348; *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032); unless they are voluntarily given up for a less amount (2 Parsons, Contr. 9th ed. p. 427; *Smyth* v. *Wright*, 15 Barb. 51; *McKibbin* v. *Peck*, 39 N. Y. 262; *Hunt* v. *Haskell*, 24 Me. 339, 41 Am. Dec. 387).

The shipowner has the right to complete the carriage, and may have a reasonable time in which to repair his injured vessel, or he may tranship and send the goods on in another vessel.

Shipton v. *Thornton*, 9 Ad. & El. 314; *The Soblomsten*, L. R. 1 Adm. & Eccl. 293; *M'Gaw* v. *Ocean Ins. Co.* 23 Pick. 405; *Harrison* v. *Fortlage*, 161 U. S. 57, 65, 40 L. ed. 616, 619, 16 Sup. Ct. Rep. 488.

Ordinarily the shipowner keeps possession of the goods during carriage, but possession in him is not essential. He may forward the cargo in a vessel belonging to someone else if his vessel is injured.

Shipton v. *Thornton*, *supra*.

He is entitled to freight, though the voyage be only partly performed by himself and completed by salvors or insurers.

The Nathaniel Hooper, *supra*; *Hubbell* v. *Great Western Ins. Co.* 74 N. Y. 246; *Hughes* v. *Sun Mut. Ins. Co.* 12 Daly, 45, 100 N. Y. 58, 2 N. E. 901, 3 N. E. 71.

Capture by an enemy does not put an end to the right to freight, which is only suspended, and revests in the shipowner on recapture.

Carver, Carriage by Sea, 3d ed. p. 274; *The Copenhagen*, 1 C. Rob. 289; *The Nathaniel Hooper*, *supra*; *Spafford* v. *Dodge*, 14 Mass. 66.

If the cargo owner forcibly takes possession of the goods, the right to freight is not thereby lost.

Braithwaite v. *Aikin*, 1 N. D. 455, 48 N. W. 354.

The question of possession, therefore, is not one of the important things to be considered, as the rights of the parties to a contract of carriage do not depend on it.

When Andreasen left the bark he had no thought of completing the voyage, but his thoughts, not communicated to the cargo owner, had no effect on the relations between the parties. He had the right to carry the lumber to Montevideo. He never gave up this right. His excusable abandonment of the vessel was not a breach of the contract, because it was a thing mutually excepted and expressly allowed for.

The Luteken, 6 Ben. 565, Fed. Cas. No. 8,609.

The only way in which Ward & Company could have got their cargo at Boston, unless Andreasen agreed to give it up, was by paying full freight for it. Andreasen could insist on carrying it on, as he did insist, and he would be obliged to give it up only on payment of the full amount. Ward & Company might waive the performance of the contract by him, but they must carry out their part of the contract by paying full freight, unless he waived the performance on their side.

Ellis v. *Willard*, *supra*.

When Andreasen rejoined his vessel at Boston the situation was the same as if he had not been obliged to abandon her, but had put into a port of necessity. The question was whether he could repair his ship within a reasonable time and complete the

voyage. He found that he could repair the ship and carry on the lumber without unreasonable delay, and he was bound to do so. If he had refused so to do he could not have recovered any freight at all (2 Parsons, Contr. 9th ed. p. 427; *Hunter* v. *Prinsep*, 10 East, 378; *Portland Bank* v. *Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Adams* v. *Haught*, 14 Tex. 243; *Welch* v. *Hicks*, 6 Cow. 504, 16 Am. Dec. 443), but would have been liable in damages for breach of the contract of carriage (*Hill* v. *Wilson*, L. R. 4 C. P. Div. 329; *Assicurazioni Generali* v. *The Bessie Morris Co.* [1892] 1 Q. B. 571).

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here by certiorari to the circuit court of appeals. The decree in that court was made in a cause in which were consolidated four suits: A libel for salvage against the Eliza Lines, her cargo and freight; a libel for possession by the cargo owners against the cargo; a libel by the master against cargo and cargo owners for freight and general average; and a libel by a bottomry lender against the vessel and freight. The Eliza Lines, a Norwegian bark, was bound on a voyage from Pensacola to Montevideo with a cargo of lumber, under a charter party, "the dangers of the seas, fire, and navigation always mutually excepted." It was abandoned, justifiably, in consequence of dangers of the seas, and was afterwards picked up by salvors and brought into Boston on September 19, 1889. The master was notified by the owners, and came on from St. John, New Brunswick, arriving on September 21. The cargo [126]owners (*Ward & Company) and the master both demanded possession of the cargo from the salvors, but the salvors retained possession, and filed their libel for salvage on September 26. The next day the master filed a claim for ship and cargo, and within an hour Ward & Company filed their claim for the cargo, as above mentioned. On October 5 the vessel was delivered to the master, and on October 18 the master moved for a delivery of the cargo to him upon stipulation, in order to resume his voyage, while Ward & Company moved that the cargo be sold, on the ground that its value was rapidly diminishing by reason of charges and costs. The former motion was denied and the latter granted on November 16. On November 27 the master filed his libel for freight and general average. The circuit court, reversing the decision of the district court, held that the master should have been allowed to complete the voyage and earn freight, and charged the cargo owners personally with the net freight that would have been earned, with other particulars not necessary to mention. 61 Fed. 308, 102 Fed. 184. The decree was affirmed with a slight variation by the circuit court of appeals. 52 C. C. A. 195, 114 Fed. 307.

The question is whether the abandonment of the vessel by the master and crew gave the cargo owners a right to refuse to go on with the voyage in the circumstances disclosed; in other words, whether the cargo owners properly were treated as guilty of a breach of contract for preventing the continuance of the voyage by their refusal and by procuring a sale. It will be noticed that the decree must stand on the ground that the contract was broken by the cargo owners, and that the shipowners were entitled to recover under it, although the voyage was not completed. The decree was not upon a new contract, such as it was attempted to set up in *Hopper* v. *Burness*, L. R. 1 C. P. Div. 137, or upon the analogy of a *quantum meruit* at common law, which was expressly disavowed. The very foundation of a recovery upon the latter ground is that the express contract is out of the way, but that a benefit has been received which ought to be paid for. Therefore, in such a case the recovery cannot exceed *the [127]benefit, as often has been explained in the books. *Gillis* v. *Cobe*, 177 Mass. 584, 59 N. E. 455; Keener, Quasi-Contracts, chap. 4. See *Flaherty* v. *Doane*, 1 Low. Dec. 148, 150, Fed. Cas. No. 4,849. In the case at bar, while the district court allowed freight *pro rata* as a charge on the proceeds of the cargo, the circuit court of appeals held the cargo owners personally for a sum much exceeding that amount, and therefore much exceeding the benefit actually received. It will not be necessary to consider the decree of the district court, since that was not appealed from by the cargo owners, and we shall not discuss the effect of the judicial sale, as it is not necessary in the view which we take.

There is no doubt that the English decisions confidently assert the cargo owner's right to refuse to go on. They may be read in the reports, and there is no need to do more than to refer to them. *The Arno*, 8 Asp. Mar. L. Cas. 5; *The Leptir*, 5 Asp. Mar. L. Cas. 411; *The Argonaut*, Shipping Gazette, Weekly Summary, Dec. 5, 1884, p. 775; *The Cito*, L. R. 7 Prob. Div. 5; *The Kathleen*, L. R. 4 Adm. & Eccl. 269. The only point which they leave open is whether, if the master should get the abandoned vessel and cargo back from the salvors before the cargo owners had declared an election to end the contract, he might in that way revive his right to finish the voyage. On that point it is enough to say here that if the English rule is right, then, even

if there is any such qualification to it, the exception must depend upon something more substantial than a few minutes' priority in filing a libel, when neither master nor cargo owner has possession either of cargo or ship, as, plainly, neither had in this case.

The right of cargo owners to treat the contract as ended by the abandonment of the ship was asserted much earlier than the English cases by Judge Ware in *Lewis* v. *The Elizabeth & Jane*, 1 Ware, 41, Fed. Cas. No. 8,321, and earlier still by Mr. Story, before he became a justice of this court, in his Edition of Abbott on Shipping (1810), pp. 338, 512, citing *Dunnett* v. *Tomhagen*, 3 Johns. 154, and *Mason* v. *The Blaireau*, 2 Cranch, 240, 2 L. ed. 266. We see nothing in *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032, sufficient [128]*to prove that he changed his opinion. That case is cited in 3 Kent, Com. 13th ed. 228, along with *Post* v. *Robertson*, 1 Johns. 24, in which, and in *Dunnett* v. *Tomhagen*, 3 Johns. 154, the supreme court of New York and Chief Justice Kent took the same general view, subject to the question whether there might be a recovery on a *quantum meruit* when benefits were accepted under the contract, in spite of a failure of complete performance. See *Caze* v. *Baltimore Ins. Co.* 7 Cranch, 358, 362, 3 L. ed. 370, 371; 3 Kent, Com. 229. Other cases are *Smith* v. *The Mansanito*, Fed. Cas. No. 13,075; *The James Martin*, 88 Fed. 649. See also 3 Kent, Com. 196. In short, we are aware of no decision in this country or in England before the present case which casts any doubt upon the rule.

It was thought by the circuit court and circuit court of appeals that the doctrine so unanimously sanctioned by so many of the most eminent judges of this country and of England is unjust; and the case was put of a long voyage nearly completed and the ship and cargo subsequently brought by salvors intact to the port of destination. But we are of opinion that there is no injustice in holding that what excuses the ship excuses the cargo, and that the rule is in accord with the general principles of contract. Subject to the question whether the cargo owners broke their contract, it seems to us more unjust to charge them personally, in favor of those who failed to complete the voyage as contemplated, with a sum much exceeding the benefit which the cargo owners received from what was done. Of course, it is desirable, if there is no injustice, that the maritime law of this country and of England should agree.

To begin at a distance, a repudiation of a contract, amounting to a breach, warrants the other party in going no further in performance on his side. *Roehm* v. *Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780. But the same thing is true of an absolute repudiation not amounting to a breach. *Frost* v. *Knight*, L. R. 7 Exch. 111, 113; *Phillpotts* v. *Evans*, 5 Mees. & W. 475, 477; *Ballou* v. *Billings*, 136 Mass. 307, 309.

It appears to us, and we shall try to prove, that an abandonment *of the ship [129] must be regarded as a renunciation of the contract, even if not a repudiation of its terms as binding. It is an overt act which is more than an attempt to give up the voyage. It not merely makes the completion of the voyage so improbable, by reason of the helplessness in which the ship is left and the intent with which the act is done, as practically to destroy the value of the contract to the cargo owner (see *Swift & Co.* v. *United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276), it is a present failure to do what the contract requires, if the purposes of the contract are to be carried out. The requirement is shown by the fact that the abandonment would be a cause of action unless justified. It not only would be a breach of contract, but no one questions that it would authorize a rescission of the contract on the other side, which not every breach of contract does. That it would authorize rescission or refusal to allow the master to change his mind if the vessel was saved shows that a continuous intent and effort to go on with the voyage is an essential condition to the obligation to pay freight. It shows, what needs no illustration, that the continuous care of the master is the main object of the cargo owner's interest in the contract. By the general principles of contract, an open cessation of performance, with the intent to do no more, even if justified, excuses the other party from further performance on his side. The principle is not peculiar to charter parties, it is illustrated in other parts of the law. See *Roehm* v. *Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780.

In the case at bar the vessel was abandoned with the intent not to return to her or to complete the voyage. This is admitted, if admission be necessary, by the testimony of the master. Of course it is not disputed that the completion of the voyage and delivery of the cargo are absolute conditions to the undertaking to pay freight, by the express terms of the contract and the familiar rule of law. 3 Kent, Com. 220, 228. The master left ship and cargo to their fate, and we cannot doubt, although it was denied, that, after he had done so, if the cargo owners had been the salvors, they could have treated the voyage as at an end. The ground must be that the aban-

[130] donment *was more than an attempt, or a mere offer of rescission, which might be revoked by the master before acceptance, and that it was an unequivocal departure from the conditions which the contract imposed. If the abandonment had been unjustified and a breach of contract, of course it would not have ended the contract, but would have left the choice whether to end it or not to the cargo owner. If justified, the simplest view would be that it was so because the contract authorized the master to end it when prevented from performance by perils of the sea, and that the contract was ended. But at all events, as control of the ship and voyage was given up and never regained, the abandonment at least gave an irrevocable power to the cargo owners to decline to be further bound. See, in addition to cases cited above, 3 Kent, Com. 196. The opposite view must be that the master still is bound to go on with the voyage notwithstanding his justifiable abandonment, if a chance should turn up,—a view which leaves his duties in a very ambiguous shape; or else that the master has the choice, which gives the election to the party whose act has made the trouble, as against the party that has done nothing and has had nothing to say.

If it be true that if, on the other hand, the master had rejoined the ship before anyone else had taken possession, or had got it back from the salvors before the cargo owners had been heard from, he might have had a right to complete the voyage, the ground must be that the law would not insist on a technical breach of condition when there had been no substantial change of circumstances and no harm done.

The argument on the other side consists largely in the attempt to treat leaving the ship under stress of perils of the sea as not distinguishable on principle from being torn bodily away from it by tempest. This is one of the oldest fallacies of the law. The difference between the two is the difference between an act and no act. The distinction is well settled in the parallel instance of duress by threats, as distinguished from overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed

[131] to him. In the former case *there is a choice and therefore an act, no less when the motive commonly is recognized as very strong or even generally overpowering, than when it is one which would affect the particular person only, and not the public at large. It has been held on this ground that duress created by fear of immediate death did not excuse a trespass. *Gilbert* v. *Stone*, Aleyn, 35, Style, 72; *Scott* v. *Shepherd*, 2 W. Bl. 892, 896. See *Miller* v. *Horton*, 152 Mass. 540, 547, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100. It has been held that a similar plea in the case of shipwrecked men at sea did not prevent the killing of one of them from being murder. *Queen* v. *Dudley*, L. R. 14 Q. B. Div. 273. See *United States* v. *Holmes*, 1 Wall. Jr. 1, Fed. Cas. No. 15,383. It is clear that a contract induced by such fear is voidable only, not void, and that the ground of avoidance being like fraud, that the party has been subjected to an improper motive for action, when that motive has been created by a stranger, and is unknown to the party, the contract stands. Keilwey, 154 *a*. pl. 3. *Fairbanks* v. *Snow*, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596. So a conveyance induced by duress is operative until avoided, and cannot be set aside when the property has passed to a purchaser without notice. *Bainbrigge* v. *Browne*, L. R. 18 Ch. Div. 188, 197; 2 Wms. Vend. & P. 767; *Clark* v. *Pease*, 41 N. H. 414. The distinction is as old as the Roman law. *Tamen coactus volui*. D. 4, 2. 21, § 5; 1 Windscheid, Pandekten, § 80.

The same principles which apply to the making of a contract apply to the breach of it and to nonperformance of the conditions attached to performance on the other side. The contract before us by construction provides that an abandonment of the voyage in consequence of the perils of the sea shall not be an actionable breach, but it equally provides that a completion of the voyage shall be an absolute condition to the right to freight. The same absoluteness attaches the further condition implied from the first, that the effort to complete the voyage shall not be given up voluntarily, midway.

The argument urged to the effect that the cargo's liability to general average created a right to have the voyage finished, however it might have been otherwise, does not need an extended *answer. The [132] cargo owners had the same right to treat the contract as ended as against a shipowner who had cut down a mast, that they would have had against one who had made no sacrifice for the common good. The contract is the supreme source of mutual rights, and cannot be overridden by the incidents of its performance.

The case was brought here by the cargo owners to get rid, if possible, of the personal liability imposed by the circuit court. As this court is of opinion that the personal liability should not have been imposed, no other question needs consideration here.

Decree reversed.

Mr. Justice **Brown**, with whom were Mr. Justice **Harlan**, Mr. Justice **McKenna**, and Mr. Justice **Day**, dissenting:

Underlying all the questions connected with the libel of Ward & Company for the possession of the cargo, and that of Andreasen, in the nature of a cross libel against the cargo *in rem*, and against Ward & Company *in personam*, for freight, is the proposition that the abandonment of the vessel by the master and crew operated as a dissolution of the contract of affreightment, and authorized Ward & Company to reclaim possession of the cargo, either freed altogether from any claim for freight, or upon the payment of a *pro rata* freight to Boston.

The general principles applicable to a contract of affreightment are entirely well settled; but it may not be amiss to restate such of them as bear upon the effect of an abandonment at sea, and subsequent rescue of the vessel. The contract is an entire one, and cannot be apportioned, unless by consent of the parties. *The Nathaniel Hooper*, 3 Sumn. 542, 554, Fed. Cas. No. 10,032; *Hunter* v. *Prinsep*, 10 East. 378, 394; *Post* v. *Robertson*, 1 Johns. 24, 26. From the moment the cargo is delivered to the vessel, each is bound to the other for the performance of the contract. The shipper cannot recover his cargo except upon the payment of full freight. *Tindall* v. *Taylor*, 4 El. & Bl. 219. Neither can the vessel demand any portion of the freight [133] until the cargo is delivered at the port *of destination. If the vessel meet with disaster at sea, and put into a port of refuge, she is entitled to retain the cargo for a reasonable time for repairs, or to tranship it to another vessel, in order that her freight may be earned. *The Soblomsten*, L. R. 1 Adm. & Eccl. 293; 1 Parsons, Shipping, 175, 231; *Cargo* v. *Galam*, Brown. & L. 167, 178. If, however, the master of the vessel is willing to surrender the cargo at an intermediate port, and the shipper is willing to receive it, he may do so upon payment of a *pro rata* freight. In other words, the parties may substitute a new contract for the original one. Neither party, however, can be compelled to this course. *Post* v. *Robertson*, 1 Johns. 24, 27.

If it be once granted that, in case of shipwreck or other disaster, the contract of affreightment is not dissolved, and the authorities on this question, both in this country and in England, settle this beyond controversy (*Cargo* v. *Galam*, Brown. & L. 167; *Shipton* v. *Thornton*, 9 Ad. & El. 314, 335), it is difficult to see why, on principle, a compulsory abandonment at sea should work a different result, provided the vessel be ultimately rescued and taken into port. The abandonment is but a feature of the disaster, and is no abandonment at all of the ship and cargo in the sense in which that word is used in the law of marine insurance, where a vessel, after such disaster, is abandoned to the underwriters. *Thornely* v. *Hebson*, 2 Barn. & Ald. 513, 519. In such case the abandonment is a voluntary and complete surrender of the ship and cargo, and of all right, title, and interest thereto, and the underwriter becomes the owner, with all the rights and liabilities incident to such ownership. It is true it has been held that the underwriter may decline to accept such abandonment, and may repair the vessel and return it to the owner, but that does not change the character of the abandonment.

The same may be said of the throwing overboard of portions of a cargo of perishable articles, on account of rottenness, putrescence, or threatened danger to the rest of the cargo. But the case under consideration is more nearly analogous to the jettison of valuable cargo for the purpose of relieving the ship or preventing her from drifting ashore. This has never been *supposed to work any change in the owner- [134] ship or an abandonment of the property, although it may subject it to the claim of salvors, who may subsequently rescue it. *The Kathleen*, L. R. 4 Adm. & Eccl. 269, 278. The abandonment of the ship and cargo in this case did not operate as a transfer of the property to anyone who should rescue it, but was an involuntary abandonment of the voyage, a relinquishment of any present intention to continue it, and a flight from the vessel to save the lives of the crew, and for the purpose of obtaining a supply of fresh water. If the abandonment have the effect claimed for it, of dissolving the contract of affreightment, logically it would have that effect from the moment the master and crew were transferred to the schooner which took them off; but it will not be doubted that if, within an hour, a steam tug had hove in sight and offered to take the abandoned vessel in tow, the rights of the master and owner would have remained unimpaired, except for the claim for salvage. In our view it would make no difference whether the master had hired a steam tug to tow her to a place of safety, or whether, after the master and crew had left her, a vessel had come along, picked her up, and towed or navigated her to a harbor of refuge. Granting that the master and crew left her with no intention of returning, such intention was caused by the belief on his part that she was a total loss. But if the circumstances were so changed that she did not become such, we see no reason

why he was not entitled to change his mind in that particular, provided that he acted with sufficient promptness, and intervening rights had not accrued.

The facts of this case show that, as soon as the master learned of the rescue of the vessel, he went to Boston, arriving September 21, two days after the bark, went aboard the vessel, announced his intention of completing the voyage, and, the day after the libel for salvage was filed, interposed a claim for ship and cargo, in which he alleged that he was entitled to the possession of the cargo of hard pine lumber then on board of her, having given bills of lading for it, and being obliged by the terms of such bills of lading to de-
[135] liver said cargo at Montevideo, *in the province of Uruguay. There was manifestly no lack of diligence here, although the agents of Ward & Company filed a claim to the cargo later on the same day, and on October 18 filed a libel for possession, and moved for a sale of the cargo. The question was thus squarely presented as to which of these parties was entitled to the cargo, which was manifestly dependent upon the other question, whether the contract of affreightment was still in existence. That there was no definite intention of abandoning the lien of the ship upon the cargo is shown by the fact that, as soon as the master was informed that the vessel had been rescued, he took immediate steps to recover possession of the cargo.

The American cases upon the effect of abandonment of a vessel at sea upon the contract of affreightment are not of any great value, as the subject is not fully discussed in any of them, and the question was not presented in the aspect in which it is before us in this case. In *Lewis* v. *The Elizabeth & Jane*, 1 Ware, 41, Fed. Cas. No. 8,321, the petition was for wages, which were denied upon the ground that the vessel had been abandoned and no freight had been earned. The case of *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032, is still more indefinite in its treatment of the subject herein involved. So, in the case of *Dunnett* v. *Tomhagen*, 3 Johns. 154, wages were denied to the seamen because no freight was earned on the homeward voyage, no part of the cargo being delivered by the ship.

In *Post* v. *Robertson*, 1 Johns. 24, the vessel was abandoned after performing three fourths of her homeward voyage, was rescued by salvors, and brought into port, where the cargo was sold, and the proceeds paid to the salvors and owners. It was held that this was not such a delivery of the cargo as would entitle the shipowners to maintain an action on the charter party for full freight. The case turned largely upon the form of action,—covenant,—and the court was inclined to the opinion that an action might have lain for a *quantum meruit*.

In none of these cases was the question discussed as to the power of the master to reclaim possession of the cargo at the *port [136] of refuge in order to earn his freight, it being seemingly assumed that the wreck and abandonment of the vessel hac dissolved all contracts, and especially that of the seamen, who attempted to enforce their lien upon the cargo before freight had been earned by its delivery at the port of destination.

It may be frankly admitted that the English cases lay down the rule that the abandonment of the vessel puts an end to the contract of affreightment, or, at least, it gives the owner of the cargo an option to do so. The case of *The Kathleen*, L. R. 4 Adm. & Eccl. 269, is the earliest upon the subject, and asserts a principle which has been followed in the subsequent English cases. The Kathleen had left Charleston with a cargo of cotton bound for Bremen, and when in the English channel suffered a collision with another vessel, for which the Kathleen was in nowise to blame. On the following day she was abandoned by her crew, and rescued by salvors, taken to Dover, and sued for salvage. The owners of the Kathleen applied for leave to bond the cargo in the salvage suits, in order that they might carry the same to its destination. The court ordered the cargo sold, on the ground that it was deteriorating fast through the damage sustained by salt water. A suit for freight was subsequently instituted by the owners of the vessel. Sir Robert Phillimore held that the original contract between the owners of the ship and cargo was at an end, and that no freight was due; and, in answer to the claim of *pro rata* freight, observed that the title to such *pro rata* freight must arise out of a new contract with the shipowner, to which both parties assent, and as neither party assented, *pro rata* freight was not due. In view of the fact that at least seven eighths of the voyage had been performed, that the collision which put an end to the voyage was not in anywise the fault of the Kathleen, that she was taken into a port in the immediate neighborhood, and that the vessel stood ready to take the cargo on to Bremen and earn her freight,—we are not favorably impressed with the natural justice of a decision which denied even *pro rata* freight to the master.

The case of *The Cito*, L. R. 7 Prob. Div. 5, was much like that of the *Kathleen, [137]

which was followed by the court of appeals in an opinion by Lord Justice Brett, subsequently Lord Esher. The Cito, on a voyage from Wilmington to Rotterdam, with a cargo of resin in barrels, was, owing to the peril of the sea, abandoned by her crew off the American coast. She was subsequently picked up and navigated to Plymouth, and there arrested for salvage. The court declined to hold that a mere abandonment at sea put an end to a contract of affreightment, since the abandonment might be wrongful, and in such a case the owner of the cargo might sue the ship upon its contract; but it held that the abandonment was so far binding upon the shipowner as to allow the cargo owner to treat such contract as abandoned. The court also held that the court below was right in ordering the cargo to be delivered to the owners upon their giving bail for salvage. Some stress was laid upon the fact that before the shipowners sought the possession of the cargo, the cargo owners had intervened and applied for it.

In the case of *The Leptir*, 5 Asp. Mar. L. Cas. 411, the salving vessel took off the crew of the vessel in distress, refused to allow her own crew to return, and the two vessels were navigated into a port of refuge. It was held that there was no abandonment, that the case of the Cito did not apply, and the court decreed for a *pro rata* freight.

In *The Argonaut*, unreported, but published in the Shipping Gazette of December 5, 1884, a vessel on a voyage from Halifax to Liverpool was abandoned by her crew, and picked up by salvors off the English coast. On being taken to Plymouth, the owners demanded the cargo, but the court ordered it carried to Liverpool, where it obtained a higher price than the owner could have gotten for it at Plymouth. It seems to have been carried in the ship by her own crew from Plymouth to Liverpool. The admiralty court allowed a *quantum meruit* freight, but its decree was reversed by the court of appeals, which held that the ship was entitled to nothing.

The prior cases were, however, pushed to their logical conclusion in that of *The Arno*,
[138] decided by the court of appeals, *8 Asp. Mar. L. Cas. 5. The vessel, while on a voyage from New York to Liverpool, was owing to stress of weather, abandoned at sea on March 31, and three days thereafter was picked up by a salvage crew, and taken to Liverpool, her port of destination. The admiralty court held that, although the cargo was delivered by the vessel on which it had been originally shipped, at the port of destination, the act of abandoning her so clearly indicated the intention of the master not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to it. It was held that no freight was recoverable. It appeared that on April 11, as soon as the owner of the Arno heard of the abandonment, he made an arrangement with the salvors, sent a tug to meet the vessel, which returned with her to Liverpool on April 25. It was intimated that if, before notice to the shipowner of the election of the cargo owner to treat the contract as at an end, he had been able to resume possession of the ship and cargo, he might perhaps have been able to annul the abandonment; but not having done so, the cargo owner had a right to treat the abandonment as a dissolution of the contract. The judgment was affirmed by the court of appeals. It is true that, in this case, the cargo was not delivered at the port of destination by the crew of the ship, but by the salvor's crew. It was, however delivered by the ship herself, and we see no reason why the salvor's crew might not have been treated as the agent of the ship in that particular; but the court held to the hard and fast rule of the Cito, that the abandonment of a ship *ipso facto* put an end to the contract of affreightment, notwithstanding the fact that the cargo was delivered by the same ship and at the port of destination. Under such circumstances the denial of all freight seems to have worked a great hardship.

Although the House of Lords has not yet spoken upon the subject, these cases must be regarded as settling the English rule that a compulsory abandonment of a vessel at sea puts an end to the contract of affreightment, and disentitles her owners to recover any portion of her freight, notwithstanding that she *and her cargo may be [139] picked up by salvors, and taken into an intermediate port, or even to the port of discharge.

That the soundness of this doctrine has not been accepted without challenge is evident, not only from certain expressions by some of the English writers, but notably by Dr. Wendt, in his work on Maritime Legislation, wherein he speaks of the Cito as having caused much surprise among those interested in maritime commerce, and comments upon it as follows (3d edition, page 629):

"So long as this Cito decision stands it gives the cargo owner the full option to take advantage of the common misfortune for the purpose of evading the contract entered into by him. This, I confidently assert, is opposed to every principle of law and justice. A contract, by the law of every

civilized country, holds good until both parties to it, of their own free will, agree that it shall not be carried out. Now, how can the abandonment of a ship in such a case as the Cito be taken to be an expression of an agreement on the part of the owners of the vessel to cancel the contract? The action of the crew in leaving a vessel to save their lives is not an act of will at all; they have to desert their vessel under the pressure of a *vis major*. How can this be taken to show an agreement on the part of the shipowner to abandon his part of the contract? He has no power to exercise any option at all. If when the vessel is recovered and the owner again requires [acquires?] the power to exercise his will in the matter, he then elects not to carry out his contract, and the cargo owner agrees, well and good; the contract is put an end to by mutual consent. To assume, however, such consent on the part of one of the contracting parties from an action forced on his servants by a power which cannot be resisted, seems to me to be a doctrine utterly opposed to common sense."

The ruling of the English courts that even a delivery of the cargo at the port of destination does not entitle the shipowners to any freight whatever seems a somewhat startling innovation upon the ancient rule [140]of the admiralty, that a loss occasioned *by a peril of the sea shall be borne as a common burden, and shared proportionately by the ship, cargo, and freight, as well as a departure from the general rule that neither party can put an end to a contract without the assent of the other.

We consider the sounder doctrine to be that the compulsory abandonment of a ship at sea should be treated merely as a relinquishment of the voyage and of any present intention to continue it; but that, if the vessel be subsequently rescued and taken into an intermediate port, the master retains the same right given to him by an ordinary disaster at sea, unattended by an abandonment, to resume possession of the ship and cargo, subject, of course, to the claim of salvors, and carry the latter forward to its destination, provided he act with promptness and before any intervening rights had accrued.

The opinion of the court assumes that the abandonment of the vessel was a repudiation and a rescission of the contract of affreightment, when in fact it was involuntary, designed only to save the lives of the crew, and had as little effect upon the contract as if the vessel had met with a disaster not involving an abandonment, and put into a port of safety for repairs. It apparently ignores the principle that, to constitute a rescission, there must be the same intent to rescind as there was originally to contract, and that the intent to rescind should not be inferred without some act which points unmistakably to that conclusion. There is no more reason for holding that the abandonment of the ship was a rescission of the contract of affreightment than that such abandonment was a renunciation of all the owner's title to the ship in case she were subsequently rescued. Whether, if Ward & Company had insisted upon the ship carrying out her contract, they might, in case of refusal, have had a cause of action, it is unnecessary to consider. In view of the severity of the storm, and of the danger of remaining on board, the effect of her abandonment on the contract probably never entered the mind of the master. Such abandonment was not a failure to perform the contract in any particular, since it was the result of an overwhelming necessity; and, if the vessel were *rescued the mas-[141] ter might repair and continue the voyage, or tranship the cargo to another vessel after the extent of the damage had been ascertained. He might indeed have supposed that the ship was irretrievably lost; but both parties took the chance of its being rescued and taken to a port of safety, when the question would then arise whether prudence required her to be repaired, or the cargo transhipped.

In such case the same question arises as if the ship had met with a disaster, and been navigated into a port by her own crew. We think it makes no difference in principle whether a tug is hired by the master to take his ship into port, or a tug in the employment of another person comes along and picks her up. If the cargo owner had himself rescued the vessel, he might doubtless have declared the contract rescinded; but it is quite otherwise if the vessel be rescued by her own master and crew, or be taken in tow by a third party.

Applying the doctrine of the opinion, it would follow (and such are the English cases of *The Kathleen* and *The Arno*) that if the vessel be abandoned near her port of destination, and towed into such port by a salving tug, she loses her whole freight, and cannot even recover on a *quantum meruit*, though the whole voyage be performed.

This conclusion seems so irreconcilable with natural justice that we are constrained to dissent.

[142]*FLORIDA McGUIRE and Matilda Caro

v.

WILLIAM A. BLOUNT, William Fisher, Mrs. William Fisher, The Pensacola City Company, Thomas C. Watson, John Williams, James M. Bullard.

(See S. C. Reporter's ed. 142–148.)

1. **Courts—disqualification of judge for interest.**—The disqualification of the trial judge for interest is not established, nor is it offered to be established in any legitimate way, by an unverified petition stating that the wife of the judge has acquired an interest in the property which is the subject-matter of the litigation, accompanied by a statement of a desire to offer testimony in support thereof, without furnishing the names of the witnesses, or filing any affidavits, or definitely stating what the witnesses would say if permitted to testify.

2. **Ejectment—sufficiency of plaintiff's title.**—The plaintiff in ejectment must recover upon the strength of his own title.

3. **Ejectment—defense of outstanding title.**—A defendant in ejectment who is not a mere trespasser or interloper may show an outstanding and subsisting title in a stranger, to defeat the plaintiff's right of recovery.

4. **Evidence—admissibility of public records as ancient documents.**—Documents which show the probate of a will in proceedings had during the Spanish control of Florida, and a judicial sale of the testator's lands, and bear upon their face every evidence of age and authenticity, and come from the official custody of the surveyor general of the United States, are admissible in evidence as ancient documents,—especially where the proceedings have been given express or tacit recognition in subsequent official investigations and conveyances.

5. **Judicial sale—validity as against technical objections.**—Technical objections to the regularity of a judicial sale had during the Spanish control of Florida will not be permitted to defeat the operation of the sale and the conveyance thereunder to pass title,—especially where a sale of the lands has been made under the title undertaken to be passed by the proceedings, and this sale has subsequently been held sufficient to convey the title by the commissioners appointed under the act of Congress of May 8, 1822 (3 Stat. at L. 709, chap. 129), for ascertaining titles to lands within the territory of Florida.

6. **Trial—directed verdict.**—A verdict may be directed in favor of one of the parties when the testimony and all the inferences which the jury can justifiably draw therefrom are insufficient to support a different verdict.

[No. 6.]

Submitted January 18, 1905. Ordered for oral argument January 30, 1905. Argued October 12, 13, 1905. Decided October 30, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court of the United States for the Northern District of Florida in favor of defendants in an action of ejectment. *Affirmed.*

See same case below, 56 C. C. A. 682, 121 Fed. 1020.

The facts are stated in the opinion.

Messrs. **Hilary A. Herbert** and **Benjamin Micou** for petitioners on original submission. *Messrs. E. T. Davis* and *Samuel S. Belden* were on the brief:

The trial judge was disqualified for interest.

State ex rel. Perez v. *Wall*, 41 Fla. 463, 49 L.R.A. 548, 79 Am. St. Rep. 195, 26 So. 1020; *Place* v. *Butternuts Woolen & Cotton Mfg. Co.* 28 Barb. 507.

A mere intruder cannot enter upon a person actually seised, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of real property. But, if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title.

Christy v. *Scott*, 14 How. 292, 14 L. ed. 426; *Bradshaw* v. *Ashley*, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297; *Seymour* v. *Creswell*, 18 Fla. 40.

A plaintiff in ejectment can recover against one not showing a better right, or an intruder.

Ashmead v. *Wilson*, 22 Fla. 258.

Where both parties claim title to land from a common source, the defendant is estopped from setting up an outstanding title with which he is disconnected.

Doyle v. *Wade*, 23 Fla. 98, 11 Am. St. Rep. 334, 1 So. 516.

As to an intruder or trespasser, or one who does not show a better right, possession of lands, like the possession of per-

NOTE.—*As to what title or interest will support an action of ejectment*—see note to Hancock v. McAvoy, 18 L.R.A. 781.

On defenses in actions of ejectment—see note to Greene v. Couse, 13 L.R.A. 206.

As to proof of ancient documents—see note to Coulson v. Walton, 9 L. ed. U. S. 51.

As to when judicial sale will be set aside—see note to Schroeder v. Young, 40 L. ed. U. S. 721.

On how far a purchaser at an execution or judicial sale is protected as a bona fide purchaser—see note to Riley v. Martinelli, 21 L.R.A. 33.

As to when a verdict may be directed by the court—see note to Grand Chute v. Winegar, 21 L. ed. U. S. 174.

sonal property, is prima facie evidence of title, and will support ejectment.

Dothard v. *Denson*, 72 Ala. 544.

None of the documents asked to be considered as a will, nor the proceedings thereunder, whether in Spanish or translations into English, are properly authenticated.

Church v. *Hubbart*, 2 Cranch, 238, 2 L. ed. 265.

To introduce into a cause a copy of any paper, the truth of that copy must be established, and sufficient reasons for the nonproduction of the original must be shown.

Smith v. *Carrington*, 4 Cranch, 70, 2 L. ed. 553.

To all intents and purposes these are private documents, coming from private hands.

Peralta v. *United States*, 3 Wall. 440, 18 L. ed. 223; *United States* v. *Vallejo*, 22 How. 422, 16 L. ed. 360.

That the defendants in error offer what they wish to have considered as the original will of Gabriel de Rivas, without evidence of its ever having been filed or recorded, or any action taken upon it, certainly, to say the least, casts well-grounded suspicions upon the validity of the other papers purporting to be copies and translations.

United States v. *Teschmaker*, 22 How. 392–406, 16 L. ed. 353–357.

All these papers were admitted as evidence without first requiring any evidence of their antiquity or of their genuineness. There is no evidence offered of the execution of the will. In fact it does not purport to be signed by Gabriel de Rivas. It is not a valid will on its face.

Meegan v. *Boyle*, 19 How. 149, 15 L. ed. 583.

There is no evidence offered to show where or when these documents were found, or of possession under any of them by alleged grantees. There is no evidence offered to free the papers from the just ground of suspicion under which they fall; yet, under the decisions of this court, there should be proof preliminary to their admission into evidence.

Applegate v. *Lexington & C. County Min. Co.* 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742; *Barr* v. *Gratz*, 4 Wheat. 213, 4 L. ed. 553; *Winn* v. *Patterson*, 9 Pet. 663, 9 L. ed. 266; *Stoddard* v. *Chambers*, 2 How. 284, 17 L. ed. 269.

This court has always protected the right of trial by jury with jealous care.

Bank of Washington v. *Triplett*, 1 Pet. 31, 7 L. ed. 40; *Barney* v. *Schmeider*, 9 Wall. 254, 19 L. ed. 650; *Mutual L. Ins. Co.* v. *Snyder*, 93 U. S. 396, 23 L. ed. 889; *Crane* v. *Morris*, 6 Pet. 610, 8 L. ed. 518; *Phœnix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 30–38, 27 L. ed. 65–69, 1 Sup. Ct. Rep. 18; *United States* v. *Union P. R. Co.* 98 U. S. 582, 25 L. ed. 143.

Even if Fisher's possession as receiver could be adverse to plaintiffs in error, whether he took possession under the order of Judge McLellan would be a collateral fact *in pais*,—an extrinsic circumstance; and the inference to be drawn therefrom should have been left to the jury.

Etting v. *Bank of United States*, 11 Wheat. 60, 6 L. ed. 419.

Whether possession is, or is not, adverse in any particular case, is a question of fact for the jury.

Hogan v. *Kurtz*, 94 U. S. 773, 24 L. ed. 317; *Jackson ex dem. Bradstreet* v. *Huntington*, 5 Pet. 402, 8 L. ed. 170.

Whether possession is continuing is also a question to be decided by the jury under proper instructions from the court.

Cook v. *Burnley* (*Cook* v. *Porter*) 11 Wall. 659, 20 L. ed. 29.

It should have been left to the jury to determine whether these documents were fraudulent, under proper instruction from the court as to what was the law. Also, no presumptions the jury might make from the other evidence in connection with the antiquity of the papers before them should have been excluded.

Warner v. *Norton*, 20 How. 460, 15 L. ed. 953; *Gregg* v. *Sayre*, 8 Pet. 252, 8 L. ed. 935; *Adams* v. *Roberts*, 2 How. 496, 11 L. ed. 353.

Whether the place of location agrees with the description in the grant is a question for the jury.

Pinkerton v. *Ledoux*, 129 U. S. 346, 32 L. ed. 706, 9 Sup. Ct. Rep. 399.

Where the boundaries of land described in any deed really are, is always a question of fact.

Andreu v. *Watkins*, 26 Fla. 401, 7 So. 876.

Where defendants do not set up title in themselves, but seek to maintain their possession as mere intruders by setting up title in a third person, it is necessary to establish the existence of such an outstanding title beyond controversy.

Greenleaf v. *Birth*, 6 Pet. 312, 8 L. ed. 410.

Among the papers relied on to show a judicial sale of this tract, there is no plat of the land, and nothing giving a description of it by metes and bounds.

United States v. *Castro*, 24 How. 351, 16 L. ed. 661.

A document, to be admissible as an ancient document, should not raise on its face any suspicions of its genuineness, should appear upon its face to be more than thirty years old, and should have come from the proper, that is, the natural, custody.

Applegate v. *Lexington & C. County Min. Co.* 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742.

There is nothing to prohibit an action of ejectment being founded upon a title by prescription.

Toltec Ranch Co. v. *Cook*, 191 U. S. 538, 48 L. ed. 292, 24 Sup. Ct. Rep. 166; *Toltec Ranch Co.* v. *Babcock*, 191 U. S. 542, 48 L. ed. 294, 24 Sup. Ct. Rep. 169.

Plaintiffs had a prior possession at the time that a possession adverse to them is claimed by defendants to have commenced running, and against this defendants cannot set up an outstanding title.

Bradshaw v. *Ashley*, 180 U. S. 63, 64, 45 L. ed. 429, 430, 21 Sup. Ct. Rep. 297.

Mr. **Benjamin Micou** for petitioners on oral argument.

Messrs. **William A. Blount** and **A. C. Blount, Jr.,** for respondents on original submission:

The plaintiffs in error cannot allege error in the nonadmission of testimony in the court below upon a general offer to introduce testimony upon a given point, unaccompanied by the production of any witness or the propounding of any specific question to him. *Non constat* that any witness produced might not have been incompetent, or any evidence offered, hearsay or otherwise, inadmissible.

Ladd v. *Missouri Coal & Min. Co.* 14 C. C. A. 246, 32 U. S. App. 93, 66 Fed. 882.

The court had a right to base its finding on its own knowledge of the facts, and refuse to take testimony upon the subject. This is the rule in cases of contempt, when the matter transpires in the presence of the court, and, hence, is in his own knowledge.

Ex parte Terry, 128 U. S. 290, 306, 32 L. ed. 405, 409, 9 Sup. Ct. Rep. 77.

The court did not err in directing a verdict for the defendants.

Chapman v. *Yellow Poplar Lumber Co.* 32 C. C. A. 402, 61 U. S. App. 499, 89 Fed. 903; *Holmes* v. *Goldsmith*, 147 U. S. 162, 37 L. ed. 122, 13 Sup. Ct. Rep. 288.

The proceedings show conclusively their judicial character as the transactions of a Spanish court. This being so, proof of the signature of the persons executing them, or of their official character, was not necessary.

Williams v. *Conger*, 125 U. S. 397–409, 31 L. ed. 778–784, 8 Sup. Ct. Rep. 933.

Custodians from the land commissioners, exercising the powers of the office, will be presumed to have done so legally, and to have been duly appointed and acting.

M'Mahon v. *Lennard*, 6 H. L. Cas. 970; 19 Am. & Eng. Enc. Law, pp. 436, 437.

Even a copy of a paper certified by a public officer who is the custodian of it is evidence, without proof of signatures to the original, upon general principles of law.

United States v. *Percheman*, 7 Pet. 51, 8 L. ed. 604; *Doe ex dem. Magruder* v. *Roe*, 13 Fla. 602; *Bell* v. *Kendrick*, 25 Fla. 778, 6 So. 868.

The protocol was admissible in evidence because the title evidenced by it had been pronounced valid by the confirmation of the land commissioners for West Florida.

Hallett v. *Doe*, 7 Ala. 900; *Cousin* v. *Labatut*, 19 How. 202–211, 15 L. ed. 601–605; *United States* v. *Arredondo*, 6 Pet. 723, 724, 8 L. ed. 559, 560.

The court, in its opinion, said that it appeared to be an ancient document; and this assertion must be taken to be true in the absence of affirmative evidence of its untruth.

Kirkland v. *Oates*, 25 Ala. 465.

Even if there was no admission, and no proof, as to keepers of the Spanish archives, the fact that they acted as such raises a presumption that they were duly appointed and acting.

M'Mahon v. *Lennard, supra;* 19 Am. & Eng. Enc. Law, pp. 436, 437.

The confirmation by the commissioners was evidence of title.

Ryder v. *Innerarity*, 4 Stew. & P. (Ala.) 29; *Hallett* v. *Doe, supra.*

There was no testimony which required the submission of the cause to the jury.

Randall v. *Baltimore & O. R. Co.* 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322; *Metropolitan R. Co.* v. *Jackson*, L. R. 3 App. Cas. 193; *Ryder* v. *Wombwell*, L. R. 4 Exch. 39; *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 472, 35 L. ed. 215, 11 Sup. Ct. Rep. 569; *North Pennsylvania R. Co.* v. *Commercial Nat. Bank*, 123 U. S. 733, 31 L. ed. 289, 8 Sup. Ct. Rep. 266; *Chapman* v. *Yellow Poplar Lumber Co. supra; Hinds* v. *Keith*, 6 C. C. A. 231, 13 U. S. App. 222, 314, 57 Fed. 15; *Marion County* v. *Clark*, 94 U. S. 278, 24 L. ed. 59; *Patton* v. *Texas & P. R. Co.* 179 U. S. 661, 45 L. ed. 363, 21 Sup. Ct. Rep. 275; *Doswell* v. *De La Lanzo*, 20 How. 29, 15 L. ed. 824; *Hanrick* v. *Patrick*, 119 U. S. 172, 30 L. ed. 405, 7 Sup. Ct. Rep. 147.

A general lumping exception to the admission of all of the documents offered is unavailing if any of them are admissible.

Holloway v. *Dunham*, 170 U. S. 615–619, 42 L. ed. 1165–1167, 18 Sup. Ct. Rep. 784; *Price* v. *Pankhurst*, 3 C. C. A. 551, 10 U. S. App. 497, 53 Fed. 312; *Luttrell* v. *Martin*, 112 N. C. 593, 17 S. E. 573; *Martin* v. *Kline*, 157 Pa. 473, 27 Atl. 753; *Rio Grande R. Co.* v. *Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, 1004; *Lowe* v. *State*, 88 Ala. 8, 7 So. 97; *Coveny* v. *Hale*, 49 Cal. 552; *University* v. *Shanks*, 40 Wis. 356; *Brantley* v.

Gunn, 29 Ala. 392; *Fitch* v. *Woodruff & B. Iron Works*, 29 Conn. 82.

The possession of John De La Rua, from whom the surveyor general obtained the Spanish archives, was a reasonable and natural possession.

Meath v. *Winchester*, 3 Bing. N. C. 183; *Gibson* v. *Poor*, 21 N. H. 441, 53 Am. Dec. 216; *Doe ex dem. Wildgoose* v. *Pearce*, 2 Moody & R. 240.

A defendant in ejectment need show no title, but can prove outstanding title in a third person without connecting himself with it.

Henderson v. *Wanamaker*, 25 C. C. A. 181, 49 U. S. App. 174, 79 Fed. 736.

The protocol was an original, and correctly designated as a protocol.

Sheldon v. *Milmo*, 90 Tex. 21, 36 S. W. 413.

Mr. **William A. Blount** for respondents on oral argument.

[143] *Mr. Justice **Day** delivered the opinion of the court:

This case was begun in the circuit court of the United States for the northern district of Florida to recover in ejectment certain lands described in the declaration. The defendants answered, and issues were joined as to the right of possession of the lands in question.

Upon the trial, after the testimony was submitted and the cause argued, the court instructed the jury to find for the defendants. Upon writ of error this judgment was affirmed by the circuit court of appeals, 56 C. C. A. 682, 121 Fed. 1020.

The plaintiffs, when the case was called for trial, filed a written motion, or petition, challenging the right of the presiding judge to hear the case, and praying that he "recuse" himself. The petition was denied and the judge presided at the trial of the case. The ground of the petition for recusation was that the wife of the judge had acquired an interest in the property which was the subject-matter of the litigation. The petition was not sworn to, and while a statement was made of the desire of the plaintiffs to offer testimony in support thereof, the names of witnesses were not furnished, no affidavits were filed, and no definite statement made of what witnesses would say if permitted to testify. The judge overruled this motion, stating that his wife had no interest in the property, and, with a view to convey an interest, the vendor had tendered a quitclaim deed to his wife, which had been declined, and no delivery ever made thereof or title vested in her. Later the judge placed on file an affidavit of a real-estate agent, stating substantially the same facts.

While the courts cannot too carefully guard against any attempt of an interested judge to force himself upon litigating parties, and should scrupulously maintain the right of every litigant to an impartial and disinterested tribunal for the determination of his rights, we find in this record nothing establishing or offering to establish, in any legitimate way, the disqualification relied upon because of a pecuniary interest in the *controversy, resulting from [144] his wife's alleged ownership of a part of the land in question.

The petitioners, who were plaintiffs in the original case, sought to recover the tract of land as the heirs of one Gabriel Rivas. The tract originally owned by him consisted of about 300 "arpents" of land near the city of Pensacola, Florida.

The defendants at the trial undertook to defeat the plaintiffs' right of recovery, not by establishing a perfect title in themselves, but relied upon showing the devestiture of the plaintiffs' title as heirs of Gabriel Rivas. It is elementary law that the plaintiff in ejectment must recover upon the strength of his own title, which must be sufficiently established to warrant a verdict in his favor. *McNitt* v. *Turner*, 16 Wall. 352, 362, 21 L. ed. 341, 346; *Watts* v. *Lindsey*, 7 Wheat. 158, 5 L. ed. 423.

A defendant in ejectment who is not a mere trespasser or interloper may show an outstanding and subsisting title in a stranger, to defeat the plaintiff's right of recovery. *Love* v. *Simms*, 9 Wheat. 515, 6 L. ed. 149; *Smith* v. *McCann*, 24 How. 398, 16 L. ed. 714; *King* v. *Mullins*, 171 U. S. 404–437, 43 L. ed. 214–226, 18 Sup. Ct. Rep. 925.

Relying on this right, the defendants sought to show, by the production of certain ancient documents, bound together, styled a protocol, that Gabriel Rivas's will had been established by proceedings had during the Spanish control of Florida, which showed that Rivas, who had received the lands in controversy by grant of November 10, 1806, from Morales, intendant, etc., of Spain, had died on April 28, 1808, his will being probated by certain proceedings approved by the governor of Florida on May 2, 1808. In this protocol proceedings are shown for the sale of the three hundred (300) arpents of lands, which belonged to Rivas, resulting in a sale to one Gregario Caro, which sale purports to have been approved by the civil and military governor of West Florida. These original documents, evidencing the probate of the will of Rivas and the sale of the lands, including those in controversy, were presented to this court, having been admitted in testimony at the trial, against the objections of *plaintiffs, [145]

under the stipulation that they came from the custody of the surveyor general of the United States, keeper of the archives. Many objections are urged to the authenticity and admissibility of these documents, as well as to the regularity of the proceedings under the Spanish law. The production of the originals of these documents has given the court an opportunity to inspect them. They bear upon their face every evidence of age and authenticity. There is nothing about them to suggest that they have been forged or tampered with. They present an honest as well as ancient appearance, and come from official custody. To such public and proprietary records the courts have applied the rules of admissibility governing ancient documents. 3 Wigmore, Ev. § 2145 and notes. With reference to such documents and records it is only necessary to show that they are of the age of thirty years, and come from a natural and reasonable custody; from a place where they might reasonably be expected to be found. 3 Wigmore, Ev. §§ 2138, 2139. While the testimony tends to show that these documents were subjected to various changes of possession during the transition of the government of Florida from Spain to the United States, and upon the evacuation of Pensacola during the Civil War, there is nothing to establish that they were ever out of the hands of a proper custodian. Nor is there proof to show that the originals were lost, or any evidence of a fraudulent substitution of a made-up record in the interest of parties to be benefited thereby.

In view of the frequency with which these proceedings have been given express or tacit recognition in subsequent official investigations and conveyances of the lands, corroborating the inference of genuineness to be gathered from the appearance and history of these documents, and the possession of the lands conveyed, we have no question that the court properly admitted them in evidence.

Admitting the correctness of this ruling, the inquiry follows, Did the judicial sale operate to devest the Rivas heirs of title to the lands? The lands were purchased at
[146] the sale of October 20, *1817, by one Gregario Caro. The sale to Caro was duly approved and confirmed on October 21, 1817. Caro conveyed to Fitzsimmons, Smythe, and Chebeaux on October 22, 1817. The sale in the judicial proceeding was recited in this deed, which was "passed" or approved by Masot, civil and military governor of West Florida.

Various technical objections have been urged as to the regularity of the proceedings. Some of these might have possibly availed had they been urged as objections to their regularity in the forum where they were had. But it is to be remembered that we are here dealing with proceedings had eighty-five years ago, under a foreign system of laws, by which it was undertaken to convey title to the premises. Such proceedings are not to be scrutinized with a view to discovering defects. They were sufficient in the view of those who undertook to pass title to the lands under the Spanish system, and our courts should have neither the right nor the disposition to upset such titles by a nice examination of the regularity of the proceedings. Every presumption is in favor of the authority and authenticity of such proceedings. *Strother* v. *Lucas*, 12 Pet. 410–438, 9 L. ed. 1137–1148. If this were not so, great confusion and uncertainty of titles would arise, especially when title depends upon the action of early colonial governors, undertaking to exercise the sovereign power which they represented. Such authority is presumed to be legitimate and regularly exercised. *United States* v. *Arredondo*, 6 Pet. 691–727, 8 L. ed. 547–560. Moreover, it appears that sale of the land has been made under the title conveyed by the proceedings and the conveyance to Gregario Caro, and the sale has been subsequently held sufficient to convey the title by the commissioners appointed under the act of Congress of May 8, 1822 [3 Stat. at L. 709, chap. 129], for ascertaining titles to lands within the territory of Florida. The report of the commissioners was subsequently ratified and confirmed by act of Congress of April 22, 1826. 4 Stat. at L. 156, chap. 29. While this action of the commissioners and of Congress may not have concluded others claiming the property, it was based upon the judicial proceedings evidenced by the protocol, and is *strong evidence of their [147]
authenticity and regularity. Those claiming in the chain of title from this conveyance have made sale of many pieces of the property, various conveyances have recited the proceedings under the will of Rivas and the conveyance to Caro, and to upset them and declare them of no effect would be to unseat many titles to real estate, conveyances which have stood for years without question. We have no hesitation in reaching a conclusion, under the facts shown in this record, that title to the lands of Gabriel Rivas, under whom the plaintiffs in ejectment claim title as heirs, was devested by the proceedings had under the Spanish authorities in Florida, and the conveyance of the lands therein to Caro, from whom, by other conveyances, many

persons have acquired title to the land in controversy.

Nor are we more impressed by the claim that the plaintiffs were in adverse and continuous possession of the property so as to acquire title by prescription. The alleged possession of the plaintiffs has not been of that character which could ripen into a prescriptive title. The alleged agent of the plaintiffs may have had some occupation of a part of the territory, not embracing the lots in controversy, and it appears that he obtained the payment of the rent from certain tenants of a land company known as the Pensacola City Company, which derived title in the chain of conveyances running back to Gregario Caro. But it also appears that this agent for the heirs of Rivas was engaged in looking after the lands for the land company, for a time at least, and that he purchased the outstanding title of one Chebeaux, who also derived title under Caro. The plaintiffs certainly did not establish or introduce testimony fairly tending to establish that open, notorious, continuous, adverse possession which gives a title by prescription. While the defendants below did not show complete title in themselves, they were not mere interlopers or trespassers, but were claiming the lands under deeds, and were entitled to show, as a defense in ejectment, an outstanding title in another. It is strenuously urged that, whatever the merits of the controversy,
[148] there was sufficient *proof to require a trial judge to submit the case to a jury; but no rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that where the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its view by granting a new trial. *Elliott* v. *Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Union P. R. Co.* v. *McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Anderson County* v. *Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569.

This view of the case warranted an instruction directing a verdict at the trial in favor of the defendants, and renders it unnecessary to consider the other errors alleged to have been committed at the trial.

The judgment of the Circuit Court of Appeals is affirmed.

J. W. GUTHRIE, A. R. Heywood, Henry Conant, Edward Conant, Patrick Healy, Richard T. Hume, and O. M. Runyon, *Plffs. in Err.*,

v.

HENRY O. HARKNESS.

(See S. C. Reporter's ed. 148–159.)

1. **Mandamus—power of state courts to issue against national banks.**—Any legal right which a stockholder of a national bank may have to obtain an inspection of its books may be enforced in the state courts by mandamus, in view of the provision of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), that, for actions against national banks at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the Federal circuit and district courts shall have jurisdiction only as in cases between individual citizens of the same state.

2. **National banks—shareholder's right to inspect the books.**—The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by U. S. Rev. Stat. § 5211 (U. S. Comp. Stat. 1901, p. 3498), requiring such banks to make reports to the Comptroller of the Currency, or by § 5240 (U. S. Comp. Stat. 1901, p. 3516), providing for the appointment of examiners to investigate the condition of such banks, or by § 5241 (U. S. Comp. Stat. 1901, p. 3517), providing that no such bank "shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice."

[No. 9.]

Submitted April 6, 1905. Ordered for oral argument May 8, 1905. Argued October 16, 1905. Decided October 30, 1905.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court for the Second Judicial District of Weber County in that state, awarding a writ of mandamus to compel the directors of a national bank to permit a stockholder to inspect the books at such times as would not interfere with the business of the bank. *Affirmed.*

See same case below, 27 Utah, 248, 75 Pac. 624.

The facts are stated in the opinion.

Mr. **Abbot R. Heywood** for plaintiffs in error on original submission. *Mr. George McCormick* was with him on the brief.

No counsel for defendant in error.

NOTE.—*On the right of a stockholder to inspect books of corporation*—see note to Weihenmayer v. Bitner, 45 L.R.A. 446.

Mr. **Abbot R. Heywood** for plaintiffs in error on oral argument.

Mr. **Hiram H. Henderson** for defendant in error on oral argument. *Mr. Herbert R. Macmillan* was with him on the brief.

Mr. Justice **Day** delivered the opinion of the court:

The defendant in error was the owner of nearly one fifth of the capital stock of the Commercial National Bank of Ogden, Utah. As such shareholder he applied for leave to inspect the books, accounts, and loans of the bank, which was refused him. He alleges the reasons for seeking such inspection to be that he might ascertain the value of his stock in the bank, and whether the business affairs of the same had been conducted according to law. He charges that loans had been made to patrons of the bank of more than one tenth of the capital stock, in violation of law, and that an inspection of the books, accounts, and loans of the bank would reveal other irregularities. Upon the hearing in the district court the following findings of fact were made:

"1. That the Commercial National Bank of Ogden, Utah, is a corporation organized and existing under and by virtue of the laws of the United States; that said corporation is doing a banking business in Ogden City, Weber county, state of Utah; that the capital stock of said bank is $100,000. divided into 1,000 shares of the par value of $100.00 per share.

"2. That the defendants are directors and have under their control and in their possession all books, papers, accounts, and loans of said Commercial National Bank.

"3. That there is no acting cashier of said bank, and that there has been no such cashier since the 1st day of November, 1902; that J. W. Guthrie is president, A. R. Heywood, vice president, and R. T. Hume is assistant cashier of said bank.

"4. That on or about the 1st day of February, 1903, plaintiff made a demand upon said directors, at the banking house of said bank, and also upon J. W. Guthrie, as pres-[150]ident, A. R. *Heywood, as vice president and general manager of said bank, and upon R. T. Hume, as assistant cashier of said bank, for permission to permit plaintiff to inspect all books, accounts, and loans of the said bank, and plaintiff made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank.

"5. That each and all of said persons refused permission to plaintiff to inspect the said books, accounts, and loans of said bank at any time or at all and they still refuse to permit such inspection.

"6. That the plaintiff is the owner and has in his possession 183⅓ shares of the capital stock of said bank, of the par value of $18,333.33, and that said stock appears on the stock books of said bank in the name of the said plaintiff.

"7. That plaintiff sought and now seeks the inspection of the books, accounts, and loans of said bank for the purpose of ascertaining the true financial condition of said bank, and also for the purpose of ascertaining the value of his stock in said bank, and also for the purpose of ascertaining whether the business affairs of the said bank have been conducted according to law.

"The court further finds that sufficient reason exists for the inspection of said books and accounts of said bank."

Upon this finding the court entered a judgment requiring the defendants to permit the plaintiff to inspect the books, accounts, and loans of the bank at such time or times as would not interfere with the business of the bank.

While the state has no power to enact legislation contravening the Federal laws for the control of national banks (*Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502), Congress has provided that, for actions against them at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the circuit and district courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state. 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508. If the stockholders had the legal right to enforce inspection, there is no room to question the authority of the state courts to enforce the right by granting the proper relief in a judicial *proceeding. *Petri* v. *Commercial*[153] *Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119–123, 48 L. ed. 119–121, 24 Sup. Ct. Rep. 54.

Upon review in the supreme court of Utah, the judgment of the district court was affirmed, it being held that it was the common-law right of the shareholder to have the inspection demanded, and that the same had not been cut down by the act of Congress regulating the business of national banks. 27 Utah, 248, 75 Pac. 624.

There can be no question that the decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member. Morawetz, in his work on Private Corporations, § 473, vol. 1, says:

"However, in the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management."

In many of the states this right has been recognized in statutes which are generally held to be merely in affirmance of the common law. Nor do we find the authorities making an exception as to this right when a corporation which does a banking business is the subject of consideration. It is said to be customary for banking companies in England to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors. *Morgan's Case* (1884) L. R. 28 Ch. Div. 620; Cook, Corp. § 517, note. The subject appears to be now regulated by statute in England. Cook, Corp. § 518. In *Cockburn* v. *Union Bank*, 13 La. Ann. 289, it was held that a stockholder in the Union Bank of Louisiana had the right to a writ of mandamus to compel the officers of the bank to allow him the privilege of inspecting the discount books of the bank within proper and reasonable hours, and in the course of the opinion it was said:

"A stockholder in a corporation possesses [154] all his individual *rights, except so far as he is deprived of them by the charter or the law of the land; as long, then, as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of everyone to see that his property is well managed, and to have access to the proper sources of knowledge in this respect."

This case was cited with approval in *State ex rel. Burke* v. *Citizens' Bank*, 51 La. Ann. 426, 25 So. 318, and *Tuttle* v. *Iron Nat. Bank*, 170 N. Y. 9–12, 62 N. E. 761. In the latter case it was said: "The principle upon which a stockholder is allowed access to the books of a corporation is as applicable to the case of a banking corporation as it is to any other kind of corporation."

In *State ex rel. Doyle* v. *Laughlin*, 53 Mo. App. 542, a stockholder in an incorporated bank had been denied by the directors the right to inspect the books for the purpose of acquainting himself with the conduct of its affairs and to learn how it was managed. The court there held that he was entitled to a writ of mandamus to compel the inspection, and this notwithstanding the bank contended that it occupied such a confidential and trust relation to its customers and depositors that it would be a breach of duty on its part to open up the books to the inspection of the relator. The authorities are fully examined, and the right of the shareholders to inspect the books for proper purposes and at proper times is recognized, in *Re Steinway*, 159 N. Y. 251, 45 L. R. A. 461, 53 N. E. 1103; *Com. ex rel. Sellers* v. *Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184. To the same effect are *Deaderick* v. *Wilson*, 8 Baxt. 108–137; *Lewis* v. *Brainerd*, 53 Vt. 520; and *Huylar* v. *Cragin Cattle Co.* 40 N. J. Eq. 392–398, 2 Atl. 274. In the latter case it was said:

"Stockholders are entitled to inspect the books of the company for proper purposes at proper times . . . and they are entitled to such inspection though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary *to their protection. To say that they have [155] the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property. *Cincinnati Volksblatt Co.* v. *Hoffmeister*, 62 Ohio St. 189–201, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

It is suggested in argument that, if the shareholder has this right, it may be abused, in that he may make an improper use of the knowledge thus gained. There is nothing in this record, however, to suggest, by way of argument or testimony, that the shareholder desired the information which the books would give for other than a lawful purpose. On the other hand, there is a distinct finding that the inspection was desired for the purpose of ascertaining the true financial condition of the bank, and for the purpose of enabling the complainant to find out the value of his stock, and whether its business was being conducted according to law. There is no suggestion that the complainant was acting in bad faith or from improper motives, or that he was seeking in any way to misuse the information which the books would afford him. We need not hold that there may not be circumstances which would justify the courts in

withholding relief to a stockholder seeking an examination of the books and accounts of the bank. In the case before us no reason is shown for denying to the stockholder the right to know how his agents are conducting the affairs of a concern of which he is part owner. Many legal rights may be the subjects of abuse, but cannot be denied for that reason. A director, who has the right to an examination of the books, may abuse the confidence reposed in him. Cer-
[156] tainly this possibility *will not be held to justify a denial of legal right, if such right exists in the shareholder. The possibility of the abuse of a legal right affords no ground for its denial. *State ex rel. Doyle* v. *Laughlin*, 53 [illegible]. App. 542; *People ex rel. Gunst* v. *Goldstein*, 37 App. Div. 550, 56 N. Y. Supp. 306. The text-books are to the same effect as the decided cases. Cook, Stocks & Stockholders, § 511; Boone, Banking, § 235; Angell & A. Priv. Corp. 607.

It does not follow that the courts will compel the inspection of the bank's books under all circumstances. In issuing the writ of mandamus the court will exercise a sound discretion, and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. *Re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103; Thomp. Corp. §§ 4412 *et seq.*

We are unable to find in § 5211 (U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 3498), requiring reports to be made to the Comptroller of the Currency, or in § 5240 (U. S. Comp. Stat. 1901, p. 3516), providing for the appointment of examiners to investigate the condition of national banks, anything which cuts down the usual common-law right in shareholders in such corporations.

In § 5210 (U. S. Comp. Stat. 1901, p. 3498) it is provided that a list of shareholders shall be kept, subject to inspection by the shareholders and creditors of the corporation and the officers authorized to assess taxes under state authority. The purpose of this section seems obvious in view of the other provisions of the statute, authorizing taxation by the state, upon the shareholder,—§ 5219 (U. S. Comp. Stat. 1901, p. 3502),— and providing for the individual liability of the shareholder to an amount equal to his stock, in cases of insolvency. Sec. 5151 (U. S. Comp. Stat. 1901, p. 3465).

This court has said that one, if not the principal, object of this section was to acquire information as to the shareholders upon whom may rest individual liability for contracts, debts, or other engagements of the bank. *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 608–621, 41 L. ed. 844, 845–850, 17 Sup. Ct. Rep. 465.

*It is true that for some purposes a na-[157]
tional bank is a public institution, notwithstanding it is the subject of private ownership. It may issue bills, which circulate as part of the currency of the country. It is subject to examination, and, in a large measure, to the supervision, of the Comptroller of the Currency. It is examined at stated periods, and may be the subject of special examination by order of the Comptroller. But it is owned by shareholders, like other banking institutions. It is subject by statute to be sued in the courts of the state. 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508. There is nothing in the banking act, as we read it, which limits a shareholder or shareholders, seeking knowledge for a lawful purpose of an institution in which they have a proprietary interest, to an application to the Comptroller for an examination by a public officer of the affairs of their company. A director need only own 10 shares of the stock. Rev. Stat. § 5146, U. S. Comp. Stat. 1901, p. 3463. The directors together need not necessarily own the controlling interest in the bank. Yet it is contended they, or the officers of their choice, may deny stockholders the privilege of inspecting, for legitimate purposes, the property which belongs to them.

But, it is said, the right of the shareholder to inspect the books is cut off by § 5241 (U. S. Comp Stat. 1901, p. 3517), providing "no association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice." We are unable to find any definition of "visitorial powers" which can be held to include the common-law right of the shareholder to inspect the books of the corporation. "Visitation" is defined by Bouvier (Law Dict. vol. 2, p. 1199) as follows:

"The act of examining into the affairs of a corporation.

"The power of visitation is applicable only to ecclesiastical and eleemosynary corporations. 1 Bl. Com. 480. The visitation of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent, Com. 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes. [*Dartmouth College* v. *Woodward*] 4 Wheat. 518, 4 L. ed. 629."

*The origin and nature of "visitorial"[158]

power received full discussion in the case cited by Bouvier from 4 Wheaton. See opinion of Mr. Justice Story in *Dartmouth College Case*, 4 Wheat. 673, 4 L. ed. 668.

The meaning of this section was before Judge Baxter in the case of *First Nat. Bank v. Hughes*, 6 Fed. 737, and of the meaning of the term "visitorial powers," as used in § 5241, that learned judge said:

"Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'"

At common law the right of visitation was exercised by the King as to civil corporations, and as to eleemosynary ones, by the founder or donor. 1 Cooley's Bl. Com. 481. "In the United States the legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause a forfeiture of their charters." 1 Cooley's Bl. Com. 482, note.

In the case before us the supreme court of Utah quotes from Merrill on Mandamus, as follows:

"Visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and, in the absence of such, the state is the visitor of all corporations."

In no case or authority that we have been able to find has there been a definition of this right which would include the private right of the shareholder to have an examination of the business in which he is interested, and the right of discovery of the methods and means by which the agents of the corporation are conducting its affairs.

[159] The right of visitation *being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind, in passing this section, that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and authorizing the appointment of a receiver to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class "vested in courts of justice" which are expressly excepted from the inhibition of the statute.

Finding nothing in the act of Congress limiting the common-law right of the shareholder, we think that, under the circumstances of this case, he was wrongfully denied an inspection of the books and accounts of the bank by its officers, and *the judgment of the Supreme Court of Utah is affirmed.*

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*UNION PACIFIC RAILROAD COMPANY, [160
Appt.,
v.
MASON CITY & FORT DODGE RAILROAD COMPANY.

(See S. C. Reporter's ed. 160–171.)

1. **Stare decisis—obiter dictum.**—A case is of equal authority upon each of two distinct and sufficient grounds upon which an appellate court rests its affirmance of a judgment, although only one of those grounds was considered in the court below.

2. **Railroads—joint use of bridge.**—The Union Pacific Railroad Company was required to permit the trains of all roads terminating at the Missouri river at Omaha to use its bridge at that point up to the fair limits of capacity, and upon payment of reasonable compensation, by the act of February 24, 1871 (16 Stat. at L. 430, chap. 67), authorizing the construction of the bridge and providing that for its use and protection the company should be empowered, governed, and limited by the provisions of the act of July 25, 1866 (14 Stat. at L. 244, chap. 246), to authorize the construction of certain bridges, and to establish them as post roads, since it must have been intended by that provision to incorporate not only those provisions of the earlier act in terms applied to all the bridges therein authorized, but also the provision for joint use, applied to substantially all the bridges, although, in reference to a single bridge, other and special directions were made.

NOTE.—*On stare decisis—obiter dicta*—see note to Union P. R. Co. v. Mason City & Ft. D. R. Co. 64 C. C. A. 361.

3. Mortgage—effect of sale of railroad under foreclosure.—The successor to the Union Pacific Railroad Company by purchase under a foreclosure sale of a first mortgage of the railway property did not take the property free from the obligation, under the act of February 24, 1871 (16 Stat. at L. 430, chap. 67), enacted subsequent to the execution of the mortgage, in the exercise by Congress of its reserved right to alter, amend, or repeal the act incorporating the railroad company, to permit the joint use, by the trains of all railroads terminating at Omaha, of the bridge whose construction at that point by the Union Pacific Railroad Company was authorized by that statute.

[No. 18.]

Argued October 19, 20, 1905. Decided November 6, 1905.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska, requiring the Union Pacific Railroad Company to permit the joint use of a railroad bridge at Omaha by the trains of a railroad terminating at the Missouri river at that point. *Affirmed.*

See same case below, 64 C. C. A. 348, 128 Fed. 230.

Statement by Mr. Justice **Brewer:**

On a bill filed by the Mason City & Fort Dodge Railroad Company (hereinafter called the Mason City company), the circuit court of the United States for the district of Nebraska entered a decree, August 19, 1903 (124 Fed. 409), requiring the Union Pacific Railroad Company (hereinafter called the Union Pacific company) to let the plaintiff into the joint use of the railroad bridge between Omaha and Council Bluffs, and the approaches thereto. On ap-
[161] peal this decree was affirmed *by the circuit court of appeals for the eighth circuit, February 29, 1904. 64 C. C. A. 348, 128 Fed. 230. Thereupon the Union Pacific company appealed to this court.

Messrs. **John N. Baldwin** and **Maxwell Evarts** argued the cause and filed a brief for appellant:

General expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits.

Cohen v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Harriman* v. *Northern Securities Co.* 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493.

The power to alter, amend, and repeal the charter of the Union Pacific Railroad Company did not give Congress the power to take from the railroad company property acquired by it in the exercise of its franchises and corporate powers; and its roadbed and the use thereof west of Twentieth street, Ohama, could not be taken from it and given to another under the guise of an amendment of its charter.

Sinking Fund Cases, 99 U. S. 700, 720, 25 L. ed. 496, 501; *Re Parrott*, 1 Fed. 481; *United States* v. *Union P. R. Co.* 160 U. S. 1, 33, 40 L. ed. 319, 330, 16 Sup. Ct. Rep. 190; *Rice* v. *Minnesota & N. W. R. Co.* 1 Black, 360, 17 L. ed. 147; *Coast Line R. Co.* v. *Savannah*, 30 Fed. 646; *Detroit* v. *Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *People* v. *O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Miller* v. *New York & E. R. Co.* 21 Barb. 513; *Johnson* v. *Goodyear Min. Co.* 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *Orr* v. *Bracken County*, 81 Ky. 593.

The appellant, under the foreclosure of the mortgage of March 1, 1865, acquired the properties of the old company free and clear of any lien, charge, or duty, of or to the United States, under any act of Congress, except as specified in the decree of foreclosure.

Toledo, D. & B. R. Co. v. *Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; *Dunham* v. *Cincinnati, P. & C. R. Co.* 1 Wall. 254, 17 L. ed. 584; *Galveston, H. & H. R. Co.* v. *Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324.

Mr. **Frank B. Kellogg** argued the cause, and, with *Messrs. James M. Woolworth, William D. McHugh*, and *Cordenio A. Severance*, filed a brief for appellee:

Where an adjudication is placed upon two or more grounds, the decision of each will be held to be of binding force, and not *obiter.*

Florida C. R. Co. v. *Schutte*, 103 U. S. 118, 26 L. ed. 327; *Alexander* v. *Worthington*, 5 Md. 489; *Jones* v. *Habersham*, 107 U. S. 179, 27 L. ed. 403, 2 Sup. Ct. Rep. 336; *Buchner* v. *Chicago, M. & N. W. R. Co.* 60 Wis. 264, 19 N. W. 56; Bouvier, Law Dict. Rawle's Revision, pp. 567, 569; *Becker* v. *Chester*, 115 Wis. 90, 91 N. W. 100; *Hawes* v. *Contra Costa Water Co.* 5 Sawy. 287, Fed. Cas. No. 6,235; *Brown* v. *Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771.

The decision in the Rock Island case construing the Union Pacific bridge act became a rule of property, governing the use of the bridge and tracks involved in this case, on which all parties have a right to rely; and it should not now be disturbed.

Harris v. *Jex*, 55 N. Y. 421, 14 Am. Rep. 285; *Levy* v. *Hitsche*, 40 La. Ann. 500, 4 So. 472; *Minnesota Min. Co.* v. *National*

Min. Co. 3 Wall. 334, 18 L. ed. 43; *Frank* v. *Evansville & I. R. Co.* 111 Ind. 132, 12 N. E. 105; *Hines* v. *Driver*, 89 Ind. 342; *Paulson* v. *Portland*, 16 Or. 450, 1 L.R.A. 673, 19 Pac. 450; *Garth* v. *Arnold*, 53 C. C. A. 200, 115 Fed. 471.

So zealous has this court been to maintain the stability of the law, that it has refused to follow the highest courts of the states in the construction of their statutes, where, after the issue of negotiable securities, the rules of law pertaining to their validity have been changed by the decisions of the Supreme Court.

Mitchell v. *Burlington*, 4 Wall. 270, 18 L. ed. 350; *Gelpcke* v. *Dubuque*, 1 Wall. 202, 17 L. ed. 524; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 18 L. ed. 38.

Admitting, for the purpose of this argument, that the question is not *stare decisis*, the conclusions reached by the court in the Rock Island case were correct.

Union P. R. Co. v. *Hall*, 91 U. S. 344–346, 23 L. ed. 428, 429; *United States* v. *Union P. R. Co.* 91 U. S. 80, 23 L. ed. 228.

The rules of construction which counsel is invoking in this case are too technical to receive the favorable consideration of a court of equity.

Joy v. *St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Lathrop* v. *Junction R. Co.* 4 Fed. 41.

All possible doubt as to the proper construction to be placed upon the act of Congress and the tripartite agreement contained in the Saunder's deed is removed when we consider what the first Pacific company and this defendant have done under it.

Atty. Gen. v. *Drummond*, 1 Drury & W. 353; *Chicago G. W. R. Co.* v. *Northern P. R. Co.* 42 C. C. A. 25, 101 Fed. 795; *Central Trust Co.* v. *Wabash. St. L. & P. R. Co.* 34 Fed. 254; *Topliff* v. *Topliff*, 122 U. S. 121, 127, 30 L. ed. 1110, 1112, 7 Sup. Ct. Rep. 1057; *Steinbach* v. *Stewart*, 11 Wall. 567, 576, 20 L. ed. 56, 58; *Hamm* v. *San Francisco*, 9 Sawy. 31, 17 Fed. 119; *Mathews* v. *Danahy*, 26 Mo. App. 660; *Jennings* v. *Whitehead & A. Mach. Co.* 138 Mass. 594; *District of Columbia* v. *Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Leavitt* v. *Windsor Land & Invest. Co.* 4 C. C. A. 425, 12 U. S. App. 193, 54 Fed. 439; *Metropolitan Nat. Bank* v. *Benedict Co.* 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 182.

The act of 1871 was an amendment to the charter of the Union Pacific Railroad Company, granting to it certain franchises and privileges, and providing the manner of the use of a certain part of its property for reasonable compensation.

Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; *Canada Southern R. Co.* v. *International Bridge Co.* 8 Fed. 192; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 567, 38 L. ed. 273, 14 Sup. Ct. Rep. 437; *Tomlinson* v. *Jessup*, 15 Wall. 459, 21 L. ed. 206; *Miller* v. *New York*, 15 Wall. 498, 21 L. ed. 104; *Maine C. R. Co.* v. *Maine*, 96 U. S. 510, 24 L. ed. 840; *Pearsall* v. *Great Northern R. Co.* 161 U. S. 646, 656, 40 L. ed. 838, 840, 16 Sup. Ct. Rep. 705; *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 589, 41 L. ed. 274, 16 Sup. Ct. Rep. 1173.

The property was brought into existence by virtue of the privileges granted by Congress, and by the money raised by the city and the county; and when the first-mortgage bondholders claimed a lien upon it, foreclosed the mortgage, and took the property, they, of necessity, accepted that property burdened with the easements imposed by the donators and by Congress.

Lake Erie & W. R. Co. v. *Priest*, 131 Ind. 413, 31 N. E. 77; *Midland R. Co.* v. *Fisher*, 125 Ind. 19, 8 L.R.A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414, 34 L. ed. 1014, 11 Sup. Ct. Rep. 357; *St. Joseph Union Depot Co.* v. *Chicago, R. I. & P. R. Co.* 32 C. C. A. 284, 60 U. S. App. 675, 89 Fed. 648; *Fosdick* v. *Schall*, 99 U. S. 251, 25 L. ed. 342; *United States* v. *New Orleans & O. R. Co.* (*New Orleans & O. R. Co.* v. *Mullen*) 12 Wall. 362, 20 L. ed. 434; *Bear Lake & River Waterworks & Irrig. Co.* v. *Garland*, 164 U. S. 16, 41 L. ed. 333, 17 Sup. Ct. Rep. 7; *Northern P. R. Co.* v. *Townsend*, 190 U. S. 267, 47 L. ed. 1045, 23 Sup. Ct. Rep. 671.

To say that a railroad company having imposed upon it certain public duties and obligations can relieve itself of those duties by a reorganization and foreclosure in pursuance of a plan of reorganization like this is, at least, an exceedingly radical doctrine.

Louisville Trust Co. v. *Louisville, N. A. & C. R. Co.* 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; *Northern P. R. Co.* v. *Townsend, supra; Chicago, R. I. & P. R. Co.* v. *Howard*, 7 Wall. 392, 19 L. ed. 117; *Central R. Co.* v. *Paul*, 35 C. C. A. 639, 93 Fed. 878; *Hill* v. *Gruell*, 42 Ill. App. 411; *United Waterworks Co.* v. *Omaha Water Co.* 164 N. Y. 41, 58 N. E. 58.

Conceding, for the purposes of this argument, that the bridge law did impose a burden, and was something more than a mere regulation of the use of the bridge for a reasonable compensation, still Congress, under its reserve power to alter, amend, or repeal this act, could impose this burden.

United States v. *Union P. R. Co.* 160 U. S. 36, 40 L. ed. 331, 16 Sup. Ct. Rep. 190; *Greenwood* v. *Union Freight & R. Co.* 105 U. S. 13, 26 L. ed. 961; *Spring Valley*

Waterworks Co. v. *Schottler*, 110 U. S. 348, 28 L. ed. 174, 4 Sup. Ct. Rep. 48; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346.

Mr. Justice **Brewer** delivered the opinion of the court:

The Mason City company contends that its right to the use of the bridge and approaches was determined by the decision of this court in *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173. And further, that if mistaken in this contention, it has that right under the statutes of the United States, and by the terms of a contract between the Union Pacific Railroad Company, on the one hand, and the city of Omaha and
[165] county of Douglass, Nebraska, **on the** *other. The case in 163 U. S. arose on two contracts: one between the Union Pacific Railway Company and the Chicago, Rock Island, & Pacific Railway Company, and the other between the first-named company and the Chicago, Milwaukee, & St. Paul Railway Company. The opinion of the circuit court (47 Fed. 15) considered only the contracts, sustained them, and entered a decree for the plaintiffs, awarding the joint use of the bridge and its approaches. That decree was affirmed by the circuit court of appeals (2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309), and the case was thereupon brought on appeal to this court. Here the decision was rested not simply on the contracts, but also on an obligation held to have been imposed on the defendant by the statutes of the United States, the court saying (p. 586, L. ed. p. 273, Sup. Ct. Rep. 1181):

"For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, imposed on the Pacific company the duty of permitting the Rock Island company to run its engines, cars, and trains over the bridge and the tracks between Council Bluffs and Omaha, and, we think, that South Omaha was included."

This was followed by several paragraphs pointing out the statutes imposing the duty. Counsel for the Union Pacific company in the case at bar earnestly contend that so much of that opinion as referred to this statutory obligation was *obiter dictum*, that the statutes were misconstrued, and also that the status of the present Union Pacific company differs so much from that of the then defendant as to make the ruling inapplicable.

We are unable to yield our assent to these contentions. While the claim of the plaintiffs in that case was founded directly upon contracts, yet, if there were a statutory duty to let them into the joint use of the bridge and its approaches, that was enough to sustain a decree in their favor, and the contracts might be regarded as simply relieving the court of the work of settling minor matters, such as method of use, compensation therefor, and matter of control. Indeed, the alleged invalidity of the contracts was rested largely on the scope of the statutes, *and the duties to[166] the government and the public imposed thereby on the railroad company. Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*. *Florida C. R. Co.* v. *Schutte*, 103 U. S. 118, 26 L. ed. 327, in which this court said (p. 143, L. ed. 336):

"It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

Further, we see no reason to question the conclusion announced in the former opinion. Chap. 67 of the Laws of Congress, 1871 (16 Stat. at L. 430), granting power to issue bonds for the construction of the bridge, provided that "for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled 'An Act to Authorize the Construction of Certain Bridges, and to Establish Them as Post Roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto."

The act referred to in this quotation (14 Stat. at L. 244, chap. 246) authorized the construction of nine bridges, as to the first of which (a bridge across the Mississippi river at Quincy) it was stated that "when constructed, all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for

reasonable compensation, to be made to the owners of said bridge."

[167] *To the seven provided for by succeeding sections authority is granted "upon the same terms, in the same manner, under the same restrictions, and with the same privileges, as is provided for in this act in relation to the bridge at Quincy, Illinois." [§ 4.]

The remaining one of the nine bridges (that over the Mississippi river at St. Louis) was to be constructed by the St. Louis & Illinois Bridge Company, "subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act." [§ 11.]

It is insisted that the act of 1871 makes applicable to the Omaha bridge only the two or three provisions in the act of 1866 common to all the bridges named therein, and as the section authorizing the bridge at St. Louis contained no direction for its use by terminating railroads, that requirement, although imposed on all the other bridges, was not brought into the act of 1871, and is inapplicable to the Omaha bridge. Counsel for the Union Pacific company have also called our attention to a few statutes authorizing the construction of bridges, which contain no provision in respect to use by other railroad companies. As against this, counsel for the Mason City company have cited over 350 acts, to be found in the several statutes of Congress, from the fifteenth to the thirty-second volume, in each of which there is a direction for use by other companies. Obviously, that was the general policy of Congress, and the few exceptions thereto were dictated by the peculiar circumstances of the cases.

Bearing in mind this general policy of the government, we think it a fair construction of the act of 1871 that, incorporating, as it did, the provisions of the act of 1866, it must have intended to incorporate not merely those in terms applied to all the bridges, but also one in harmony with that general policy and applied to substantially all, and this, although, in reference to a single bridge, other and special directions were made. Aside, therefore, from any reliance upon the doctrine of *stare decisis*, the act of 1871 must be

[168] considered as requiring the *Union Pacific company to permit the trains of all roads terminating at the Missouri river at Omaha to use its bridge up to the fair limits of capacity, and on payment of reasonable compensation.

It may be remarked in passing that it is expressly conceded in this case by the Union Pacific company that there is no question of the reasonableness of the compensation tendered, or the capacity of the bridge and approaches for the service asked by the Mason City company.

The final question is this: Is the status of the present Union Pacific Railroad Company, the appellant, so different from that of the company to which it is a successor as to render inapplicable the decision in the Rock Island case, and to nullify the requirements of the act of 1871?

What are the facts? The acts of Congress, July 1, 1862 (12 Stat. at L. 489, chap. 120), July 2, 1864 (13 Stat. at L. 356, chap. 216), creating the Union Pacific Railroad Company, authorized it to mortgage its road for $16,000 a mile (increased to $48,000 a mile in the mountainous districts), and loaned the credit of the United States for an equal amount, secured by a second lien on the property. The initial point of the main line of the Pacific Railroad was fixed on the Iowa bank of the Missouri river, opposite the city of Omaha. *Union P. R. Co.* v. *Hall*, 91 U. S. 343, 23 L. ed. 428. On March 1, 1865, the Union Pacific Railroad Company executed its first mortgage, conveying its entire line from the western boundary of the state of Iowa to its western terminus. This mortgage in terms included the road "heretofore constructed or hereafter to be constructed." The act of 1871 authorized a mortgage of not exceeding two and a half million of dollars to raise money for the construction of the bridge. This mortgage was executed, the money raised, and the bridge built. The act of 1862, § 18, provided that "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, . . . Congress may, at any time, having due regard for the rights of said companies *named herein, add [169] to, alter, amend, or repeal this act." The act of 1864, which was an amendment of the act of 1862, in § 22 preserved the right of Congress to at any time "alter, amend, or repeal this act." It also, in § 9, gave express authority to the company to maintain ferries or construct bridges over the Missouri river. The mortgage of 1865 was foreclosed, and the present appellant, the Union Pacific company, a corporation organized under the laws of Utah, became the purchaser. The contention now is that, as this mortgage antedated the act of 1871, the purchaser at the foreclosure thereof took the property freed from any burdens or obligations imposed by that act. It held the bridge as a part of its line, under no obligations to permit its use by any other company.

We shall not stop to inquire whether this

foreclosure and sale was anything more than a reorganization under the form of a judicial proceeding, nor whether, if it were in all respects a bona fida sale to an independent third party, such sale took the property out of the jurisdiction of Congress, and prevented that body from further legislation in aid of the purpose of the act, "namely, to promote the public interest and welfare." The question before us is whether an amendment to the act, purely administrative in the character of the burdens imposed, aimed to promote the public interest and welfare, enacted while the title to the property remained in the original company, a corporation chartered by Congress, which preserves intact all the pecuniary rights of the company, and whose privileges are accepted and acted upon by the company, is denuded of vitality by a sale to a new company under foreclosure of a mortgage executed prior to such legislation. That question must be answered in the negative.

The first transcontinental railroad, to wit, the Union Pacific Railroad, was a great public undertaking. Private capital was believed to be and was, in fact, unwilling to attempt it. Congress felt that the public interest required its construction. It sought to interest private capital in the [170] enterprise, and believed *that the work could be better done through the instrumentality of a corporation. At the same time it became practically the sponsor for the enterprise by large donations of government credit and public lands. In so doing it was not seeking to aid a purely private enterprise. What it did was in furtherance of the public interests, and it reserved to itself the right to alter, amend, or repeal the act in so far as was necessary to promote those interests, limiting its action by the single proviso that due regard must be had to the rights of the company. Everyone who purchased the bonds of the company or gave it credit did so with full knowledge that this was a quasi-national enterprise, and that, if deemed necessary by Congress, the interests of the public might be promoted by additional legislation, in so far as the pecuniary rights of the company and its creditors were not sacrificed. The construction of the bridge, doing away, as it did, with the delay and annoyance of transportation across the river by a ferry, added largely, not merely to the value of the entire property, but also to the great convenience of the traveling and shipping public. The act giving authority for a large issue of bonds, thereby insuring the immediate construction of the bridge, was accompanied by a proviso that, upon reasonable compensation. the use of the bridge should be accorded to other companies. Availing itself of the privileges conferred, the company accepted the amendment in its entirety, and is bound by its terms as fully as though it had embodied them in a contract. So long as the full facilities of the Union Pacific company were not interfered with thereby, and a reasonable compensation was paid therefor, it cannot in any just sense be held that its rights were not duly regarded. And it cannot be tolerated that a private individual or a state corporation can, by the purchase at a judicial sale of the property, strike down all the legislation of Congress passed subsequently to the mortgage, for the promotion of the public interests. We cannot assent to the contention that the present owner of the property holds it free from obedience to all such legislation. Now, as before *the foreclosure and sale, the [171] public interests are to be regarded, and not simply private purposes, wishes, or prejudices.

One thing more requires notice. It is contended that the terms of the decree are too broad; that they give to the Mason City company, not merely the use of the bridge and its approaches, including therein connections with Western roads terminating at Omaha, but also the use of all side or spur tracks connecting the Union Pacific Railroad with private industries, and the track extending northward from the main line of the Union Pacific to the old ferry crossing. On the argument counsel for the appellee stated that his company made no claim to a right to use these tracks. If the language of the decree is open to this misconstruction it should be corrected, and the circuit court may make such correction on proper application.

Decree affirmed.

Mr. Justice **McKenna** took no part in the decision of this case.

NEDERLAND LIFE INSURANCE COMPANY, Limited, *Petitioner*,

v.

MARY MEINERT.

(See S. C. Reporter's ed. 171–182.)

Insurance—sufficiency of notice of time for payment of premium.—Prefixing the

NOTE.—*On forfeiture of life insurance for nonpayment of premium*—see notes to Thompson v. Knickerbocker L. Ins. Co. 26 L. ed. U. S. 765, and Gunther v. New Orleans Cotton Exch. Mut. Aid Asso. 2 L.R.A. 118.

On the necessity and sufficiency of notice of insurance premiums, dues, and assessments—see note to Ferrenbach v. Mutual Reserve Fund Life Asso. 59 C. C. A. 317.

words "the conditions of your policy provide" to that part of the notice of the time for payment of the premium which, under N. Y. Laws 1892, chap. 690, § 92, must state that, unless paid by or before the day it falls due, the policy and all payments thereon will become forfeited and void, does not render such notice insufficient as a basis for forfeiture for nonpayment, although the policy in fact provides for a forfeiture only in case of nonpayment of the premium within thirty days after it is due.

[No. 11.]

Argued October 18, 1905. Decided November 6, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Indiana in favor of plaintiff in an action on a policy of life insurance. Judgments of both courts *reversed* and the cause remanded to the Circuit Court, with instructions to enter judgment for defendant.

See same case below, 62 C. C. A. 377, 127 Fed. 651.

Statement by Mr. Justice **Peckham:**

Mrs. Meinert, the plaintiff below, filed in the circuit court of the United States for the district of Indiana her amended complaint, by leave of court, against the petitioner, the insurance company, to recover $5,000 on a certain policy of insurance for that sum on the life of her deceased husband, William Meinert. She obtained judgment on the trial before a judge without a jury, which was affirmed in the circuit court of appeals. 62 C. C. A. 377, 127 Fed. 651. This court allowed a writ of certiorari to review that judgment, and the case is now here upon the return to that writ.

The material facts are the following: The company, on the 5th day of March, 1896, issued the policy in suit in consideration of the payment of quarterly premiums of $25.25, each, on or before the 5th days of March, June, September, and December in each year for five years; after that the payments were to be $64.25 for the following fourteen years or until the previous death of the insured, should his death occur before the expiration of the specified period. Four quarterly payments of $25.25 each were made, the last one having been made on or before December 5, 1896. No other instalment of premium was ever paid. The assured died on the 24th day of March, 1900. Over three years and three months had passed, therefore, since the last payment of any premium. Meinert, up to the time of his death, lived at Evansville, Indiana.

On the 15th day of February, 1897, the company sent him by mail a written notice as follows:

*Nederland Life Insurance Co. (Ld.), es-[173]
tablished in Amsterdam (Holland), 1858. United States Branch, 874 Broadway, New York city.

Pursuant to chapter 690 of the insurance law of 1892 of the state of New York, you are hereby notified that the quarterly premium of $25.25 on policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid at the United States branch office of the company, or to a person authorized to collect such premium, holding the company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DuBourcq,
President of the U. S. Branch.

If payment is made to the company directly, it can be done by valid draft, check, postal or express money order, made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

This notice was duly received by the assured February 16, 1897.

On Saturday, April 3, 1897, the company sent him by mail another notice, as follows:

Nederland Life Insurance Co., Limited, established 1858, Amsterdam, Holland. United States Branch, 874 Broadway, New York.

New York, April 3, 1897.

William Meinert,
217 Law ave., Evansville, Indiana.

Dear Sir:—

The premium on your policy which fell due on the 5th March has not been paid, and the policy is therefore *null and void.[174]
I beg to inform you, however, that if the same is paid within ten days your policy will be reinstated.

L. I. DuBourcq.
President.

Policy No. 58021.

This notice was received by him in due course of mail on Monday, April 5, 1897, but he never acknowledged its receipt, and never took any steps to have the policy reinstated. On April 22, 1897, the company entered on the appropriate records of its office the declaration that the policy was forfeited and lapsed for failure to pay instalment of premium.

It was agreed between the company and the assured that the provisions printed or

written upon the back of the policy were to be taken as part of it, as fully as if they were set forth at length on its face, and signed by the parties. One of them was article 2, which reads as follows:

"In case of nonpayment of any annual premium or instalment thereof within thirty days after the same shall fall due, this policy shall be null and void, subject, however, to provisions as to cash surrender and paid-up policy values. The company will, however, as a matter of favor, and not of right, mail notice to the insured or the assignee, at the last address furnished by him or them to the company, to the effect that the policy may be re-established by the payment of the annual premium or instalment thereof still due, within ten days after mailing notice."

The application for the insurance, which, by agreement, was also made part of the contract, provided that "this application shall be governed by the laws of the state of New York, the place of said contract to be the principal office in the United States of said company, in the city of New York."

Mr. **John L. Cadwalader** argued the cause, and, with *Messrs. George Coggill* and *George W. Wickersham*, filed a brief for petitioner.

Mr. **G. K. Denton** argued the cause, and, with *Messrs. Larz. A. Whitcomb* and *Albert J. Beveridge*, filed a brief for respondent.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The judgment in favor of the plaintiff below for the recovery of the amount found due upon the policy in question is based on the above-mentioned facts, the courts holding that the policy was not forfeited, but was in [177] full force because of the *alleged failure of the company to comply with the law of New York in relation to giving the notice provided for therein. The provision in question is found in § 92, chapter 690, of the Laws of New York for 1892. The section is set forth in the margin.†

The alleged failure to comply with the terms of the section consists in prefixing the words, "*the conditions of your policy provide*," to the notice required by the statute, which provides that the notice shall state that "unless such premium . . . then due shall be paid . . . by or before the day it falls *due" (March 5, 1897), [178] "the policy and all payments thereon will become forfeited and void," etc., whereas, by reference to the policy, article 2, indorsed on the back thereof, it will be seen that if the premium is not paid *within thirty days* after the same shall fall due, the policy shall be null and void. The notice thus mistakenly states that the policy "by its conditions" will become void, etc., while in truth it is the language of the statute which the notice uses.

The company contends that the law of New York does not, for the reasons stated in the brief of counsel, apply to the particular facts set forth herein, and it also contends that the notice which was in fact given fully complied with the terms of the law. We pass over the first contention without discussion, because we are of opinion that, assuming the New York statute to apply, the notice given by the company was sufficient, and the policy was forfeited long before the death of the plaintiff's husband.

Referring to the statute, it is seen that, by omitting the above-mentioned words, "the conditions of your policy provide," the rest of the notice actually given does comply with the terms of the statute. The notice informed the assured that, unless the premium which would fall due on the 5th of March, 1897, if the policy was then in force, should be paid by or before that date, the policy and all payments thereon would become forfeited and void, except as to the right to a cash surrender value or paid-up policy. This is exactly what the statute required the notice to state. The statute does not require the notice to state that the policy would become forfeited only after the expiration of thirty days after the payment became due, or notice was mailed, in case such payment were not made, but it says distinctly that the notice shall state that

†Laws of New York, chap. 690, § 92.

"92. No forfeiture of policy without notice. "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest, or instalment, or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five, days prior to the day when the same is payable.

"The notice shall also state that unless

failure to pay the premium by or before the date it falls due will forfeit the policy and all payments thereon.

Why should the mistaken statement as to the conditions of the policy prove fatal, when the exact language of the statute as to the contents of the notice is used? The [179] error of fact as *to the consequence of a failure to pay, as contained in the notice, would be exactly the same if the words above referred to had been omitted; because the statute provides that the assured shall, nevertheless, have thirty days after mailing the notice before a forfeiture can be asserted. There can be no doubt that the premium did become due on the 5th of March, and the thirty days' extension simply permitted a payment within that time to save a forfeiture.

Now, whether the statement in the notice were incorrect because of a failure to state accurately the conditions of the policy, or because of a failure to tell the assured the subsequent provisions in the statute as to forfeiture, is not in either case material, so long as the notice follows the statute; and if it do that, it is good, even though it contains such a mistake as is set forth herein. The purpose of the statute was to prevent a forfeiture by the nonpayment of the premium when due, because of inadvertence or forgetfulness; and when the assured receives the very notice required by the statute, its purpose is fulfilled, although the notice contains in another respect such a mistake as does this notice. It is most unreasonable to hold that a statement of the consequence of the failure to pay the premium when due, mistakenly attributed in the notice to a provision in the policy, should be held fatal, when the same statement, without attributing it to a provision in the policy, would be a fulfilment of the requirements of the statute. In either case there would be an error as to the time of forfeiture, but there would also be a correct statement, in the very words of the statute, of the time the premium was payable, its amount, and where it could be paid. In such case to assume that an injury might follow is, as we think, to assume an ignorance or carelessness on the part of the assured which is unreasonable as well as improbable. A spark of intelligence on the part of the assured would prompt him to refer to his policy, and he would then see the mistake of fact made in the notice as to the length of the time he had in which to pay in order to prevent a forfeiture. If he thought the notice rightly stated the fact as *to forfeiture, the natural result would be [180] greater care to pay, or some application to extend the time of payment on or before the day when the payment became due. Of that day he had the ample notice provided in the statute. It is scarcely possible to imagine any injury resulting from this error, although extraordinary and wonderful things do sometimes occur. Courts, however, cannot proceed upon the theory that policy holders are *non compotes mentis*, and that the natural result of such a mistake of fact upon a person of ordinary intelligence cannot be assumed in the case of a holder of a policy of insurance. It cannot reasonably be assumed that the assured might be betrayed into not doing at all what the notice tells him must be done on or before a certain day in order to save a forfeiture, because the notice omits to tell him of the extended time before the forfeiture can really be enforced, nor can such failure be anticipated as the result of the mistake. So long as the assured has in fact the notice required by law, we are of opinion that such a mistake as was made in this case is immaterial.

The cases from the New York courts do not decide contrary to our decision herein. In *Phelan* v. *Northwestern Mut. L. Ins. Co.* 113 N. Y. 147, 10 Am. St. Rep. 441, 20 N. E. 827, the notice was not like the one in this case. The notice spoken of there, it was held, did not comply with the statute, because it was not given in its words, and the language actually used was held by the majority of the court to be so far from complying with the statute in a material manner as to render it of no use. The court said that the notice, instead of saying that the policy would become forfeited and void, said that "members neglecting so to pay are carrying their own risks;" and that the latter words, while they might be comprehensive to those versed in the language of insurers, and accustomed to their phrase-

such premium, interest, instalment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy, as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

ology, were not the language of the statute, and did not embody the notice which the statute required.

The other case (*Schad* v. *Security Mut. Life Asso.* 155 N. Y. 640, 49 N. E. 1104) affirmed, without any opinion, the decision of
[181] the *appellate division of the supreme court, reported in 11 App. Div. 487, 42 N. Y. Supp. 314, where it was held that a statement that in case of the nonpayment of the premium when it became due the policy would cease to be in force did not comply with the notice required by the statute, that if the premium was not paid when due the policy and all payments thereon would become forfeited and void.

In *McDougall* v. *Provident Sav. Life Assur. Soc.* 135 N. Y. 551, 32 N. E. 251, it was held that where the policy was out of the ordinary form, a notice which did not follow literally the words of the statute, but contained a statement reminding the assured of the time and place when and where to make any payments required by the terms of the contract, the amount thereof, and the effect of nonpayment, was sufficient.

A statute of this kind should not be construed so as to make it a trap for either side. Forfeitures, though generally not regarded with favor by courts of equity, yet are necessary, and should be fairly enforced, in cases of life insurance. Promptness of payment is essential in such business. *New York L. Ins. Co.* v. *Statham*, 93 U. S. 24–30, 23 L. ed. 789–791.

Where, therefore, the assured has in truth received notice (as provided by statute) of the time of payment of the premium, its amount, and where it can be paid, and a statement is made in the words of the statute itself as to the effect of nonpayment, a mistaken additional statement like the one made here ought not to be held a failure to comply with the terms of the statute, and thus prevent a forfeiture which the assured evidently contemplated.

We are aware of the case of *New York L. Ins. Co.* v. *Dingley*, 35 C. C. A. 245, 93 Fed. 153, but we cannot agree with the views therein expressed.

The case before us shows no evidence of any injury to the assured on account of the notice. He received, as the record shows, another notice on the 5th of April, informing him that his policy was forfeited, but that it could be reinstated by the simple payment of the premium within ten days
[182] thereafter. *He made no acknowledgment of the receipt of the notice, failed to pay the premium, and asked no extension of time. Finally, on the 22d day of April, the forfeiture was noted on the books of the company. We think that the statute was complied with and that the forfeiture was legal.

The judgments of the Circuit Court of Appeals and the Circuit Court for the District of Indiana must be reversed and the cause remanded to the latter court, with instructions to enter judgment for the defendant.

Reversed.

CORKRAN OIL & DEVELOPMENT COMPANY, *Plff. in Err.*,
v.
LAURENT ARNAUDET, Arthur Latreille, Eugene Houssiere, *et al.*

(See S. C. Reporter's ed. 182–194.)

1. **Error to state court—Federal question—when raised in time.**—Counsel's inadvertence in relying in the state court on the 5th Amendment to the Federal Constitution as invalidating a provision of the state Constitution is not corrected in time to sustain a writ of error from the Supreme Court of the United States by alleging a violation of the 14th Amendment in a petition for rehearing in the highest state court, which was denied without opinion.

2. **Error to state court—the record for jurisdictional purposes.**—The petition for writ of error from the Supreme Court of the United States to a state court, and the assignment of errors therein, form no part of the record on which to determine whether a Federal question was decided by the state court.

3. **Error to state court—Federal ques-**

NOTE.—*On the general subject of writs of error from United States Supreme Court to state courts*—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998, and *Re* Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L.R.A. 329.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 413.

tion—decision on non-Federal ground.—The judgment of a state court denying the right of possession of real property under a title founded on an act of Congress, which rests upon the ground that the title of the adverse party under a tax deed was made good by prescription under the state Constitution, involves no Federal question which will sustain a writ of error from the Supreme Court of the United States.

[No. 22.]

Argued October 24, 25, 1905. Decided November 13, 1905.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment affirming a judgment of the Eighteenth Judicial District Court for the Parish of Acadia, in that state, in favor of defendants in a petitory action to recover possession of real property. *Dismissed* for want of jurisdiction.

See same case below, 111 La. 563, 35 So. 747.

Statement by Mr. Chief Justice **Fuller:**

This was a petitory action commenced by the Corkran Oil & Development Company in the eighteenth judicial district court for the parish of Acadia, Louisiana, on the 6th day of December, A. D. 1901, against Laurent Arnaudet and others, to recover possession of certain real property. Plaintiff alleged that the land was claimed by Anthony Corkran during his lifetime, and by his heirs and legal representatives after his death, and that said claim, known as the "Corkran grant," was finally confirmed to Corkran's
[183] heirs and legal *representatives by an act of Congress of February 10, 1897, and a patent was issued to them in accordance with the act. That Corkran died in about the year 1819, and his succession was duly opened in St. Landry parish, where he resided, and where the property was situated, and that petitioner acquired title to said property from Corkran's heirs and descendants by acts of sale on various dates specified, said dates being subsequent to November 10, 1901. That neither Corkran and wife, nor any of his heirs, legal representatives, or descendants, ever sold or disposed of their rights, title, or interests in the land before the sales to petitioner, and petitioner was now the just, true, and legal owner of the property. Notwithstanding which, defendants, without legal right or title, and against petitioner's rights, had entered upon, and now possessed and held, said property, and refused to deliver the same to petitioner as of right.

The act of Congress referred to is as follows (29 Stat. at L. 517, chap. 213):

"Chap. 213. An Act to Quiet Title and Possession with Respect to Certain Unconfirmed and Located Private Land Claims in the State of Louisiana.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all the right, title, and interest of the United States in and to the lands situated in the state of Louisiana, known as the located but unconfirmed private land claims therein, aggregating about eighty thousand acres, and specifically described in the list or tabular statement accompanying the report, dated February nineteenth, eighteen hundred and eighty, made by the surveyor general of Louisiana to the Commissioner of the General Land Office, under a resolution of the United States Senate of December second, eighteen hundred and seventy-nine, and which report and list were communicated to the Senate by the Secretary of the Interior on March eighth, eighteen hundred and eighty, as Senate Executive Document numbered one hundred and eleven, Forty-sixth Congress, second session, shall be, and the same are hereby, directed to be granted, released, and relinquished *by the United [184] States, in fee simple, to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and completely, in every respect whatever, as could be done by patents issued therefor according to law.

"Sec. 2. That nothing contained in this act shall in any manner abridge, devest, impair, injure, or prejudice any valid right, title, or interest of any person or persons in or to any portion or part of the lands mentioned in said first section, the true intent of this act being to relinquish and abandon, grant, give, and concede, any and all right, interest, and estate, in law or equity, which the United States is or is supposed to be entitled to in said lands, in favor of all persons, estates, firms, or corporations who would be the true and lawful owners of the same under the laws of Louisiana, including the laws of prescription, in the absence of the said interest and estate of the United States.

"Sec. 3. That the Department of the Interior shall cause patents to issue for such lands, and such patents shall issue in the name of the original claimant as appears in the list or schedule aforesaid, and when issued shall be held to be for the use and benefit of the true and lawful owners as provided in sections one and two of this act."

The patent is as follows:

"The United States of America to all to whom these presents shall come, Greeting:

"Whereas, by the act of Congress approved February 10th, A. D. one thousand eight hun-

dred and ninety-seven, entitled 'An Act to Quiet Title and Possession with Respect to Certain Unconfirmed and Located Private Land Claims in the State of Louisiana,' it is provided—

[Here follows the act of February 10, 1897, in full.]

"And whereas, the private land claim of Anthony Corkran appears in the list of claims embraced in the aforesaid Senate Executive Document numbered one hundred
[185] and eleven, *and, therefore, stands confirmed and entitled to (a patent under the terms of the) act of Congress hereinbefore recited.

"And whereas, the aforesaid claim has been regularly surveyed as section forty-seven in township nine, south of range two west in the southwestern district of Louisiana, containing five hundred and eighty acres and ninety hundredths of an acre, as appears by the plat and descriptive notes thereof on file in the General Land Office of the United States, duly approved by Chas. F. Dickinson, U. S. surveyor general for the state of Louisiana, on the thirtieth day of October, one thousand eight hundred and ninety-seven, which said plat and descriptive note are herein inserted and made a part of these presents, and are in the words and figures following, to wit:

[Plat and descriptive note.]

"Now know ye, that the United States of America, in consideration of the premises herein set forth, and in conformity with the provisions contained in sections two and three of the aforesaid act of the tenth day of February, one thousand and eight hundred and ninety-seven, has given and granted, and by these presents does give and grant, unto the said Anthony Cockran and to his heirs and assigns, the tract of land embraced and described in the foregoing survey.

"To have and to hold the said tract of land with the appurtenances unto the said Anthony Cockran his heirs, assigns, and successors in interest forever."

Dated November 22, 1897.

The defendants filed exceptions, and also answered, admitting that Anthony Corkran, or Cochran, claimed the land in question, and that it was patented to Corkran and his heirs under and according to the act of February 10, 1897, which was fully set forth in the preamble to the patent; and they asserted that the true intent of said act of Congress fully appeared from the 2d section of the act, and that "under and by virtue of the laws of Louisiana, all the right, title, and interest of Anthony Corkran and his heirs in and to the land claimed by plaintiff, and patented as aforesaid to An-
[186] thony *Corkran and his heirs, had been devested long prior to the issuance of the aforesaid patent, and was held in full and complete ownership long prior to the date of said patent by the authors of defendants and by defendants, under valid and perfect titles, by and under the laws of Louisiana, including the laws of prescription."

That the authors of defendants and defendants themselves had acquired by true and valid title all the right, title, interest, and estate at law or in equity in the lands patented to Anthony Corkran and his heirs prior to the issue of the patent, by virtue of the laws of Louisiana providing for the sale of all lands situated within its borders for nonpayment of taxes, by mesne conveyances of said lands from the purchaser at a tax sale December 2, 1882, for unpaid taxes assessed on said realty for the year 1881; and that since said tax sale the real estate in question has always been in the possession of the purchaser at that sale and the authors of defendants and the defendants themselves, and been occupied by them as owners in undisturbed and quiet possession. Defendants further pleaded in bar of the action and in support of their title "the prescription of three, five, and ten years, and that the prescription of three years established by article 233 of the Louisiana Constitution of 1898 is a complete bar to this action." Defendants also asserted that they had paid taxes on said property during the time of their possession, and had placed thereon valuable improvements, amounting in the aggregate to upwards of $20,000. The trial court decided the case on the merits, and found that defendants claimed title to the land in controversy through Henry Gellert, who purchased the land at a tax sale in 1882, for taxes assessed against said land in the name of Anthony Corkran or his heirs, and set forth the facts on which the court held that the land in controversy was subject to such assessment and sale. The trial court held that the defendants were protected by the prescription of three years, provided in article 233 of the Constitution of 1898, as well as the prescription of three and five years pleaded, *and [187]
entered judgment for defendants. On appeal, the judgment was affirmed by the supreme court of Louisiana, the case being reported 111 La. 563, 35 So. 747.

That court found as facts that, under the act of February 10, 1897, a patent issued on November 22, 1897, to Anthony Corkran and his heirs and assigns for the lands in controversy in this suit; that there was not in the record any previous application for the land or entry thereof by Anthony Corkran, but that the records of the Land Department showed that, in 1816, the land was surveyed by Deputy United States Surveyor Aborn, by virtue of "an order from the

principal deputy surveyor of the western district, state of Louisiana, and in conformity with a certificate, B No. 1151, from the board of commissioners of the said western district" for Anthony Corkran; that this map and *procès verbal* were approved May 21, 1817, by Gideon Fritz, principal deputy surveyor; that the land was again surveyed in 1875 by P. A. Thibodaux, deputy surveyor, and across his map is written "Claimed by Anthony Corkran—no confirmation found;" that the officers of the United States Land Office refused to dispose of the land under the general land laws of the United States, and finally Congress passed the act of 1897; that on December 27, 1882, the tax collector of the parish of St. Landry executed a deed in favor of Henry Gellert, which was recorded on the same day in the conveyance book of that parish, reciting that on the 2d day of December, 1882, he had adjudicated to said Gellert at public sale the land in controversy, "being the property of Anthony Corkran or his heirs, as per assessment roll of the state of Louisiana of the year 1881, to satisfy a debt due the said state for the unpaid taxes" for said year; and that "the present defendants are admittedly in possession of the land patented to Anthony Corkran or his heirs." And the court held "that the land in controversy was subject to taxation and sale for nonpayment of taxes," and that the objection that it was not so subject was untenable.

As to the objection that the tax deed was
[188] invalid because *of indefiniteness of description, the court held that the presumption, after the great lapse of time, was that the assessment roll to which the deed referred was sufficiently precise and definite, and was correct and regular, and that defendants were justified in relying on the presumption of regularity, in the absence of actual attack upon the tax proceedings.

The court held further that the argument of plaintiff that Corkran and his heirs were without right of any kind in the land in controversy would leave the government, so far as they were concerned, free to make such disposition of said land as it might think proper; for the result of such argument would be to throw them out of court for want of interest in the subject-matter, their rights resting exclusively upon the government's acts. The court said:

"If Corkran or his heirs had no claim of character such as could be forced or legally entitled to have been recognized, the government could impose such conditions to the voluntary recognition of the same as it thought proper, and the parties claiming under the act of recognition would be forced to accept them or nothing. . . .

"There is no one before the court claiming rights under the government adverse to the rights acquired by the parties under the government, and whatever rights the government itself might have had, or grounds for objection, it had expressly renounced and waived, not only in favor and behalf of Anthony Corkran or his heirs, but of any other person who would have had legal rights had the government itself had none when those rights attached. This renunciation or waiver could as legally and properly have been made by the government in behalf and in favor of this class of persons as it could have been made in favor of the Corkran heirs; and that this renunciation and waiver was intended to cover and protect the rights of the latter class appears on the face of the act of Congress. . . .

"Grant that the act of Congress was an original grant to the Corkran heirs as of date of its passage; it was none the less *a [189] grant coupled with conditions and charges in favor of third parties, and the Corkran heirs were forced to accept the grant with the conditions attached. They could not accept it as far as it might be favorable to them, and repudiate its effect as to other parties. . . . There are no persons claiming adverse rights, and, the government having expressly renounced and waived her own, plaintiff cannot, through her, urge them."

The court pointed out that counsel, notwithstanding the provisions of article 233 of the Constitution of 1898 as to the prescription of three years barring an action seeking to annul a tax title, had brought a direct petitory action against defendants in actual possession of the property which they claimed. The court continued:

"On the trial of the case, defendants established that they and their authors had been in possession as they had alleged, . . .

"Defendants evidently relied in their pleadings and proof upon article 233 of the Constitution, upon the strength of the defensive position which they would hold when they should have shown an actual corporeal possession of the property claimed by themselves and their authors for nineteen or twenty years as owners, and have traced their rights back to a tax sale.

". . . Defendants do not plead prescription against the petitory, but upon an incidentally raised, action of nullity. The sale referred to was strictly a sale for taxes. The property was proceeded against as property belonging to Anthony Corkran or his heirs, and, as matters have now shaped themselves, it must be taken to have belonged to them at the time of the sale. The defendants and their authors not only

had corporeal possession prior to 1898, but it extended (before the institution of this suit) for three years after the adoption of the Constitution of 1898, so that this possession was itself protected permanently from attack by plaintiff by article 233, independently of the merits of the tax title . . .
[190] even *had the property, at the time of the tax sale, not been segregated from the public domain, and even though their title to the property had been void. . . . This permanent protection to possession is equivalent to legal ownership. *Pillow* v. *Roberts*, 13 How. 472, 14 L. ed. 228. . . . Plaintiffs had certainly the right, even on their own theory, to attack defendants' tax title after February, 1897. Having failed to institute their proceeding within the three years from the date of the adoption of the Constitution, their right of action was forever barred. *Re Lockhart*, 109 La. 740, 33 So. 753.

"We think that defendants have sustained their defense under both of the prescriptions invoked,—that of ten years *acquirendi causa*, and that of three years, under article 233 of the Constitution."

Messrs. **Kenneth Baillio** and **E. B. Dubuisson** argued the cause, and, with *Mr. Hampden Story*, filed a brief for plaintiff in error:

Federal and constitutional questions are presented for review by this court under the writ of error granted in this case.

Martin v. *Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Bagnell* v. *Broderick*, 13 Pet. 436, 10 L. ed. 235; *Chouteau* v. *Eckhart*, 2 How. 372, 11 L. ed. 304: *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Cunningham* v. *Ashley*, 14 How. 377, 14 L. ed. 462; *Hussman* v. *Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

The record, containing the statement of facts and the decision, presents these questions.

Armstrong v. *Athens County*, 16 Pet. 285, 10 L. ed. 967; *Walker* v. *Villavaso*, 6 Wall. 128, 18 L. ed. 854.

The decision of a state court against a right or title to land set up under an act of Congress is reviewable in the Supreme Court of the United States.

Johnson v. *Towsley*, 13 Wall. 72, 18 L. ed. 485; *Silver* v. *Ladd*, 6 Wall. 440, 18 L. ed. 828; *Atherton* v. *Fowler*, 91 U. S. 143, 23 L. ed. 265; *Glasgow* v. *Baker*, 128 U. S. 560, 32 L. ed. 513, 9 Sup. Ct. Rep. 154; *Minnesota* v. *Bachelder*, 1 Wall. 109, 17 L. ed. 551; *Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Martin* v. *Hunter*, *supra*; *Crowell* v. *Randell*, 10 Pet. 368, 9 L. ed. 458.

This court, therefore, has jurisdiction to review the judgment brought up by the writ of error to ascertain whether that judgment has correctly applied the laws of the state of Louisiana on the subject of prescription to the facts of this case.

Martin v. *Hunter*, 1 Wheat. 359, 4 L. ed. 111; *Smith* v. *Maryland*, 6 Cranch, 286, 3 L. ed. 225.

Messrs. **D. Caffery, Jr.,** and **Gilbert L. Dupré** argued the cause, and, with *Messrs. D. Caffery, J. Sully Martel*, and *P. J. Chappuis*, filed a brief for defendants in error:

A Federal question cannot be raised on a petition for rehearing after judgment in the highest court of the state,—the more so where such petition is denied without opinion.

Taylor, Jurisdiction & Procedure of U. S. Supreme Court, § 244, p. 448; *Texas & P. R. Co.* v. *Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Turner* v. *Richardson*, 180 U. S. 91, 45 L. ed. 440, 21 Sup. Ct. Rep. 295.

And a petition for the writ forms no part of the record upon which to determine whether a Federal question arose and was decided in the state court.

Taylor, Jurisdiction & Procedure of U. S. Supreme Court, § 243, p. 447; *Butler* v. *Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; *Clark* v. *Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; *Manning* v. *French*, 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; *Johnson* v. *Risk*, 137 U. S. 307, 34 L. ed. 686, 11 Sup. Ct. Rep. 111; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

A writ of error to a state court is not allowed as a matter of right.

Twitchell v. *Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Spies* v. *Illinois* (*Ex parte Spies*) 123 U. S. 131–143, 31 L. ed. 80, 8 Sup. Ct. Rep. 21.

To give this court jurisdiction of a writ of error to a state court, it must affirmatively appear not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Johnson v. *Risk*, and *Leeper* v. *Texas*, *supra*; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63–70, 41 L. ed. 72–74, 16 Sup. Ct. Rep. 939; *De Saussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

When a record shows that two questions are presented by the pleadings, one Federal and one non-Federal, and that the judgment below rested upon a decision of the non-Federal question, this court has no jurisdiction to review the judgment.

Murdock v. *Memphis*, 20 Wall. 590, 22 L. ed. 429; *Eustis* v. *Bolles*, 150 U. S. 361–366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; *Johnson* v. *Risk*, 137 U. S. 300–307, 34 L. ed. 683–686, 11 Sup. Ct. Rep. 111; *Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63–69, 41 L. ed. 72–74, 16 Sup. Ct. Rep. 939; *Castillo* v. *McConnico*, 168 U. S. 678, 679, 42 L. ed. 624, 18 Sup. Ct. Rep. 229; Taylor, Jurisdiction & Procedure of U. S. Supreme Court, pp. 437, 438; *Poppe* v. *Langford*, 104 U. S. 770, 771, 26 L. ed. 922, 923; *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306.

All that was said about the act of Congress of February 10, 1897, was unnecessary, and was not required in the determination of the cause,—the decision finally resting upon a line of decisions (*Canter* v. *Williams*, 107 La. 77, 31 So. 627; *Ashley Co.* v. *Bradford*, 109 La. 641, 33 So. 634; *Re Lockhart*, 109 La. 740, 33 So. 753) declared by the court to have conclusively settled the law on the subject; and which, in effect, it announced had become a rule of property in that state.

No rule is more firmly established than that this court will follow the construction given by the supreme court of a state to a statute of limitation of a state.

Leffingwell v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Bauserman* v. *Blunt*, 147 U. S. 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63–73, 41 L. ed. 72–75, 16 Sup. Ct. Rep. 939. See also *Poppe* v. *Langford*, *supra*; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 351, 46 L. ed. 944, 22 Sup. Ct. Rep. 691; *Castillo* v. *McConnico*, 168 U. S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229.

It is well settled that the construction put upon a state statute by the highest court of the state will generally be followed by this court, unless it conflicts with the Constitution, or a Federal statute, or a general rule of commercial law.

Powell v. *Brunswick County*, 150 U. S. 433, 442, 37 L. ed. 1134, 1137, 14 Sup. Ct. Rep. 166; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Rippey* v. *Texas*, 193 U. S. 504–509, 48 L. ed. 767–769, 24 Sup. Ct. Rep. 516; *Phœnix Ins. Co.* v. *The Treasurer* (*Phœnix Ins. Co.* v. *Gardiner*) 11 Wall. 204, 20 L. ed. 112; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

In the instant case the plaintiff did complain before judgment that it had been deprived of its property without due process of law, but that this had been done under article 5 of the amended Constitution of the United States. It thereafter, in its application for rehearing, and in its petition for the writ, declared that it had suffered under the 14th Amendment. This declaration, made for the first time after judgment in the state courts, comes too late.

Chapin v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Scudder* v. *Comptroller* (*Scudder* v. *Coler*) 175 U. S. 33, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Simmerman* v. *Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333.

The writ forms no part of the record upon which action here is taken.

Leeper v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Chapin* v. *Fye*, 179 U. S. 127, 130, 45 L. ed. 119, 121, 21 Sup. Ct. Rep. 71; *Miller* v. *Cornwall R. Co. supra*; Taylor, Jurisdiction & Procedure of U. S. Supreme Court, § 244, p. 448.

The general principle which deprives this court of jurisdiction, and cuts off any further investigation into this case after ascertaining that a state prescription was upheld in the supreme court of Louisiana, is that, before it can be said that any right or title under a statute of the United States has been denied, it is necessary to overcome the judgment of the state court upon a question of local or state law.

Poppe v. *Langford*, 104 U. S. 770, 26 L. ed. 922; *Johnson* v. *Risk*, 137 U. S. 309, 34 L. ed. 687, 11 Sup. Ct. Rep. 111; *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245, 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; *Dibble* v. *Bellingham Bay Land Co. supra*.

The Federal question must be considered as not decided when a question of state law intervenes, and is decisive of the case. To give jurisdiction, the Federal question must be necessary to the judgment or decree complained of.

Detroit City R. Co. v. *Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *Choutcau* v. *Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *Citizens' Bank* v. *Board of Liquidation* (*Louisiana ex rel. Citizens' Bank* v. *Board of Liquidation*) 98 U. S. 140, 25 L. ed. 114; *McManus* v. *O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Murdock* v. *Memphis*, 20 Wall. 590, 22 L. ed. 429; *Adams County* v. *Burlington & M.*

River R. Co. 112 U. S. 127, 28 L. ed. 680, 5 Sup. Ct. Rep. 77; *Chapman* v. *Goodnow* (*Chapman* v. *Crane*) 123 U. S. 548, 31 L. ed. 238, 8 Sup. Ct. Rep. 211; *Brooks* v. *Missouri*, 124 U. S. 400, 31 L. ed. 458, 8 Sup. Ct. Rep. 443; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 29, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; *De Saussure* v. *Gaillard*, 127 U. S. 234, 32 L. ed. 132, 8 Sup. Ct. Rep. 1053; *Israel* v. *Arthur*, 152 U. S. 362, 38 L. ed. 478, 14 Sup. Ct. Rep. 583; *Wailes* v. *Smith*, 157 U. S. 276, 39 L. ed. 700, 15 Sup. Ct. Rep. 624; *Hale* v. *Akers*, 132 U. S. 565, 33 L. ed. 447, 10 Sup. Ct. Rep. 171; *San Francisco* v. *Itsell*, 133 U. S. 67, 33 L. ed. 571, 10 Sup. Ct. Rep. 241.

Messrs. Frederic D. McKenney, John Spalding Flannery, and *James L. Autry* filed a separate brief for defendants in error:

The supreme court of Louisiana held that, the prescribed period having elapsed without suit having been brought, art. 233 of the state Constitution guaranteed to defendants the permanency of their possession and that such guaranteed permanency of possession was equivalent, under the state law, to a legal title. This was the real and indisputable ground upon which the judgment of the state court rested. Whether the conclusion reached was correct depends entirely upon the proper construction and application of the provisions of the state Constitution to the facts found. It does not in any wise depend upon the Constitution, or laws, or authority of the United States. A writ of error to review such a judgment will not lie.

Chapman v. *Goodnow* (*Chapman* v. *Crane*) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Wells* v. *Goodnow* (*Wells* v. *Crane*) 150 U. S. 84, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22.

Where the decision of the state supreme court rests on an independent ground of law not involving any Federal question, this court has no jurisdiction.

New Orleans Waterworks Co. v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

The ground of the decision in the state courts was independent of any claim of right under the statute of 1897, and its adjudication involved no Federal question. The writ of error should, therefore, be dismissed.

Eustis v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Carothers* v. *Mayer*, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106; *Moran* v. *Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

If the accident that either one or both of the parties to the controversy claimed title under the United States was to be considered as sufficient to bring it within the jurisdiction of this court, then every controversy involving the title to such lands, whether it involved merely the inheritance, partition, devise, or sale, of it, would, with equal propriety, be subject to examination by this court.

Moreland v. *Page*, 20 How. 522, 523, 15 L. ed. 1009, 1010.

It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance. If this were so, the title to all the vast domain, once vested in the United States, could be brought from the state courts to this tribunal.

Carpenter v. *Williams*, 9 Wall. 785, 786, 19 L. ed. 827, 828; *Martin* v. *Marks*, 97 U. S. 345, 348, 24 L. ed. 940, 941.

The mere averment of the existence of a Federal question is not sufficient to give this court jurisdiction; a real, and not a fictitious, Federal question is essential to give this court jurisdiction over the judgment of state courts; and, when it appears that the alleged Federal question upon which jurisdiction is invoked is wholly without foundation, the writ of error will be dismissed.

Sawyer v. *Piper*, 189 U. S. 154, 156, 157, 47 L. ed. 757–759, 23 Sup. Ct. Rep. 633.

The attempt to assert a Federal question for the first time in a petition for rehearing is too late, unless it appears that the court entertained the petition and disposed of the question.

Fullerton v. *Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221.

Apart from the foregoing considerations, the plaintiff in error ought not to receive favorable consideration in this court. Its sole interest in the lands in controversy grows out of champertous agreements, which are contrary to public policy, unlawful, and void.

While the judgment of the supreme court of the state did not turn upon this point, the proof concerning it is indisputable. This court will not be astute to maintain a writ of error in such a case.

Peck v. *Heurich*, 167 U. S. 624, 630, 632, 42 L. ed. 302, 305, 17 Sup. Ct. Rep. 927.

Mr. Chief Justice **Fuller,** having made the foregoing statement, delivered the opinion of the court:

In the progress of the case in the trial court no Federal *question as such was spe- [193] cifically raised, but when it reached the supreme court it was assigned for error that if article 233 of the Constitution of Louisiana of 1898 had the effect of validating the tax sale to Henry Gellert, it was in violation of article 5 of the amend-

ments to the Constitution of the United States. Counsel for plaintiff in error admit that this was a misreference, but contend that it was corrected by the petition for rehearing filed after judgment, which alleged a violation of the 14th Amendment; but this came too late, unless the petition was entertained and the point passed on. *Fullerton* v. *Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221. And this petition was denied without any observations.

The petition for the writ of error from this court and the assignment of errors herein set up Federal questions, but they form no part of the record on which to determine whether a Federal question was decided by the state court. *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71. And counsel further state "that in so far as the errors assigned are said to have violated the due process of law provision of the 14th Amendment to the Constitution of the United States, they are not pressed."

If it be conceded that plaintiff specially set up and claimed title to the land in controversy under the act of Congress of February 10, 1897, that would not be sufficient to give jurisdiction unless the state courts had decided against such title. But that was not the decision here. What was decided was that the prescribed period having elapsed, article 233 of the Louisiana Constitution operated as the equivalent of legal title through the tax deed. The correctness of this conclusion depended on the proper construction and application of the provisions of the state Constitution on the facts found, and not on the Constitution or laws of the United States.

The state Constitution of 1898 was adopted and went into effect May 12, 1898. La. Const. 1898, p. 88. Article 233 provided:

"No sale of property for taxes shall be
[194] set aside for any *cause, except on proof of dual assessment, or of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted . . . within three years from the adoption of this Constitution, as to sales already made." Const. 1898, p. 61.

The record showed that defendants and their authors had been, since 1882, in quiet, peaceable possession of the property in question under a tax title, the validity of which had not been impeached by any direct proceeding; that more than three years had elapsed before the institution of the present action since the adoption of the Constitution (and more than that since the passage of the act of February 10, 1897, and the issue of the patent, November 22, 1897), and that at any time within such three years plaintiff or its authors might have instituted suit against defendants to annul the sale.

And the decision of the state supreme court that, in these circumstances, article 233 made good defendants' title, rested on a ground independent of the act of 1897, and involved no Federal question.

Writ of error dismissed.

UNION REFRIGERATOR TRANSIT COMPANY, *Plff. in Err.*,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 194–211.)

Constitutional law—due process of law—state taxation of tangible personal property in other states.—Due process of law is denied a Kentucky corporation by a tax assessed under the authority of Ky. Stat. § 4020, upon its rolling stock permanently located in other states and employed there in the prosecution of its business.

[No. 84.]

Argued October 13, 16, 1905. Decided November 13, 1905.

IN ERROR to the Court of Appeals of the Commonwealth of Kentucky to review a judgment which, reversing the judgment of the Jefferson Circuit Court, sustained an assessment on the rolling stock of a Kentucky corporation permanently located in other states and employed there in the prosecution of its business. *Reversed* and remanded for further proceedings.

See same case below, 26 Ky. L. Rep. 23, 80 S. W. 490.

Statement by Mr. Justice **Brown:**

This proceeding was begun by a statement filed by the revenue agent of the commonwealth in the Jefferson county court, praying that certain personal property belonging to the plaintiff in error be assessed for taxation for state, county, and municipal taxes, and be also adjudged to pay a penalty of 20 per cent on the aggregate amount of the tax.

To this statement the transit company filed certain demurrers and answers, upon which, and upon the deposition of the comptroller of the company in St. Louis, Missouri, the case went to a hearing, and re-

NOTE.—*On the situs, for taxing purposes, of tangible personal property of domestic corporations in the United States*—see note to Teagan Transp. Co. v. Board of Assessors, 69 L.R.A. 431.

sulted in a finding of facts that the transit company was the owner of 2,000 cars in September, 1897, 1898, 1899, and 1900, to which years the recovery was limited, of the value of $200 each; that its cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list such a proportion of its cars as, under a system of averages upon their gross earnings, were shown to be used in the state of Kentucky during the fiscal year, the court finding by
[196] this method that *there were subject to assessment in Kentucky 28 cars for the year 1897, 29 for the year 1898, 40 for the year 1899, and 67 for 1900.

The court also found that the cars other than those mentioned were not liable to assessment.

The order of the county court was affirmed by the circuit court, and an appeal taken to the court of appeals of Kentucky, which reversed the judgment of the court below, and found that the company was liable to taxation upon its entire number of 2,000 cars, and directed the court below to enter judgment against it for the taxes appropriate to this number. 26 Ky. L. Rep. 23, 80 S. W. 490.

To review this judgment this writ of error was sued out.

Messrs. **William H. Field** and **Alexander Pope Humphrey** argued the cause, and, with *Mr. Frederick Forcht, Jr.*, filed a brief for plaintiff in error:

The legislature of Kentucky had no power to authorize the assessment of tangible personal property which has acquired a taxable situs outside the territorial limits of the state.

Western U. Teleg. Co. v. *Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 172, 41 L. ed. 961, 17 Sup. Ct. Rep. 527; *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Morgan* v. *Parham*, 16 Wall. 471, 21 L. ed. 303; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 687; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Blackstone* v. *Miller*, 188 U. S. 202, 47 L. ed. 443, 23 Sup. Ct. Rep. 277; *Coe* v. *Errol*, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 96, 47 L. ed. 399, 23 Sup. Ct. Rep. 266; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *New Orleans* v. *Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol* v. *Washington County*, 177 U. S. 145, 44 L. ed. 707, 20 Sup. Ct. Rep. 585; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 22, 35 L. ed. 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; *Billings* v. *Illinois*, 188 U. S. 104, 47 L. ed. 403, 23 Sup. Ct. Rep. 272; *Kelley* v. *Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 399, 47 L. ed. 519, 23 Sup. Ct. Rep. 468; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; 1 Cooley, Taxn. 3d ed. 2, 22, 27, 84, 249; Rorer, Inter-State Law, 204; *State* v. *Falkinburge*, 15 N. J. L. 320; *Wilkey* v. *Pekin*, 19 Ill. 160; *People ex rel. Kennedy* v. *Tax Comrs.* 35 N. Y. 441; *Pullman's Palace Car Co.* v. *Twombly*, 29 Fed. 658; *Baldwin* v. *Shine*, 84 Ky. 502, 2 S. W. 164; *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Com.* v. *American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

Mr. **Henry L. Stone** argued the cause, and, with *Messrs. Samuel B. Kirby* and *Robert W. Bingham*, filed a brief for defendant in error:

The general assembly of the state of Kentucky had power and jurisdiction to provide that the personal property of all residents of that state, or of corporations organized under the laws of that state, whether in or out of that state, should be taxed in that state.

1 Cooley, Taxn. 3d ed. pp. 86, 644, 673, 674; *Com.* v. *Hays*, 8 B. Mon. 1; *Barret* v. *Henderson*, 4 Bush, 255; *Boyd* v. *Selma*, 96 Ala. 150, 16 L.R.A. 729, 11 So. 393; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Goldgart* v. *People*, 106 Ill. 25; *Foresman* v. *Byrns*, 68 Ind. 247; *Lose* v. *State*, 72 Ind. 285; *Griffith* v. *Watson*, 19 Kan. 23; *Frothingham* v. *Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; *Horne* v. *Green*, 52 Miss. 452, 25 Am. & Eng. Enc. Law, p. 152; Burroughs, Taxn. p. 186; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18–36, 35 L. ed. 613–621, 3 Inters. Com. Rep.

595, 11 Sup. Ct. Rep. 876; *Pacific Nat. Bank* v. *Pierce County*, 20 Wash. 675, 50 Pac. 936; *State, Fish, Prosecutor*, v. *Branin*, 23 N. J. L. 484; *People ex rel. New York C. & H. R. R. Co.* v. *Roberts*, 32 App. Div. 113, 52 N. Y. Supp. 859; *Tennessee* v. *Whitworth*, 117 U. S. 136, 29 L. ed. 832, 6 Sup. Ct. Rep. 645; *People ex rel. Savings Bank* v. *Coleman*, 135 N. Y. 231, 31 N. E. 1022; *Bradley* v. *Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Griggsby Constr. Co.* v. *Freeman*, 108 La. 435, 58 L.R.A. 349, 32 So. 399; *Indiana ex rel. Wolf* v. *Pullman Palace Car Co.* 16 Fed. 193; *Pullman Southern Car Co.* v. *Nolan*, 19 Cent. L. J. 369, 22 Fed. 276; *Irvin* v. *New Orleans, St. L. & C. R. Co.* 94 Ill. 105, 34 Am. Rep. 208; *Appeal Tax Court* v. *Pullman Palace Car Co.* 50 Md. 452; *State ex rel. Armour Packing Co.* v. *Stephens*, 146 Mo. 662, 69 Am. St. Rep. 625, 48 S. W. 929; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70–82, 43 L. ed. 899–904, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; *Norfolk & W. R. Co.* v. *Board of Public Works*, 97 Va. 23, 32 S. E. 779; *Com.* v. *American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Leonard* v. *New Bedford*, 16 Gray, 292; *Appeal Tax Court* v. *Western Maryland R. Co.* 50 Md. 274; *Appeal Tax Court* v. *Northern C. R. Co.* 50 Md. 417; *Union Refrigerator Transit Co.* v. *Lynch*, 18 Utah, 378, 48 L.R.A. 790, 55 Pac. 639.

The plaintiff in error is not deprived of its property without due process of law, or denied the equal protection of the laws, by § 4020 of the Kentucky statutes, within the meaning of the 14th Amendment to the Federal Constitution.

Florida C. & P. R. Co. v. *Reynolds*, 183 U. S. 474, 46 L. ed. 285, 22 Sup. Ct. Rep. 176; *King* v. *Mullins*, 171 U. S. 436, 43 L. ed. 226, 18 Sup. Ct. Rep. 925; Judson, Taxn. § 437, p. 562; *Head Money Cases* (*Edye* v. *Robertson*) 112 U. S. 595, 28 L. ed. 802, 5 Sup. Ct. Rep. 247; *Bells Gap R. Co.* v. *Pennsylvania*, 134 U. S. 233, 33 L. ed. 894, 10 Sup. Ct. Rep. 533; *Merchants' & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 464, 42 L. ed. 238, 17 Sup. Ct. Rep. 829; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 478, 38 L. ed. 242, 14 Sup. Ct. Rep. 396; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Louisville & N. R. Co.* v. *Louisville*, 16 Ky. L. Rep. 796, 29 S. W. 865; *Kidd* v. *Alabama*, 188 U. S. 730–733, 47 L. ed. 669–673, 23 Sup. Ct. Rep. 401; *Wright* v. *Louisville & N. R. Co.* 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *State Railroad Tax Cases*, 92 U. S. 607, 608, 23 L. ed. 671, 672; *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 29, 35 L. ed. 618, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Davidson* v. *New Orleans*, 96 U. S. 97, 106, 24 L. ed. 616, 620; *Dyer* v. *Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *People* v. *Home Ins. Co.* 92 N. Y. 347, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385; *Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 512, 46 L. ed. 304, 22 Sup. Ct. Rep. 95; *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 343, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Com.* v. *Delaware, L. & W. R. Co.* 145 Pa. 96, 22 Atl. 157; *Com.* v. *American Dredging Co. supra; San Mateo County* v. *Southern P. R. Co.* 7 Sawy. 517, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Northern P. R. Co.* v. *Walker*, 47 Fed. 681; *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 695, 21 L. ed. 382, 388; *McHenry* v. *Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

Mr. Justice **Brown** delivered the opinion of the court:

In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property permanently located in other states, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the 14th Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "all real and personal estate within this state, and all personal estate of persons residing *in this state, and of all [202] corporations organized under the laws of this state, whether the property be in or out of this state, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the transit company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling

stock used within the state, which was determined by the proportion which the number of miles of the railroad in the state bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. *Northern C. R. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490–499, 22 L. ed. 189–193; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669. In *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, it was held, after full consideration, that the taking of pri-
[203] vate property *without compensation was a denial of due process within the 14th Amendment. See also *Davidson* v. *New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; *Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 519, 35 Am. St. Rep. 515, 33 N. E. 695.

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation, and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation. As said by Adam Smith in his Wealth of Nations, Book V. chap. 2, pt. 2, p. 371: "The subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly* v. *Pittsburgh*, *104 U. S. 78, 26 L. ed.[204] 658; *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.* 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. Subject to these individual exceptions, the rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood* v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land, which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state; much less where such action has been defended by any court. It is said by this court in the *State Tax on Foreign-held Bonds Case*, 15 Wall. 300–

319, 21 L. ed. 179–187, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said
[205] in *Louisville *& J. Ferry Co.* v. *Kentucky*, 188 U. S. 385–396, 47 L. ed. 513–518, 23 Sup. Ct. Rep. 463: "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government,—namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also *M'Culloch* v. *Maryland*, 4 Wheat. 316–429, 4 L. ed. 579–607; *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596–599, 15 L. ed. 254, 255; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 429, 431, 20 L. ed. 192, 194, 195; *Morgan* v. *Parham*, 16 Wall. 471–476, 21 L. ed. 303, 304.

Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592, 26 L. ed. 845; *Sturges* v. *Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Kidd* v. *Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. Of course, we do not enter into a consideration of the question, so much discussed by political economists, of the double taxation involved in taxing the property from *which [206] these securities arise, and also the burdens upon such property, such as mortgages, shares of stock, and the like,—the securities themselves.

The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a state other than that of its owner, is taxable there. *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686. We have also held that, if a corporation be engaged in running railroad cars into, through, and out of the state, and having at all times a large number of cars within the state, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

There are doubtless cases in the state re-

ports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicil of the owner; but upon examination they all, or nearly all, relate to intangible property, such as stocks, bonds, notes, and other choses in action. We are cited to none applying this rule to tangible property, and, after a careful examination, have not been able to find
[207] any wherein the question *is squarely presented, unless it be that of *Wheaton* v. *Mickel*, 63 N. J. L. 525, 42 Atl. 843, where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however, that they were permanently located there. The case turned upon the construction of a state statute, and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles, and vessels engaged in navigation. But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicil of its owner. The cases in the state reports upon this subject usually turn upon the construction of local statutes granting or withholding the right to tax extraterritorial property, and do not involve the constitutional principle here invoked. Many of them, such, for instance, as *Blood* v. *Sayre*, 17 Vt. 609; *Preston* v. *Boston*, 12 Pick. 12; *Pease* v. *Whitney*, 8 Mass. 93; *Gray* v. *Kettell*, 12 Mass. 161, turn upon the taxability of property where the owner is located in one, and the property in another, of two jurisdictions within the same state, sometimes even involving double taxation, and are not in point here.

One of the most valuable of the state cases is that of *People ex rel. Hoyt* v. *Tax & A. Comrs.* 23 N. Y. 224, where, under the New York statute, it was held that the tangible property of a resident, actually situated in another state or county, was not to be included in the assessment against him. The statute declared that "all lands and all personal estate within this state" were liable for taxation, and it was said in a most instructive opinion by Chief Judge Comstock that the language could not be obscured by the introduction of a legal fic-
[208] tion about the *situs of personal estate. It was said that this fiction involved the necessary consequence that "goods and chattels actually within this state are not here in any legal sense, or for any legal purpose, if the owner resides abroad;" and that the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim *In fictione juris semper æquitas existit.* See *Eidman* v. *Martinez*, 184 U. S. 581, 46 L. ed. 700, 22 Sup. Ct. Rep. 515; *Blackstone* v. *Miller*, 188 U. S. 189, 206, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277. "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, that might result from the general rule of law." [3 Bl. Com. 43.] The opinion argues with great force against the injustice of taxing extraterritorial property when it is also taxable in the state where it is located. Similar cases to the same effect are *People ex rel. Jefferson* v. *Smith*, 88 N. Y. 585; *New Albany* v. *Meekin*, 3 Ind. 481, 56 Am. Dec. 522; *Wilkey* v. *Pekin*, 19 Ill. 160; *Johnson* v. *Lexington*, 14 B. Mon. 648; *Catlin* v. *Hull*, 21 Vt. 152; *Nashua Sav. Bank* v. *Nashua*, 46 N. H. 389.

In *Weaver* v. *State*, 110 Iowa, 328, 81 N. W. 603, it was held by the supreme court of Iowa that a herd of cattle within the state of Missouri, belonging to a resident of Iowa, was not subject to an inheritance tax upon his decease. In *Com.* v. *American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained, outside of the state. It was said that the nontaxability of tangible personal property located permanently outside of the state was not "because of the technical principle that the situs of personal property is where the domicil of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages, and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another state. In such cases it is taxable within the jurisdiction where found, and is exempt *at the domicil [209] of the owner." The property in that case, however, was held not to be permanently outside of the state, and therefore not exempt from taxation. The rule, however, seems to be well settled in Pennsylvania, that so much of the tangible property of a corporation as is situated in another state, and there employed in its corporate business, is not taxable in Pennsylvania. *Com.* v. *Montgomery Lead & Zinc Min. Co.* 5 Pa.

Co. Ct. 89; *Com.* v. *Delaware, L. & W. R. Co.* 145 Pa. 96, 22 Atl. 157; *Com.* v. *Westinghouse Electric Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111; *Com.* v. *Standard Oil Co.* 101 Pa. 119. The rule is the same in New York. *People ex rel. Pacific Mail S. S. Co.* v. *Tax & A. Comrs.* 46 How. Pr. 315.

But there are two recent cases in this court which we think completely cover the question under consideration, and require the reversal of the judgment of the state court. The first of these is that of the *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463. That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the state of Indiana. We held that the fact that such franchise had been granted by the commonwealth of Kentucky did not bring within the jurisdiction of Kentucky, for the purpose of taxation, the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament, derived from and having its legal situs in that state. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the 14th Amendment; as much so as if the state taxed the land owned by that company; and that the officers of the state had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways."

The other and more recent case is that of [210]the *Delaware, L. & W. *R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669. That was an assessment upon the capital stock of the railroad company, wherein it was contended that the assessor should have deducted from the value of such stock certain coal mined in Pennsylvania and owned by it, but stored in New York, there awaiting sale, and beyond the jurisdiction of the commonwealth at the time appraisement was made. This coal was taxable, and in fact was taxed, in the state where it rested for the purposes of sale at the time when the appraisement in question was made. Both this court and the supreme court of Pennsylvania had held that a tax on the corporate stock is a tax on the assets of the corporation issuing such stock. The two courts agreed in the general proposition that tangible property permanently outside of the state, and having no situs within the state, could not be taxed. But they differed upon the question whether the coal involved was permanently outside of the state. In delivering the opinion it was said: "However temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign states for purposes of taxation, and, in truth, it was there taxed. We regard this tax as, in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it." The decision in that case was really broader than the exigencies of the case under consideration require, as the tax was not upon the personal property itself, but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which was held should have been deducted.

The adoption of a general rule that tangible personal property in other states may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other *property kept[211] at country houses in other states or even in foreign countries, of stocks of goods and merchandise kept at branch establishments, when already taxed at the state of their situs, but of that enormous mass of personal property belonging to railways and other corporations, which might be taxed in the state where they are incorporated, though their charter contemplated the construction and operation of roads wholly outside the state, and sometimes across the continent; and when, in no other particular, they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the state, is open to grave doubt; but it is possible that legislation alone can furnish a remedy.

Our conclusion upon this branch of the case renders it unnecessary to decide the second question, *viz.*, whether the transit company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same state, which are controlled by different considerations.

We are of opinion that the cars in ques-

tion, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that *the judgment of the Court of Appeals must be reversed*, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice **White** concurred in the result.

Mr. Justice **Holmes:**

It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the 14th Amendment; and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.

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[212] *WILLIAM MARVIN, *Plff. in Err.*,
v.
BELLE B. TROUT.

(See S. C. Reporter's ed. 212-228.)

1. **Constitutional law—due process of law—subjecting premises to judgment for money lost there at play.**—The owner of a building which he knowingly permits to be used for gaming purposes is not deprived of his property without due process of law by Ohio Rev. Stat. § 4275, which authorizes an action to subject such building to the payment of a judgment obtained by an informer for the recovery of money lost there at play.

2. **Constitutional law—due process of law—necessity of jury trial.**—A judgment founded upon a state statute is not wanting in due process of law because the statute does not provide for or permit a trial by jury.

3. **Constitutional law—due process of law—who may raise question.**—The objection that due process of law is not afforded an owner of property used for gaming purposes by Ohio Rev. Stat. § 4275, under which a judgment against those who won money there at gambling, when not impeached for fraud or collusion, is made conclusive evidence of the amount of money lost in an action to charge the property of the owner, is not open to such an owner where there is proof outside the record of the judgment, showing the amount of money lost, given against his objection that the fact was not in issue.

[Nos. 19, 20.]

NOTE.—*As to what constitutes due process of law*—see Kuntz v. Sumption, 2 L.R.A. 655, and note; *Re* Gannon, 5 L.R.A. 359, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; and Gilman v. Tucker, 13 L.R.A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Argued October 20, 23, 1905. Decided November 13, 1905.

IN ERROR to the Supreme Court of the State of Ohio to review two judgments affirming judgments of the Circuit Court of Hancock County, in that state, in favor of plaintiff in actions to subject the property of the owner of the building where gaming was carried on, with his knowledge and assent, to the payment of judgments for the recovery of money lost there at play. *Affirmed.*

See same case below, 70 Ohio St. 437, 72 N. E. 1161, 1162; on first writ of error, 62 Ohio St. 132, 56 N. E. 655.

Statement by Mr. Justice **Peckham:**

The plaintiff in error in these cases seeks to review the judgments of the supreme court of Ohio, affirming judgments recovered against him by the defendant in error in one of the circuit courts of Ohio. The two cases involve the same question, which relates to the validity of the sections of the statute of the state of Ohio in regard to gambling, known as §§ 4270, 4273, and 4275 of the Revised Statutes of that state. The sections are set forth in the margin.†

†Sec. 4270. If any person, by playing at any game, or by means of any bet or wager, loses to any other person any sum of money or other thing of value, and pays or delivers the same, or any part thereof, to the winner, the person who so loses and pays or delivers may, at any time within six months next after such loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof, from the winner thereof, with costs of suit, by civil action founded on this chapter, before any court of competent jurisdiction.

"Sec. 4273. If the person losing such money or thing of value as provided in § 4270 does not, within the time therein specified, without collusion or deceit, sue, and with effect prosecute, for the money or thing of value so lost and paid or delivered, any person may sue for and recover the same, with costs of suit, against any winner as aforesaid, for the use of the person prosecuting the same.

"Sec. 4275. The property, both real and personal, of a defendant against whom a judgment is rendered under this chapter, either for fines, costs, or to recover money or other thing of value, lost or paid, shall be liable therefor, without exemption, and such judgment shall be a lien thereon until paid; if the owner of the building in which the money was lost knowingly permits it to be used for gaming purposes, such building and the real estate upon which it stands shall be liable therefor in the same manner; and the guardian or trustee of a minor, insane person, or idiot, who permits any property under his charge to be used for gaming purposes, and the same becomes liable on account thereof, shall be liable to his ward for the amount thereof."

[213] *The defendant in error commenced these actions in the court of common pleas of Hancock county, under § 4275, for the purpose of making certain judgments, recovered by her against other parties, a lien on the property of the plaintiff in error to the extent of those judgments. The defendant demurred to the petition in each case. One of the grounds of demurrer was that the petition showed a former judgment in favor of defendant for the same cause of action. The demurrers were sustained, and judgments to that effect were affirmed on error by the circuit court; but the supreme court reversed them and remanded the cases for further proceedings. 62 Ohio St. 132, 56 N. E. 655. The defendant then answered, and the cases went to trial in the common pleas, where plaintiff recovered judgments in her favor. On appeal in each case, to the circuit court of Hancock county, a trial was had *de novo*, which resulted in judgments in favor of plaintiff (24 Ohio C. C. 333), which were affirmed, without any opinion, by the supreme court of Ohio. 70 Ohio St. 437, 72 N. E. 1161, 1162. The defendant below has brought the cases here by writs of error.

The following are the facts upon which [214] the questions arise: *At the March term, 1895, of the court of common pleas for Hancock county, the defendant in error brought her action under the above § 4273, to recover from the defendants in that suit, who were named Clifford, Gassman, and Marvin (the last named being this plaintiff in error), moneys alleged to have been lost by the plaintiff's husband in gambling (and won by them) between the 20th day of March, 1893, and the 19th day of March, 1894. She subsequently brought another action at the September term, 1896, in the same court of common pleas, against the same parties, to recover moneys alleged to have been so lost and won between March 19 and June 19, 1894. In the first action she recovered $3,473 and costs against all three defendants, and in the second she recovered $1,300 and costs against the same defendants. Those judgments were subsequently reversed on error, by the circuit court, as to Marvin, and affirmed as to the other defendants.

The plaintiff below then commenced these actions in the court of common pleas of Hancock county against the defendant Marvin as the owner of the premises in which the gambling was carried on, to make the judgments theretofore obtained by her against Clifford and Gassman a lien upon the building of which Marvin, the defendant, was the owner, on the ground that he knowingly permitted the same to be used by them for gambling purposes. The petition in each case stated in substance the ownership by defendant Marvin of the property where the gambling was carried on; that Clifford and Gassman carried on gambling there in violation of law; that the defendant knowingly permitted his building to be so used. The petition then alleged the recovery of a judgment by plaintiff against the defendants Clifford, Gassman, and Marvin, for the amount stated in the judgment; that the action was brought pursuant to § 4273 of the Revised Statutes of Ohio, to recover from the defendants money staked and betted by plaintiff's husband, and the judgment recovered was for the amount found by the court to have been staked and betted *by [215] plaintiff's husband and won by the defendants; that the judgment was, on error, reversed as to Marvin, but affirmed as to the other defendants, and that the judgment remained in full force as to them, and was wholly unpaid; that the said games of chance, "on which said money was staked and betted and lost" by plaintiff's husband, to the defendants Clifford and Gassman, were played at the rooms in defendant Marvin's building, and while defendant knowingly permitted the same to be used by them for such purpose. The prayer was to have the judgment declared a lien on the building, and that it be sold, etc.

The defendant, in his answer in each case, admitted the ownership of the premises at the times alleged in the petition, and also the recovery of the judgment as stated in the petition, and that such judgment as to the defendant Marvin was reversed, and the defendant denied the other allegations in the petition. He subsequently filed an amended answer setting up the Ohio statute of limitations. The cases were tried substantially as one case in the common pleas, and resulted in judgments in favor of the plaintiff. Upon appeal to the circuit court a retrial of the case was had. 24 Ohio C. C. 333. On that trial it was admitted that at the times mentioned in the petition the premises described therein were used for gambling purposes by Clifford and Gassman, that they are the same premises in which the money described in judgment or represented by the judgments set up in the petition are claimed to have been lost, but, not admitting that plaintiff's husband, in fact, gambled with Clifford and Gassman between March 19, 1893, and June 20, 1894, it is admitted, for the purposes of this action, that if he did, such gambling was done in the building and upon the premises of the defendant described in the petition. It was also conceded that the judgments were rendered against Clifford and Gassman, and that they occupied no other premises, and conducted no gambling during

the periods specified in the petition except upon the premises described in the petition.

[216] *In the course of the trial, the judgments against Clifford and Gassman were offered and received in evidence, under a general objection on the part of the defendant Marvin.

The plaintiff also proved, outside the record of the Clifford and Gassman judgments, by a witness called by her, the fact of the gambling, and the amount lost, and the place where it was lost. The witness having stated that he had lost the money to the full amount represented by the judgments, in gambling, was asked to state whether he had lost it at Clifford and Gassman's. This question was objected to at the very moment that the witness answered that he had, the objection being as follows: "Counsel on behalf of defendant Marvin objected to the above answer and moved the court to strike out so much of the answer as relates to the fact and the extent of the loss, on the ground that it is not alleged in the petition, and is not an issue of fact in the case. Which motion the court overruled, to which ruling of the court the defendant then and there excepted."

The witness then again stated, under this objection, that the moneys were lost at gaming in this building, and were represented by these judgments, and that the moneys were lost as stated in the petition and at Clifford and Gassman's.

There was also evidence given on the trial tending to prove that the premises were not only used by Clifford and Gassman for gambling purposes during the times mentioned in the petition, but that such user was with the knowledge of the defendant Marvin, and that he knowingly permitted the same.

Upon the trial the defendant gave no evidence.

The circuit court, in giving judgment for the plaintiff, found these facts, and stated (24 Ohio C. C. 333) that in an action under § 4275, to subject the premises where the gaming was carried on and the money lost, to the payment of a judgment recovered against the winner, such judgment, when not impeached for fraud or collusion, was conclusive that the moneys lost and winnings secured, which caused the plaintiff's injury, were lost in gaming, and were

[217] won by the *defendant in the judgment; that the same were won and lost in violation of law, and that the plaintiff, in consequence thereof, sustained damages to the amount of the judgment; that such judgments as to these facts are not open to dispute by the owner of the premises, in an action against him under that section.

The defendant Marvin then brought the cases by writs of error to the supreme court of the state for review, where they were affirmed, without any opinion; but some weeks after the mandate to the court below had been issued from the supreme court, that court, on motion of the plaintiff in error, ordered what is termed a "journal entry" to be made, as follows:

Journal Entry.

Whereupon, on motion of said plaintiff in error, William Marvin, the court order it to be certified and made part of the record of this case and of the judgment of affirmance heretofore entered herein, that this action is founded upon sections forty-two hundred and seventy-three (4273) and forty-two hundred and seventy-five (4275) of the Revised Statutes of Ohio on the subject of gaming.

It is further certified that said plaintiff in error set up in his petition in error, asking the reversal of the judgment of the circuit court of Hancock county, Ohio, that said sections of said statutes and the proceedings of said circuit court had thereunder were repugnant to section one, article fourteen of the amendments to the Constitution of the United States, and repugnant to article one, section nine, and article one, section ten, and section three of article three of said United States Constitution. Also that said sections of said statutes and the proceedings had thereunder were claimed and set up by plaintiff in error to be an invasion of his private right of property, in violation of said Constitution and amendments. That said judgment of affirmance was in favor of the validity of said statutes and of said proceedings had thereunder, and *that they were not repugnant to any [218] of the provisions of said Constitution or of the amendments thereto.

Mr. **George F. Pendleton** argued the cause and filed a brief for plaintiff in error:

The legislature and the courts cannot take the private property of one person and give it to another.

Chicago & E. R. Co. v. *Keith*, 67 Ohio St. 279, 60 L.R.A. 525, 65 N. E. 1020; *Bowman* v. *Middleton*, 1 Bay, 252; Cooley, Const. Lim. 6th ed. p. 198; *Taylor* v. *Ross County*, 23 Ohio St. 22.

Making this judgment conclusive violated Mr. Marvin's right of property under the Constitution.

2 Tiedeman, State & Federal Control of Persons & Property, § 178, p. 871.

If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects,

or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the Constitution.

1 Tiedeman, State & Federal Control of Persons & Property, p. 17; *Marbury* v. *Madison*, 1 Cranch, 137, 2 L. ed. 60; *Minnesota* v. *Barber*, 136 U. S. 319, 34 L. ed. 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

If the crime of gambling on the real estate of the owner with his knowledge and consent is such an egregious wrong to the good morals of the state as to require rigorous measures to correct the wrong, the state has ample power to correct it, and to prevent its repetition. It can find no justification within the 14th Amendment when it seeks to destroy or confiscate the real estate of the owner of the property where the gambling is done.

2 Tiedeman, State & Federal Control of Persons & Property, § 152, p. 763; *Welch* v. *Stowell*, 2 Dougl. (Mich.) 332; *State ex rel. Rhodes* v. *Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588.

So, the taking of the property from the owner as a punishment for allowing an illegal business to be conducted in some of the rooms, and giving it as a gratuity to another person, can find no justification, in view of the protection, to the owner, of his private property, guaranteed to him by the 14th Amendment.

Cooley, Const. Lim. 6th ed. pp. 208, 707; *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Edson* v. *Crangle*, 62 Ohio St. 49, 56 N. E. 647.

Every exercise of the police power of the state, to be valid, must be reasonable.

State v. *Marble*, 72 Ohio St. 33, 70 L.R.A. 35, 106 Am. St. Rep. 570, 73 N. E. 1063; Freund, Pol. Powers, § 63; *Rideout* v. *Knox*, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390; *Lawton* v. *Steele*, *supra*; *Plessy* v. *Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Chicago & E. R. Co.* v. *Keith*, *supra*; *Booth* v. *Illinois*, 184 U. S. 425, 428, 429, 46 L. ed. 623, 625, 626, 22 Sup. Ct. Rep. 425; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 579, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; *Minnesota* v. *Barber*, 136 U. S. 319, 34 L. ed. 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Holden* v. *Hardy*, 169 U. S. 366, 398, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 558–560, 563, 46 L. ed. 679, 689–691, 22 Sup. Ct. Rep. 431.

William Marvin is not bound by the judgment obtained by Belle B. Trout against Clifford and Gassman. He, not being a party thereto, is not personally bound by it; and neither could it be made the basis of a claim against his real estate in the petition described.

Iron Cliffs Co. v. *Negaunee Iron Co.* 197 U. S. 463, 471, 49 L. ed. 836, 840, 25 Sup. Ct. Rep. 474; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 480, 41 L. ed. 518, 523, 17 Sup. Ct. Rep. 161; *Scott* v. *McNeal*, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. ed. 914, 915; *Finley* v. *Bank of United States*, 11 Wheat. 304, 307, 6 L. ed. 480.

Mr. **John Poe** argued the cause and filed a brief for defendant in error:

This court would not assume jurisdiction of these cases because of the complaint here, that the holding of the Ohio courts deprives Mr. Marvin of any rights guaranteed to him by the 5th, 6th, 7th, 8th, or 9th Amendment referred to, for these were not intended to limit the powers of the states in respect to their own people, but to operate on the national government only.

Spies v. *Illinois* (*Ex parte Spies*) 123 U. S. 131, 132, 166, 31 L. ed. 80, 86, 8 Sup. Ct. Rep. 21.

The claim here sought to be made is that the statutes of Ohio, referred to, are repugnant to the Constitution of the United States; but, as no such claim was set up or made in the trial courts of Ohio, it follows that this court would have no jurisdiction to entertain these cases for that reason.

Spies v. *Illinois* (*Ex parte Spies*) 123 U. S. 131, 132, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21; *Brooks* v. *Missouri*, 124 U. S. 394, 395, 31 L. ed. 454, 456, 8 Sup. Ct. Rep. 443; *French* v. *Hopkins*, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *Powell* v. *Brunswick County*, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; *Morrison* v. *Watson*, 154 U. S. 111–115, 38 L. ed. 928, 929, 14 Sup. Ct. Rep. 995; *Miller* v. *Texas*, 153 U. S. 535, 538, 539, 38 L. ed. 812–814, 14 Sup. Ct. Rep. 874; *Sayward* v. *Denny*, 158 U. S. 180–184, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *Giles* v. *Teasley*, 193 U. S. 146–160, 48 L. ed. 655–658, 24 Sup. Ct. Rep. 359.

Ohio is not the only state where like statutes are sustained by the highest courts.

Polk County v. *Hierb*, 37 Iowa, 361; *La France* v. *Krayer*, 42 Iowa, 147; *Bertholf* v.

O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; *Bell* v. *Cassem*, 158 Ill. 45, 29 L.R.A. 571, 41 N. E. 1089; *Booth* v. *People*, 186 Ill. 43, 50 L.R.A. 762, 57 N. E. 798.

The liability to seizure attaches to the thing. If a man uses his property for the purposes of the violation of the laws, he loses his right to have it at all.

Dobbins's Distillery v. *United States*, 96 U. S. 395, 400, 401, 24 L. ed. 637–639; *The Palmyra*, 12 Wheat. 1, 6 L. ed. 531; *United States* v. *The Malek Adhel*, 2 How. 210, 11 L. ed. 239; *Munn* v. *Illinois*, 94 U. S. 114, 24 L. ed. 77; *The Ann*, 9 Cranch, 289, 3 L. ed. 734; *United States* v. *The Little Charles*, 1 Brock. 380, Fed. Cas. No. 15,612; *United States* v. *A Distillery*, 2 Abb. (U. S.) 192, Fed. Cas. No. 14,965.

Due process of law does not imply or require a jury trial.

Adler v. *Whitbeck*, 44 Ohio St. 568, 9 N. E. 672.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The plaintiff in error seeks to reverse the judgments herein, based on the gaming statute of Ohio, because, as he insists, that statute is unconstitutional on several different grounds: First, because it is (as he avers) an unconstitutional extension of the police power of the state, resulting in the taking of the property of the plaintiff in error for the benefit of the defendant in error; or, in other words, it results in the taking of the property of the plaintiff in error without his consent, for a private purpose, and that it is an invasion of his private right of property, in violation of the Federal Constitution; second, because the statute denies or does not provide for an exercise of the right of trial by jury, and, therefore, a judgment founded upon it is obtained without due process of law; third, because the judgment first obtained against the persons who actually won the money is made conclusive evidence against the plaintiff in error of the amount of money thus lost, although he was neither a party nor privy to that judgment, as it was reversed as to him, and he was thereupon dismissed from the case.

A reference to the record does not show that any one of these questions was raised, either by the pleadings or on the trial of the case. The only evidence that any ques-
[223] tion was *raised in the supreme court, assailing the validity of the statute as a violation of any provision of the Federal Constitution, consists of a statement in the petition in error to the supreme court, that the statute was a violation of certain sections of the Federal Constitution, and in the certificate of the supreme court of Ohio, which that court ordered to be made a part of the record, and which is above set forth. It is a certificate from the court, as distinguished from one by an individual judge.

The petition in error does not show that any question involving the Federal Constitution was actually argued or brought to the attention of the supreme court. It is well settled in this court that a certificate from a presiding judge of the state court, made after the decision of the case in that court, to the effect that a Federal question was considered, and decided by the court adversely to the plaintiff in error, cannot confer jurisdiction on this court, where the record does not otherwise show it to exist; that the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the Federal question. *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; *Henkel* v. *Cincinnati*, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Fullerton* v. *Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221. As the certificate in the case at bar was made by the court, and was ordered by it to be attached to and form part of the record itself, it is perhaps sufficient to show that some questions of a Federal nature were before that court, and decided by it. It is true the certificate is quite loose in its statement as to what was the nature or character of these questions. It is certified that the plaintiff in error contended that the sections of the statute and the proceedings of the circuit court had thereunder were repugnant to those sections of the Constitution of the United States referred to in the certificate. By reference to them it will be seen that § 1, article 14, contains several provisions quite distinct from, and having no relation to, each other, and the certificate does not state which one of the provisions of that section was claimed *to have been violated by [224] the statute in question. Section 9 of article 1 has itself seven subdivisions, and it would be difficult even to guess which particular provision the plaintiff in error claimed was violated by the statute. Section 10 of the same article is also referred to as having been violated by the statute; also article 3, § 3, which relates to the trial of all crimes by jury. Then there is stated to have been made by the plaintiff in error a general contention that the statute and proceedings thereunder were an invasion of his private right of property in violation of the Federal Constitution and its amendments.

A more general statement of the presentation of the Federal questions to a state court could scarcely be made. It is almost

impossible to determine from such certificate what Federal question was decided in the case. We have heretofore held that an objection very similar to this raised no Federal question. *Clarke* v. *McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

Assuming, however, that by reference to the 1st section of the 14th Amendment, the question of the illegal extension of the police power of the state may be raised, under the claim that a judgment founded upon the statute would permit the taking of the property of the plaintiff in error without due process of law, we are of opinion that the objection is without merit. For a great many years past gambling has been very generally in this country regarded as a vice, to be prevented and suppressed in the interest of the public morals and the public welfare. The power of the state to enact laws to suppress gambling cannot be doubted; and, as a means to that end, we have no doubt of its power to provide that the owner of the building in which gambling is conducted, who knowingly looks on and permits such gambling, can be made liable in his property which is thus used, to pay a judgment against those who won the money, as is provided in the statute in question. That statute, or one somewhat similar to it (without the conclusive feature of the judgment as evidence in the action to charge the property of the owner of the building [225]*where the gambling was carried on), has been in force in Ohio ever since, at least, 1831, and similar legislation is found upon that subject or upon that of the regulation of the sale of liquor, in most of the states of the Union. The plain object of this legislation is to discourage and, if possible, prevent gambling. The liability of the owner of the building to make good the loss sustained under the circumstances set forth in the statute was clearly part of the means resorted to by the legislature for the purpose of suppressing the evil in the interest of the public morals and welfare. We are aware of no provision in the Federal Constitution which prevents this kind of legislation in a state for such a purpose. To say that it must be limited to a provision allowing a recovery of the money by the one who lost it, would be in effect to hold invalid all legislation providing for proceedings in the nature of *qui tam* actions. Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer. 3 Bl. Com. chap. 9, m. p. 161; 2 Bl. Com. chap. 29, m. p. 437; 2 Hawk. P. C. 8th ed. 368; 1 Selwyn, N. P. 621; *Dozier* v. *Williams*, 47 Miss. 605; *Beadleston* v. *Sprague* (1810) 6 Johns. 101; *Caswell* v. *Allen*, 10 Johns. 118; *Parker* v. *Colcord* (1819) 2 N. H. 36; *Pike* v. *Madbury* (1841) 12 N. H. 262; *Com.* v. *Churchill* (1809) 5 Mass. 180.

Legislation giving an interest in the forfeiture to a common informer has been frequent in congressional legislation relating to revenue cases. It is referred to in the act of March 3, 1797 (1 Stat. at L. 506, chap. 13, U. S. Comp. Stat. 1901, p. 3604), and cases arising under its provisions are to be found in 10 Wheat. 246, 6 L. ed. 314, *United States* v. *Morris*, and 6 Pet. 404, 8 L. ed. 443, *M'Lane* v. *United States*.

*And in 1861, in 12 Stat. at L. 292, 296, [226]chap. 45, § 11, one moiety of the forfeiture is given "to him who shall first sue for the same."

There can be no doubt of the right of the government to give the whole instead of a moiety of the forfeiture to the informer.

Second. The contention on the part of the plaintiff in error, that the statute violates the Federal Constitution because it does not provide for or permit trial by jury, is equally without merit. *Maxwell* v. *Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

Third. The contention that the statute violates the 1st section of the 14th Amendment, because under it, as is averred, a judgment against those who won the money at gambling, when not impeached for fraud or collusion, is conclusive evidence of the amount lost in an action against the owner of the property where the money was lost, who was neither party nor privy to such judgment, cannot, in the state of this record, be here raised. Upon the trial the defendant in error offered the judgment against Clifford and Gassman in evidence, and it was received under a general objection made by the plaintiff in error. By reference to the record it appears that the plaintiff in error on the trial conceded that the judgment was rendered against Clifford and Gassman. The formal putting in evidence of a judgment, the existence of which was conceded, can raise no question whatever. At a subsequent stage of the trial oral evidence was given outside of the record of the judgments (under objection by the plaintiff in error that there was no such issue in the case) of the amount of money that was in fact lost at play, and that it was represented by, and was as large as, the amount stated in the judgment offered in evidence.

One of the grounds of objection to the evidence, made by the plaintiff in error, was that neither the fact nor the extent of the loss was alleged in the petition or was an issue in the case. The petition in substance contained both averments and the answer denied them. There was such an issue, although defendant, in his objection, overlooked it. The objection *was overruled and [227] the evidence given. It surely cannot now be pretended that the plaintiff in error was thereby harmed. Can he now be heard to say that the statute is void because of the conclusive character which he avers is therein given to the judgment, when there was proof outside the record (given against his own objection and averment that the fact was not in issue) showing the amount of money lost? If the statute do mean that such prior judgment is conclusive, what legal interest has the plaintiff in error in the question when there is other evidence in his case, although given against his objection that there was no issue on that fact? The whole statute is not void, even if it mean that the judgment is conclusive; and when other evidence is given, the (alleged) invalid provision is eliminated in such case, and the party who insists there is no issue as to loss, not being harmed, cannot raise the question. *Albany County* v. *Stanley*, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; *Clark* v. *Kansas City*, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284. The statement of the circuit court as to the conclusive character of a judgment was, as applied to the plaintiff in error, a mere abstraction. It does not appear, even by the certificate of the supreme court, that the plaintiff in error claimed the protection of the 1st section of the 14th Amendment on the ground of the alleged erroneous decision of the court below on this question, nor does it appear that the supreme court itself gave any opinion upon or determined it. These facts must appear in the record. *Dewey* v. *Des Moines*, 173 U. S. 193, 197, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71. The certificate that the plaintiff in error claimed the protection of that section is fully satisfied by treating it as raising the question of the invalidity of the statute on the ground of an illegal extension of the police power, and also because it did not permit a trial by jury, and thereby, as contended, denying due process of law. These grounds we have already considered. We cannot and ought not to assume that the supreme court, in this state of the record, took cognizance of the question of the conclusiveness of the judgment, and the certificate does not show that the court did so.

*In what has been said we do not wish it [228] to be understood that this court intimates an opinion upon the alleged invalidity of the statute upon the above ground. We simply say that the plaintiff in error cannot raise that question.

The judgments of the Supreme Court of Ohio are affirmed.

GEORGE C. RANKIN, Receiver of the Hutchinson National Bank, *Plff. in Err.*,
v.
EDWARD E. BARTON.

(See S. C. Reporter's ed. 228–232.)

1. **Error to state court—Federal question.**—A decision of a state court that the statute of limitations applicable to the right to enforce the individual liability of stockholders in national banks is put in motion by a delay of the Comptroller of the Currency in making an assessment involves a Federal question which will sustain a writ of error from the Supreme Court of the United States.
2. **Limitation of actions—enforcement of liability of stockholders in national banks.**—A state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank until the amount of such liability has been ascertained and assessed by the Comptroller of the Currency.

[No. 125.]

NOTE.—*On limitation of actions to enforce liability of stockholder*—see notes to United States v. Stanford, 40 L. ed. U. S. 751; and Platt v. Wilmot, 48 L. ed. U. S. 809.

Error to state court in cases involving questions under the national banking law.

Parties setting up as a defense title in a third party under the national banking law, and not claiming for themselves any title, right, privilege, or immunity given by that law, are not entitled to have a judgment of a state court adverse to their contention reviewed in the Supreme Court of the United States. Miller v. National Bank, 106 U. S. 542, 27 L. ed. 289, 1 Sup. Ct. Rep. 536.

Where a national bank organized from a state bank is held liable by a state court to pay bills issued by such state bank, and the national bank claims immunity from such liability by reason of its organization under the national banking act, the Supreme Court of the United States has jurisdiction to review the state decision. Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60.

A question as to the power of a national bank to become a stockholder in a savings bank is a Federal one. California Nat. Bank v. Kennedy, 167 U. S. 363, 42 L. ed. 198, 17 Sup. Ct. Rep. 831.

And so is the question whether a national bank has power to discount a note on real-

Submitted October 17, 1905. Decided November 13, 1905.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Reno County, in that state, sustaining the defense of the statute of limitations in an action to enforce the individual liability of a shareholder in a national bank. *Reversed* and remanded for further proceedings.

See same case below, 69 Kan. 629, 77 Pac. 531.

The facts are stated in the opinion.

Mr. **H. Whiteside** submitted the cause for plaintiff in error:

The exercise of the judgment and authority of the Comptroller is indispensable whenever the personal liability of the stockholder is sought to be enforced; and it must precede the institution of the suit by the receiver.

Kennedy v. *Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168; *United States* v. *Knox*, 102 U. S. 422, 26 L. ed. 216; *Germanica Nat. Bank* v. *Case*, 131 U. S. exliv. Appx. and 23 L. ed. 961; *Bushnell* v. *Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; *Aldrich* v. *Yates*, 95 Fed. 78; *Aldrich* v. *Campbell*, 38 C. C. A. 347, 97 Fed. 663; *De Weese* v. *Smith*, 97 Fed. 309; *Studebaker* v. *Perry*, 43 C. C. A. 69, 102 Fed. 947.

Mr. **George A. Vandeveer** submitted the cause for defendant in error. *Mr. F. L. Martin* was on the brief:

There is no Federal statute of limitations applicable to this class of actions, and the statute of limitations of the state in which the action is brought controls.

Campbell v. *Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; *Price* v. *Yates*, 2 Browne, Nat. Bank Cas. 204.

A statute of a state is whatever the court of last resort in such state construes it to be.

M'Elmoyle v. *Cohen*, 13 Pet. 312, 10 L. ed. 177; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Metcalf* v. *Watertown*, 153 U. S. 671, 38 L. ed. 862, 14 Sup. Ct. Rep. 947; *Balkam* v. *Woodstock Iron Co.* 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010.

In Kansas the rule is that the bar of the statute cannot be postponed by the failure

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estate security. Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939.

A claim by a national bank, of an exemption from liability on a contract because the contract was one which it had no power, under the national banking law, to make, involves a Federal question. Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

The decision of a state court that a claim against a national bank was an existing demand at the date of its suspension does not involve a Federal question. Chemical Nat. Bank v. Hartford Deposit Co. 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439.

Whether, by reason of a false assumption of corporate authority, the officers, directors, and shareholders of what purported to be a national bank, but which never attained legal authority to do business, became liable as partners, on the principle of agency, for contracts entered into in the name of the corporation, is not a Federal question, but only a question of general law. Seeberger v. McCormick, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

But whether or not a recovery can be had on a lease made by a national banking association not then authorized to commence business, but which had made and filed its articles of association, by virtue of the exception made by U. S. Rev. Stat. § 5136, U. S. Comp. Stat. 1901, p. 3455, as to incidental and preliminary business, and because the prohibition of business by that section did not make prohibited contracts invalid, is a Federal question. McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

A claim against a purchaser of shares of stock of a national bank which subsequently became insolvent, for a loss incurred by his failure to insert his name, or that of some other responsible person, in the blank transfer signed on the books of the bank, presents no Federal question which will give the Supreme Court of the United States jurisdiction to review a judgment of a state court overruling such contention. The purchaser's obligation, if any, grows out of his contract, and not out of the banking law. Le Sassier v. Kennedy, 123 U. S. 521, 31 L. ed. 262, 8 Sup. Ct. Rep. 244.

A decision by a state court that, under a state statute, a national bank could not recover from a corporation interest in excess of the statutory rate, although corporations are prohibited from pleading the defense of usury, does not present a Federal question, where it rests upon a determination of the state court of the meaning of the state law as applied to all creditors, without denying the equality of right to the bank. Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 325, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039.

A controversy merely as to which of the parties has the superior equity to shares of stock in a national bank, and in which the national banking act is only collaterally involved, does not raise a Federal question. Leyson v. Davis, 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500.

An action to recover back usurious interest from a national bank, expressly based on an act of Congress, presents a Federal question. Talbot v. First Nat. Bank, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; Talbot v. Sioux Nat. Bank, 185 U. S. 182, 46 L. ed. 862, 22 Sup. Ct. Rep. 621.

See also note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States.*

An exception to the action of a state court in overruling an objection to the introduction of any evidence under a petition in a suit to

of the creditor to avail himself of any means within his power to prosecute, or to preserve, his claim; and that action must be taken within a reasonable time; and that, in no event, will such reasonable time be extended beyond the statutory period of limitation.

Atchison, T. & S. F. R. Co. v. *Burlingame Twp.* 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271; *Rork* v. *Douglas County*, 46 Kan. 176, 26 Pac. 391; *Bauserman* v. *Charlott*, 46 Kan. 480, 26 Pac. 1051; *Kulp* v. *Kulp*, 51 Kan. 341, 21 L.R.A. 550, 32 Pac. 1118.

And this is the general rule recognized by this court.

Bauserman v. *Blunt, supra; Rankin* v. *Barton*, 69 Kan. 629, 77 Pac. 531; *West* v. *Topeka Sav. Bank*, 66 Kan. 527, 63 L.R.A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

The validity of a statute or treaty of the United States is not drawn in question, within the meaning of this section, every time rights claimed under a statute or treaty are controvertible; nor is the validity of an authority every time an act done by an authority is disputed.

Kennard v. *Nebraska*, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247; *Borgmeyer* v. *Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Ferry* v. *King County*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. Rep. 128; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

This court will not review the decision of the state court construing its own statute of limitations.

Great Western Teleg. Co. v. *Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Walsh* v. *Columbus, H. Valley & A. R. Co.* 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; *Hamblin* v. *Western Land*

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recover the penalty imposed by the laws of the United States upon national banks for knowingly contracting for and receiving usurious interest, on the ground that the compiaint was insufficient, does not indicate that the attention of the state court was directed to the proposition that, by its decision, it might deny some title, right, privilege, or immunity, arising under such laws. Schuyler Nat. Bank v. Bellong, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24.

A ground assigned for a motion for a new trial in the state court, that the judgment holding a receiver of a national bank to be a trustee was "contrary to law," is insufficient to raise a question of the denial of a right claimed under an act of Congress. Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

A judgment of the state court against the cashier of a national bank for his failure to comply with certain requirements of a state law is reviewable in the Supreme Court of the United States where his defense was that he was amenable to no law but a law of Congress, and that a state legislature had no power to prescribe his duty; as the judgment could not have been rendered without holding, and in effect deciding, that this plea was bad. Waite v. Dowley, 94 U. S. 527, 24 L. ed. 181.

A judgment for plaintiff in a suit against a national bank on a contract which the bank claimed it had no power, under the national banking law, to make, and was consequently exempt from liability thereon, necessarily determined, adversely to the bank, that it had no such exemption or immunity as asserted under that act, although the state court may have held the bank liable independently of that question. Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

A decision by the highest court of a state in favor of the claim that a lease made by a national banking association, not then authorized to commence business, but which had made and filed its articles of association, was invalid, under U. S. Rev. Stat. § 5136, U. S. Comp. Stat. 1901, p. 3455, is subject to review by writ of error from the Supreme Court of the United States, where the lessor specially set up and claimed a right to recover on the lease on the ground that it was within the exception to that section as to incidental and preliminary business, and also that the prohibition of business by that section did not make prohibited contracts invalid as between the parties. McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

See also note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33, on *How and when questions must be raised and decided in a state court in order to make a case for writ of error from the Supreme Court of the United States.*

Other notes not hereinbefore referred to, involving questions respecting the appellate jurisdiction of the Supreme Court of the United States over state courts are: *What the record must show respecting the presentation and decision of a Federal question in order to confer such jurisdiction,*—Hooker v. Los Angeles, 63 L.R.A. 471; *The record for this purpose,*—Home for Incurables v. New York, 63 L.R.A. 329; *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts,*—Missouri *ex rel.* Hill v. Dockery, 63 L.R.A. 571; *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal,*—Wedding v. Meyler, 66 L.R.A. 833.

Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Harrison* v. *Myer*, 92 U. S. 111, 23 L. ed. 606.

Where a state law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction.

Congdon v. *Goodman*, 2 Black, 574, 17 L. ed. 257; *Scott* v. *Jones*, 5 How. 343, 12 L. ed. 181; *Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169.

A decision of the state court resting upon the construction, and not upon the validity, of a state statute, does not present a Federal question.

Grand Gulf R. & Bkg. Co. v. *Marshall*, 12 How. 165, 13 L. ed. 938; *Ferry* v. *King County, supra; Snell* v. *Chicago*, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489.

Decisions based on local laws not involving constitutional questions are not reviewable here.

Hibben v. *Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Smith* v. *Indiana*, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. Rep. 51.

Mr. Justice **McKenna** delivered the opinion of the court:

The question in this case is the application of the statute of limitations of a state to the liability of a stockholder of a national bank before the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. The trial court held the statute applicable, and its judgment was affirmed by the supreme court of the state.

The petition was filed November 13, 1902, and averred that the Hutchinson National Bank became insolvent in 1893, and plaintiff in error was appointed its receiver. On July 9, 1894, the Comptroller of the Currency ordered an assessment of $75,000 upon the individual liability of the stockholders, being $75 on each share, to pay the
[231] debts of the bank. After *application of the amounts collected, and after further accounting, it was found necessary to make another assessment, and on November 20, 1900, the Comptroller of the Currency made another assessment of $19,000, being $19 upon each share. It was averred "that said assessment was made just as soon as discovered, in the exercise of diligence, to be necessary, and just as soon as it was ascertained that the first assessment and assets of the bank were insufficient." The amount due from defendant in error was $627, for which judgment was prayed. A demurrer was sustained to the petition on the ground that it showed on its face that the cause of the action was barred by the statute of limitations of the state. In sustaining this ruling, the supreme court of the state said: (1) That although the cause of action arose under the act of Congress, which prescribed no limitation on the remedy against stockholders, the statute of the state applied; and (2) the statute commenced to run, not when the assessment was made against a stockholder, but was put in motion by delay in making the assessment. Prior decisions of the supreme court of the state were relied on for this conclusion. They established the local law to be, it was said, that when an act to be done is wholly within the control of the party suing, he must perform it within a reasonable time, and such time cannot extend the period within which the action would be barred if no such preliminary step were necessary. And it was decided that the averment of the petition, that the second assessment was made as soon as it was discovered to be necessary, was a mere conclusion of the pleader, which was countervailed by the facts alleged.

We think the court overlooked the official character and power of the Comptroller of the Currency, and the decisions of this court declaring them. A national bank is an instrumentality of the United States; its circulating notes are guaranteed by the United States; and if the United States should be compelled to pay them, the United States has a paramount lien on the assets of the bank for reimbursement. The administration of the bank's assets is, therefore, vested in the Comptroller *of the Currency [232] as an officer of the United States. He appoints the receiver, and directs his acts. The individual liability of a stockholder can only be enforced by his order. The provision is as much for the benefit of the stockholders as for the United States, and it is indispensable to the bringing of a suit against the stockholder. In other words, the liability dates from the order of the Comptroller. It was said in *Kennedy* v. *Gibson*, 8 Wall. 498, 505, 19 L. ed. 476, 478: "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be

enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and, if put in issue, must be proved." Subsequent cases have reiterated the doctrine. *McDonald* v. *Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; *Studebaker* v. *Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463. As the power of the Comptroller is derived from a statute of the United States, it cannot be controlled or limited by state statutes.

A motion is made by defendant in error to dismiss the writ of error for want of jurisdiction in this court. It is manifest from what we have said that the motion is without foundation.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

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[233]*ATTORNEY GENERAL OF THE STATE OF MICHIGAN upon the Relation of L. E. KIES *et al.*, *Plff. in Err.*,

v.

THOMAS J. LOWREY, H. S. Walworth, C. H. Manzer, *et al.*

(See S. C. Reporter's ed. 233–240.)

1. **Error to state court—Federal question—decision on Non-Federal grounds.**—The Supreme Court of the United States is not without jurisdiction to review, by writ of error, a decision of a state court sustaining a state statute claimed to impair contract obligations, because the state court rests its conclusion of the nonexistence of the contract upon a construction of the state Constitution and laws.

2. **Contracts—impairment of obligation—legislative alteration of school districts.**—Contract obligations are not impaired by the creation by Mich. Laws 1901, local acts No. 315, of a new school district, to which was given the property within its limits which had belonged to the districts from which it was created.

3. **Constitutional law—due process of law—legislative alteration of school districts.**—The property of a school district is not taken without due process of law by the creation, by Mich. Laws 1901, local acts No. 315, of a new district, to which was given the property within its limits which had belonged to the districts from which it was created.

4. **Constitutional law—guaranty of republican form of government—legislative alteration of school districts.**—Legislative creation and alteration of school districts and division and apportionment of the property of such districts is compatible with the republican form of government guaranteed by U. S. Const. art. 4, § 4, even assuming that this provision applies to the creation of, or the powers or the rights of property of, subordinate municipalities of a state.

[No. 21.]

Argued October 23, 24, 1905. Decided November 13, 1905.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which, reversing the judgment of the Circuit Court for the County of Hillsdale, in that state, in proceedings in the nature of *quo warranto*, sustained the validity of a state statute creating a new school district and giving it the property within its limits which had belonged to the districts from which it was created. *Affirmed.*

See same case below, 131 Mich. 639, 92 N. W. 289.

The facts are stated in the opinion.

Mr. **Frank A. Lyon** argued the cause and filed a brief for plaintiff in error:

School districts are municipal corporations.

Seeley v. *Board of Education*, 39 Mich. 486, note; *School Dist. No. 4* v. *Gage*, 39 Mich. 484, 33 Am. Rep. 421; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 250, 15 Am. Rep. 202.

The right of local self-government by these municipalities and local institutions is an absolute and vested right which the state cannot take away.

Mechem, Pub. Off. § 123; *People ex rel. LeRoy* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Atty. Gen.* v. *Detroit*, 29 Mich. 110; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Atty. Gen.* v. *Detroit*, 58 Mich. 213, 55 Am.

NOTE.—*On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United Staes on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L.R.A. 655, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; Re Gannon, 5 L.R.A. 359, and note; and Gilman v. Tucker, 13 L.R.A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Rep. 675, 24 N. W. 887; *Moreland* v. *Millen*, 126 Mich. 381, 85 N. W. 882; *Maynard* v. *First Representative District*, 84 Mich. 228, 11 L.R.A. 332, 47 N. W. 756; *Stuart* v. *School Dist. No. 1*, 30 Mich. 69; *Belles* v. *Burr*, 76 Mich. 1, 43 N. W. 24; *State ex rel. Holt* v. *Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *Evansville* v. *State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *Clinton* v. *Cedar Rapids & M. River R. Co.* 24 Iowa, 455; *State ex rel. Atty. Gen.* v. *Moores* (*State ex rel. Smyth* v. *Moores*), 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175; *Cincinnati, W. & Z. R. Co.* v. *Clinton County*, 1 Ohio St. 77; *Parker* v. *Com.* 6 Pa. 511, 47 Am. Dec. 480; *People ex rel. Bolton* v. *Albertson*, 55 N. Y. 50; *Rathbone* v. *Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; *Benson* v. *New York*, 10 Barb. 223; *State* v. *Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833; *West Point Water Power & Land Improv. Co.* v. *State*, 49 Neb. 218, 66 N. W. 6; *People ex rel. McCagg* v. *Chicago*, 51 Ill. 17; *People* v. *Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Grogan* v. *San Francisco*, 18 Cal. 590; Cooley, Const. Lim. 5th ed. 45, 203, 209, 225, 228, 291–294; Dill. Mun. Corp. 4th ed. §§ 9, 65–74; Von Holst, Const. Law, 271; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Milwaukee* v. *Milwaukee*, 12 Wis. 100; *Pearson* v. *State*, 56 Ark. 148, 35 Am. St. Rep. 91, 19 S. W. 499; *Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Warren* v. *Lyons City*, 22 Iowa, 351; *Tippecanoe County* v. *Lucas*, 93 U. S. 108, 23 L. ed. 822; *Bristol* v. *New Chester*, 3 N. H. 524; *People ex rel. Fountain* v. *Westchester County*, 4 Barb. 64; *State ex rel. Board of Education* v. *Haben*, 22 Wis. 660.

We have a right here to consult the opinion of the supreme court of Michigan to ascertain what points were made and considered by that court.

Murdock v. *Memphis*, 20 Wall. 590–633, 22 L. ed. 429–443; *McManus* v. *O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Gross* v. *United States Mortg. Co.* 108 U. S. 481–487, 27 L. ed. 796–798, 2 Sup. Ct. Rep. 940; *Adams County* v. *Burlington & M. River R. Co.* 112 U. S. 123, 129, 28 L. ed. 678, 680, 5 Sup. Ct. Rep. 77; *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133–137, 29 L. ed. 118, 119, 5 Sup. Ct. Rep. 811; *Jacks* v. *Helena*, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; *Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Kreiger* v. *Shelby R. Co.* 125 U. S. 39–45, 31 L. ed. 675–678, 8 Sup. Ct. Rep. 752.

Counsel has failed to keep in mind the difference between the decision and the opinion of the court. The decision of the court is its judgment, while the opinion is simply the reasons given for that judgment.

Houston v. *Williams*, 13 Cal. 27, 73 Am. Dec. 565.

Mr. **Henry B. Graves** argued the cause and filed a brief for defendants in error:

School districts have been called municipal corporations.

Belles v. *Burr*, 76 Mich. 1, 43 N. W. 24; *School Dist. No. 4* v. *Gage*, 39 Mich. 484, 33 Am. Rep. 421.

But, more properly, perhaps, they may be called quasi-municipal corporations.

25 Am. & Eng. Enc. Law, 2d ed. p. 31; *Bush* v. *Shipman*, 5 Ill. 186; *People ex rel. Cairo & St. L. R. Co.* v. *Dupuyt*, 71 Ill. 651; *Littlewort* v. *Davis*, 50 Miss. 403; *Johnson* v. *Dole*, 4 N. H. 478; *Stroud* v. *Stevens Point*, 37 Wis. 367; *Rawson* v. *Spencer*, 113 Mass. 40; *Harris* v. *School Dist. No. 10*, 28 N. H. 58; *Rogers* v. *People*, 68 Ill. 154; *Heller* v. *Strommel*, 52 Mo. 309; *School Dist. No. 11* v. *Williams*, 38 Ark. 454; *Beach* v. *Leahy*, 11 Kan. 23.

The charter of a municipal corporation is in no sense a contract, and the property acquired by the municipality is not acquired by virtue of any contract with the creator of the municipality.

Dartmouth College v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; *East Hartford* v. *Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518; *Aspinwall* v. *Daviess County*, 22 How. 364, 16 L. ed. 296.

Municipal corporations are mere creatures of the state, brought into existence to perform for the state certain public functions. The property of municipal corporations is simply the tools which the state authorizes the municipalities to acquire wherewith to perform these public functions. In some cases municipalities may acquire private property incidental to the performance of their public functions. Such property is usually received by grant from the bounty of public-spirited citizens; and in such case it is beyond the power of the state to divert the grant, or deprive the inhabitants of the municipality of the subject of the grant without due process of law.

Worcester v. *Worcester Consol. Street R. Co.* 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; *East Hartford* v. *Hartford Bridge Co. supra; United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Laramie County* v. *Albany County*, 92 U. S. 307, 23 L. ed. 552; *Tippecanoe County* v. *Lucas*, 93 U. S. 108, 23 L. ed. 822; *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 25 L. ed. 699; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Newton* v. *Mahoning County*, 100 U. S. 548, 25 L. ed. 710; *Essex Public Road Board* v. *Skinkle*, 140 U.

S. 334, 35 L. ed. 446, 11 Sup. Ct. Rep. 790; *Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Whitney* v. *Stow*, 111 Mass. 368.

The abolished school districts were public corporations, and neither owed their existence, nor held their property, through any contract with the state.

2 Comp. Laws Mich. 1897, § 4652; *Rawson* v. *Spencer; Dartmouth College* v. *Woodward; East Hartford* v. *Hartford Bridge Co.; Aspinwall* v. *Daviess County; United States* v. *Baltimore & O. R. Co.; Laramie County* v. *Albany County; Tippecanoe County* v. *Lucas; Mt. Pleasant* v. *Beckwith; Newton* v. *Mahoning County; Essex Public Road Board* v. *Skinkle*, and *Worcester* v. *Worcester Consol. Street R. Co.*, *supra*.

No Federal question was raised in the Hillsdale circuit court, all references being to the Constitution of Michigan.

Porter v. *Foley*, 24 How. 415, 16 L. ed. 740; *Endowment Benev. Asso.* v. *Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Kipley* v. *Illinois*, 170 U. S. 182–187, 42 L. ed. 998–1002, 18 Sup. Ct. Rep. 550; *Jacobi* v. *Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48.

It is doubtful whether this court will examine the opinions of the judges of the supreme court of Michigan to ascertain what was decided in that court, because it is doubtful whether such opinions are part of the record.

Murdock v. *Memphis*, 20 Wall. 590, 22 L. ed. 429; *Gross* v. *United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

But, if this court will examine the opinions of the supreme court of Michigan, no opinion of that court was ever rendered in this case, because no opinion was ever handed down, concurred in by a majority of the judges sitting in the case.

Dubuque v. *Illinois C. R. Co.* 39 Iowa, 56; *Whiting* v. *West Point*, 88 Va. 905, 15 L.R.A. 860, 29 Am. St. Rep. 750, 14 S. E. 698; *Grier's Estate*, 171 Pa. 412, 33 Atl. 375; *People ex rel. Lyon* v. *Circuit Judge*, 37 Mich. 377; *Boyle* v. *Zacharie*, 6 Pet. 348, 8 L. ed. 423; *Durant* v. *Essex Co.* 7 Wall. 107, 19 L. ed. 154.

If it can be said that the question of the taking of property without due process of law under the 14th Amendment was raised in the Hillsdale circuit court (which we deny), this question was abandoned in the supreme court of Michigan.

Harding v. *Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

The briefs of counsel in the court below are not part of the record, except, possibly, where referred to in the opinions.

Ibid.

The burden is on the plaintiff in error affirmatively to show that the supreme court of Michigan decided a Federal question.

Chicago, I. & L. R. Co. v. *McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200.

Mr. **Fred H. Stone** also argued the cause and filed a brief for defendants in error.

Mr. Justice **McKenna** delivered the opinion of the court:

The Constitution of the state of Michigan requires the legislature to establish and provide a system of public schools, whereby a school shall be kept open at least three months in each year in every school district in the state. In fulfilment of this requirement legislation was enacted from time to time providing for the formation of school districts. Under this legislation (1881) four school districts were organized in the townships of Somerset and Moscow, county of Hillsdale. In 1901 the legislature passed an act known as "Act Number 315 of the Local Acts of the State of Michigan for the Year 1901," entitled "An Act to Incorporate the Public Schools of the Village of Jerome, Hillsdale County, Michigan; Define the Boundaries Thereof, Provide for the Election of Trustees and Fix their Powers and Duties, and Provide for the Distribution of the Territory of the Disorganized Districts." By this act one of the districts formed in the townships of Somerset and Moscow, in which the village of Jerome is situated, and portions of other districts, were set off and incorporated in one school district, to be known as "the public schools of the village of Jerome." The act appointed defendants in error trustees of the new district, to continue in office until their successors should be elected, as provided in the act. The act gave to the new district *the property within its limits which had [238] belonged to the districts from which it was created, and required the new district to assume and pay the debts and obligations of the old districts. The new district did not include all of the lands of the old districts.

On the 7th of October, 1901, an information was filed in the nature of a quo warranto by the attorney general of the state upon the relation of L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary, charging defendants in error with usurping, intruding into, and unlawfully claiming to exercise "a false, fictitious, and pretended public office,

to wit, trustees and officers of the pretended school district known as 'the public schools of the village of Jerome,' and *ex officio* 'the board of school inspectors of the public schools of the village of Jerome,' to wit, at the county of Hillsdale aforesaid, in contempt of the people of the state of Michigan, and to their great damage and prejudice."

The circuit court rendered a judgment of ouster against defendants in error. The supreme court entered the following judgment: "The judgment of ouster should be affirmed as to such officers as now hold under the legislative appointment, if there be any thus holding. As to others, if any, it will be reversed."

The grounds of attack upon the validity of the act creating the new district in the supreme court of the state were as follows:

First. It deprives this school district or municipality of the right of local self-government, guaranteed to all municipalities by the Constitution.

Second. The title to the act indicates, and the act itself embraces, more than one object.

Third. The act is broader than the title; the body of the act embraces many objects not covered by the title.

Fourth. The act as passed impairs the obligation of contracts, within the meaning of the Constitution of the United States and the Constitution of the state of Michigan.

[239] *With the first three grounds we have no concern. They present strictly local questions. We are concerned with the fourth ground only in so far as it invokes the Constitution of the United States. The supreme court disposed of this ground as follows: "We have already shown that the obligation of contracts is not impaired. The districts did not hold this property under any contract with the state, but as a public agency." In other words, the nonexistence of a contract was rested on the construction of the Constitution and laws of the state, and hence defendant in error contends that the decision of the court did not involve a Federal question. This, however, overlooks the power and duty of this court to determine for itself the existence or nonexistence of a contract. Other grounds in support of the motion to dismiss are urged which, we think, are also untenable. The motion is therefore denied.

Plaintiff in error broadened in this court his objections to the act, based on the Constitution of the United States. He urges, besides the contract clause of the Constitution, that provision of the 14th Amendment which protects private property from deprivation without due process of law, and § 4, article 4, which provides: "The United States shall guarantee to every state in this Union a republican form of government." But the grounds all depend ultimately upon the same arguments. If the legislature of the state has the power to create and alter school districts, and divide and apportion the property of such district, no contract can arise, no property of a district can be said to be taken, and the action of the legislature is compatible with a republican form of government even if it be admitted that § 4, article 4, of the Constitution, applies to the creation of, or the powers or rights of property of, the subordinate municipalities of the state. We may omit, therefore, that section and article from further consideration. The decision of the other grounds urged we may rest upon the opinion of the supreme court of the state and the case of *Lamarie County* v. *Albany County*, 92 U. S. 307, 23 L. ed. 552. It is there said in many ways, with citation of *many supporting cases, that the legisla- [240] ture of the state has absolute power to make and change subordinate municipalities. The following quotation meets exactly the contentions of plaintiff in error:

"Institutions of the kind, whether called counties or towns, are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not, and cannot be, any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests as understood by those who control the action of the legislature. Opposition is sometimes manifested, but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable." Many cases are cited. See also *Worcester* v. *Worcester Consol. Street R. Co.* 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327.

Judgment affirmed.

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*TAMPA WATERWORKS COMPANY, [241]
Plff. in Err.,
v.
CITY OF TAMPA.

(See S. C. Reporter's ed. 241–247.)

1. Error to state court—questions re-

viewable — statutory construction. — The decision of a state court construing a state statute so as to remove any question of its repugnancy to the Federal Constitution cannot be reviewed by the Supreme Court of the United States on writ of error to the state court.

2. **Constitutional law — self-executing provisions.**—A provision of a state Constitution giving the legislature full power to correct abuses, and prevent unjust discrimination and excessive charges, is self-executing to the extent that contracts made after it went into effect are subject to the possibility of the exercise of such power.

3. **Error to state court—following state court decisions.**—The decision of a state court that a municipality could not, by a contract with a water company, deprive itself of the right to establish reasonable maximum water rates, conformably to a state statute adopted to carry into effect a provision of the state Constitution in force when the contract was made, which invests the legislature with full power to pass laws to correct abuses and prevent excessive charges by "persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature," and declares that the legislature "shall provide for enforcing such laws by adequate penalties or forfeitures," is not so clearly erroneous as to require reversal on a writ of error from the Supreme Court of the United States.

[No. 29.]

Argued and submitted October 27, 1905. Decided November 13, 1905.

IN ERROR to the Supreme Court of the State of Florida to review a decree affirming a decree of the Circuit Court for Hillsborough County, in that state, which dismissed on demurrer a bill to enjoin the enforcement of an ordinance fixing maximum water rates, on the ground that such ordinance impaired the obligation of a contract between the municipality and the water company. *Affirmed.*

See same case below (Fla.), 36 So. 174, on former appeal, 34 So. 631.

The facts are stated in the opinion.

Mr. **William A. Carter** argued the cause, and, with *Messrs. Stephen M. Sparkman, Edward L. Sparkman,* and *Peter O. Knight,* filed a brief for plaintiff in error:

The city of Tampa, at the time said contract was entered into and the amendments thereto made, possessed ample power to contract with the plaintiff in error for a public and private supply of water.

Los Angeles City Water Co. v. *Los Angeles,* 88 Fed. 720; *Santa Ana Water Co.* v. *San Buenaventura,* 56 Fed. 339; *Wells* v. *Atlanta,* 43 Ga. 67; *Atlantic City Waterworks Co.* v. *Atlantic City,* 48 N. J. L. 378, 6 Atl. 24; *Indianapolis* v. *Indianapolis Gaslight & Coke Co.* 66 Ind. 396; 1 Dill. Mun. Corp. §§ 91, 443.

The city of Tampa likewise had the power, in such contract, to fix the rates for a public and private supply of water for said city and its inhabitants during the entire contract period, and so to bind any future council from altering or interfering in any way with the same.

McQuillin, Mun. Ord. § 584; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co.* v. *Rivers,* 115 U. S. 683, 29 L. ed. 528, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Los Angeles City Water Co.* v. *Los Angeles,* 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; *Pingree* v. *Michigan C. R. Co.* 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; *Atlantic City Waterworks Co.* v. *Atlantic City, supra; Illinois Trust & Sav. Bank* v. *Arkansas City,* 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Greenville* v. *Greenville Waterworks Co.* 125 Ala. 625, 27 So. 764; *Vincennes* v. *Citizens' Gaslight Co.* 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573; *Indianapolis* v. *Indianapolis Gaslight & Coke Co. supra; Newport* v. *Newport Light Co.* 84 Ky. 168; *Fergus Falls Water Co.* v. *Fergus Falls,* 65 Fed. 591.

The constitutional provision relied upon by defendant in error conferred no power upon the legislature. This is manifest upon the face of the provision. It is only declaratory of a power that already existed.

State ex rel. Lamar v. *Jacksonville Terminal Co.* 41 Fla. 377, 27 So. 225.

It is a power inherent in every American state legislature, and does not require to be expressed in order that the legislature may pass laws for the correction of abuses, or to

NOTE.—*On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts*—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On self-executing constitutional provisions—see note to Willis v. St. Paul Sanitation Co. 16 L.R.A. 281.

As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; and Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; and Forepaugh v. Delaware, L. & W. R. Co. 5 L. R.A. 508.

prevent excessive charges by persons or corporations performing services of a public nature where contract rights do not intervene.

McWhorter v. *Pensacola & A. R. Co.* 24 Fla. 417, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co.* v. *Iowa* (*Chicago, B. & Q. R. Co.* v. *Cutts*) 94 U. S. 155, 24 L. ed. 94; Cooley, Const. Lim. 7th ed. 870.

The constitutional provision was not self-executing. It was dormant, requiring the action of the legislature to vitalize it, and, until this was done, could not form a part of, or be written by implication into, any contract.

Cooley, Const. Lim. 119–121; 6 Am. & Eng. Enc. Law, 2d ed. p. 919; *Sharp* v. *National Biscuit Co.* 179 Mo. 553, 78 S. W. 787.

The right to abolish, to alter and amend, does not give to a municipality the right to interfere with vested rights. These cannot be affected by legislative action, either directly or indirectly.

Beach, Pub. Corp. §§ 110–112.

The ordinance in question impairs the obligation of the contract between the city of Tampa and plaintiff in error, constitutes a taking of its property without due process of law, and denies to it the equal protection of the law.

Scott v. *Toledo*, 1 L.R.A. 688, 36 Fed. 395; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Sinnickson* v. *Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184; *Harness* v. *Chesapeake & O. Canal Co.* 1 Md. Ch. 249; *Henderson* v. *Central Pass. R. Co.* 21 Fed. 358; *Baker* v. *Norwood*, 74 Fed. 997; *Davidson* v. *New Orleans*, 96 U. S. 102, 24 L. ed. 618; *Kentucky Railroad Tax Cases*, 115 U. S. 331, 29 L. ed. 416, 6 Sup. Ct. Rep. 57; *New Memphis Gas & Light Co.* v. *Memphis*, 72 Fed. 952; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 198, 22 Am. Rep. 71; *Board of Education* v. *Bakewell*, 122 Ill. 348, 10 N. E. 378; *Rigney* v. *Chicago*, 102 Ill. 77; *Chicago & W. I. R. Co.* v. *Englewood Connecting R. Co.* 115 Ill. 385, 56 Am. Rep. 173, 4 N. E. 246.

Messrs. **Hugh C. Macfarlane** and **James F. Glen** submitted the cause for defendant in error. *Mr. John P. Wall* was with them on the brief:

The provision of the Florida Constitution in question is a self-executing limitation upon legislative power.

Davis v. *Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210.

There can be no complaint that the exercise of such reserved power impairs the obligation of a contract, or deprives a party of property without due process of law, subject to the suggested qualification that there might be such an abuse of the power under the guise of its exercise as to call for interference.

Stanislaus County v. *San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Northern C. R. Co.* v. *Maryland*, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; *Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Covington* v. *Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; *United States* v. *Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Pennsylvania College Cases* (*Jefferson College* v. *Washington & J. College*) 13 Wall. 190, 20 L. ed. 550.

A Constitution is not a grant of power, but a limitation, and, in the nature of things, every such limitation, as a limitation, is self-executing or inherently effective. The provisions of a state Constitution are designed, in and of themselves, to be restrictions in so far as they either expressly or by implication prohibit legislation in derogation thereof. Legislation may be necessary, as it often is, to carry into effect the mandate of a constitutional provision, but none the less is the constitutional provision a presently operative limitation upon legislative power.

Cooley, Const. Lim. 7th ed. p. 120, note 5; pp. 127 et seq.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here by writ of error to a decree dismissing the bill of the plaintiff in error upon demurrer. 45 Fla. 600, 34 So. 631, 36 So. 174. The bill alleges a contract between the plaintiff water company and the city of Tampa, by which the former was to erect waterworks and to *have the [242] right to charge certain rates for the use of its water for thirty years, with various other terms, not necessary to mention. By a sub-

sequent ordinance the city fixed lower rates as the highest to be charged by any person or corporation furnishing water to the city or its inhabitants, and imposed a penalty on violation of this ordinance or refusal to furnish water in compliance with its terms. The bill sets up that this ordinance impairs the obligation of the plaintiff's contract, and takes its property without due process of law, contrary to the Constitution of the United States. The city justified under § 30, article 16, of the state Constitution in force when the contract was made, and under an act approved May 31, 1901, chap. 5070, after the date of the contract. The supreme court of the state held the justification sufficient, and dismissed the bill.

We assume for the purpose of decision that the contract made was within the powers of the city, subject to whatever qualification or inherent weakness the Constitution created or imposed. We assume also that the case shows more than a mere breach of contract by the city if its justification fails, and pass at once to the merits of the justification.

The clause of the state Constitution is as follows: "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures."

In pursuance of this clause in the Constitution the legislature passed the act referred to above. By this act the corporate authorities of cities, towns, and villages were empowered to prescribe by ordinance maximum charges for water. "Such charges to be just and reasonable: Provided, that this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town, or village and any person, firm, or corporation for
[243] the supply of water to *such city, town, or village or its inhabitants. But this act shall not be held to validate any contract heretofore made." This act was construed by the supreme court of Florida, as we understand it, to mean that cities might establish reasonable maxima in any case where they could do so without impairing the obligation of contracts. Therefore the act was held to authorize the ordinance complained of unless the ordinance was open to constitutional objection. This construction of the statute is a very slight extension of the direct meaning of the words used, and seems to us reasonable even if a somewhat different one could be conceived. Of course it removes any question of constitutionality from the statute, and therefore there seems to be no ground for reviewing the decision upon that point. *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Weber* v. *Rogan*, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263.

We turn to the construction of the Constitution of the state. There was some argument that the clause was not self-executing. But so far as it expressed a power of the legislature, of course, as soon as the Constitution went into effect, that power existed at once, and contracts afterwards were made subject to the possibility of its exercise, as it was exercised by the subsequent statute. *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, 355, 28 L. ed. 173, 176, 4 Sup. Ct. Rep. 48; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820. The only question then is, how far the clause of the Constitution goes. When the contract was made there had been no judicial construction of the clause which withdrew the contract from its operation, nor has there been since, so far as we are aware. There is no ground for the application of the doctrine of *Muhlker* v. *New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, or *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520. In such circumstances, although we construe the Constitution for ourselves, and determine the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment (*Douglas* v. *Kentucky*, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199), "the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced *with [244] doubt,"—a principle reinforced by the later cases. *Burgess* v. *Seligman*, 107 U. S. 20, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Wilson* v. *Standefer*, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 220, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820; *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 674, 675, 677, 47 L. ed. 641, 649, 650, 23 Sup. Ct. Rep. 386.

It cannot be said that the interpretation adopted is not a possible one. Water companies are corporations performing services of a public nature quite as much as common carriers, and, therefore, are within the words of the clause which is not confined to common carriers. A natural method of preventing excessive charges is the passage by the cities or towns within which the services are performed, of ordinances establishing reasonable rates and punishing noncompliance. Therefore the power to prevent excessive charges, given to the legislature, properly was exer-

cised by a law granting cities authority to pass ordinances of the kind supposed.

So much probably would be admitted; but it is said that the clause is merely declaratory of powers which the legislature would have had without it, and which, with or without it, the legislature could cut down by contract. The argument is not without force, but it did not prevail in this case, and we are not prepared to overrule the Florida courts in their interpretation of their own laws. It is entirely possible to read the words as conferring a power which, by their very form, they were meant to make inalienable. No doubt some sort of a legislature would exist, Constitution or no Constitution; and presumably would have power to regulate rates charged by companies performing public services, or to restrict that power by a constitutionally binding contract. But the actual legislature derives its being, its form as a senate and house of representatives, and its powers, from the instrument in force. When the Constitution says that the legislature "is invested" with a certain power, it invests it with that power; and does so none the less that, in the absence of those words, a more or less similar power would be implied by more general expressions in the same instrument. It says that the power shall be [245]"full *power;" and the adjective may be read as meaning a power which cannot be cut down. When it goes on to require that the legislature "shall" provide for enforcing the laws which it is expected to pass for the correction of abuses and the prevention of excessive charges, the argument is strengthened that it means to impose a duty which the legislature is not at liberty to give up. Such was the opinion of the supreme court of Florida, and we have yielded to the judgment of the state court upon more doubtful questions than this.

The case stands on the single ground of contract. There is no allegation that the rates fixed by the new ordinances are unreasonable, or that their effect will be to destroy or considerably impair the value of the plaintiff's property. Although the 14th Amendment is invoked, no case is made out under it on any other ground than that the obligation of a binding contract is impaired. The single question is whether the city of Tampa is bound for thirty years from the date of its agreement to permit certain specified rates to be charged, even if they have ceased to be reasonable. We are not prepared to say that the supreme court of Florida was wrong in deciding that it is not bound, under the Florida Constitution and laws. The effect of a former decree dismissing a bill brought by the city, which is set up in this bill, cannot be reargued here.

Decree affirmed.

Mr. Justice **Brown**, with whom was Mr. Justice **Peckham**, dissenting:

In September, 1887, the waterworks company made a contract with the city for the establishment of waterworks, in which it was agreed that the contract should continue in force for thirty years from the time the works were completed and ready for duty, and that the owners might charge and collect quarterly, in advance, for water furnished to private consumers, prices not to exceed certain maximum rates fixed by the contract.

*At this time there was in force the fol- [246] lowing constitutional provision in Florida:

"The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures."

By an act of the legislature passed May 31, 1901 (chap. 5070), the corporate authorities of any city were empowered to prescribe by ordinance maximum rates and charges for the supply of water, such charges to be just and reasonable; provided, "that this act shall not be so construed as to impair the validity of any valid contract heretofore entered into . . . for the supply of water to such city," "but this act shall not be held to validate any contract heretofore made."

On December 20, 1901, the city council of Tampa passed the ordinance complained of (No. 274), which provided that "it shall be unlawful for any individual, company, or corporation furnishing water to the city of Tampa or its inhabitants, to charge any higher rates for water than those hereinafter specified." The ordinance made a large deduction in the rates fixed by the original ordinance or contract, and thereby, as it is alleged, impaired its obligation.

The constitutional provision was evidently not self-executing, though it vested full power in the *legislature* to prevent excessive charges for the performance of public services. The legislature did not see fit to exercise this power to its full extent. But in authorizing corporate authorities in any city, etc., to fix rates, provided that *the act should not be so construed as to impair the validity of any valid contract.* This it had the right to do. It was not bound to exercise the whole power vested in it by the Constitution, but might grant so much of such

power to the corporate authorities as it deemed best for the public interests. This we have repeatedly held with respect to parceling out the power vested in Congress by
[247] the Constitution. *M'Intire v. Wood, 7 Cranch, 504, 3 L. ed. 420; *Kendall* v. *United States*, 12 Pet. 524–616, 9 L. ed. 1181–1217; *Cary* v. *Curtis*, 3 How. 236–245, 11 L. ed. 576–581.

It follows that if the ordinance of 1901 impaired the original contract between the waterworks and the city, it exceeded its powers under the act of the legislature.

In its opinion the supreme court of Florida assumed, without deciding, that "the powers granted to the city were sufficient to authorize it to contract with the water company for a public and private supply of water," and were also sufficient to enable the city to insert clauses fixing the rates and obligating the city to pay these rates for water used by it during the entire contract period, and that the same powers existed of fixing the rates for water supply to individuals.

Now, as the Constitution only delegated to the *legislature* the power to authorize the corporate authorities to reduce rates, and the legislature delegated that power only in cases where it did not impair the validity of any contract, it seems to me clear that the city council of Tampa exceeded its authority in reducing rates protected by a contract, and must be held to have impaired its obligation.

CHESAPEAKE BEACH RAILWAY COMPANY, *Plff. in Err.*,

v.

WASHINGTON, POTOMAC, & CHESAPEAKE RAILROAD COMPANY.

(See S. C. Reporter's ed. 247–252.)

1. **Deeds—certainty in description.**—The vagueness of the descriptive language in a deed when considered alone is not material if, when taken in connection with the plats to which it refers, it is sufficiently certain to identify the land.

2. **Evidence—presumption of continued possession.**—Possession of a railway roadbed will be presumed, in ejectment, to have followed the title until the dispossession by defendant took place, where the railway tracks were on the land, and the plaintiff railway company claimed under a series of deeds purporting to convey the property.

3. **Trusts—deed from trustee—effect of recital of foreclosure decree on title conveyed.**—The deed from a trustee in a mortgage conveys whatever title he had, although it recites a decree of foreclosure; since it will not be assumed from this recital that the trustee acted only by virtue of the power which the decree conferred.

4. **Railroads—conveyance of roadbed—effect of grantee's lack of legislative authority to extend its line over the roadbed.**—The lack of any congressional authority in the successive grantees of a railway roadbed lying in the District of Columbia to extend their lines into that District could not affect their title if the original grantor had such authority.

5. **Deeds—necessity of seisin.**—A conveyance by a disseisee is valid in the District of Columbia.

[No. 35.]

Argued October 31, November 1, 1905. Decided November 13, 1905.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District in favor of plaintiff in an action of ejectment to recover a railway roadbed. *Affirmed.*

See same case below, 23 App. D. C. 587.

The facts are stated in the opinion.

Mr. **Frederic D. McKenney** argued the cause, and, with *Mr. John Spalding Flannery*, filed a brief for plaintiff in error:

The making of a crop is not sufficient basis upon which to predicate a claim of possession (*Conn* v. *Franklin* [Tex.] 19 S. W. 126), nor is the causing of surveying to be done (*Thompson* v. *Burhans*, 61 N. Y. 52; *Greenleaf* v. *Brooklyn, F. & C. I. R. Co.* 141 N. Y. 395, 36 N. E. 393).

In the absence of proof of actual ouster of the plaintiff or its grantors by the defendant, it was incumbent upon the plaintiff to show continuous possession on its part, and that of its grantors, to date of supposed ouster, or, at least, that the supposed possession of the Southern Maryland Railroad Company has never been abandoned.

Sabariego v. *Maverick*, 124 U. S. 297, 31 L. ed. 445, 8 Sup. Ct. Rep. 461; *Bradshaw* v. *Ashley*, 180 U. S. 59, 64, 45 L. ed. 423, 429, 21 Sup. Ct. Rep. 297.

The defendant below was not a party to the Central Trust Company suit, and consequently cannot be bound by the recitals of the decree or the deed made pursuant to it.

Carver v. *Jackson*, 4 Pet. 82, 7 L. ed. 790; Martindale, Conveyancing, §§ 73, 515.

The limitation of the grantor's powers, as well as the scope of its intention, is clearly defined by the recitals of the trust deed; and with no less certainty is the capacity in which the grantor was acting declared there-

NOTE.—*As to certainty in description in deed*—see note to O'Hara v. United States, 10 L. ed. U. S. 737.

As to the effect of reference in a deed to a recorded map or plat—see notes to Kenyon v. Knipe, 13 L.R.A. 142; and M'Iver v. Walker, 3 L. ed. U. S. 696.

in; and yet, because the grantee named in the deed caused it to be recorded in the District of Columbia, this court is asked to hold that the grantee thereby became entitled to take and hold the lands, although they were not comprehended by the decree under which the grantor acted, nor intended to be conveyed thereby; the title to the lands in the District being vested in the grantor in a capacity different from that in which it purported to be acting when conveying the Maryland lands.

Titcomb v. *Currier*, 4 Cush. 591; Devlin, Deeds, § 455; *Hitz* v. *Jenks*, 185 U. S. 155, 46 L. ed. 851, 22 Sup. Ct. Rep. 598; *Batchelor* v. *Brereton*, 112 U. S. 396, 404, 28 L. ed. 748, 750, 5 Sup. Ct. Rep. 150; *Agricultural Bank* v. *Rice*, 4 How. 225, 11 L. ed. 949.

It is well settled that the defendant in an action of ejectment may avail himself of a weakness in the plaintiff's title without asserting his own (*Simmons* v. *Wagner*, 101 U. S. 260, 262, 25 L. ed. 910, 911) and that the defendant may defeat the plaintiff's right to recover in ejectment by showing an outstanding legal title in other parties (*Hanrick* v. *Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147). *A fortiori*, he may defeat the plaintiff by an admission made in his or its pleadings showing the existence of an adverse outstanding title in another.

It is the law of Maryland, in force in the District of Columbia, that, in order to maintain an action of ejectment where the plaintiff relies upon title, he must show that he has both the right of possession and the legal title to the land in dispute; and, to establish the latter, he must trace his title back to the state, or to the United States, or some other primary source, unless both parties are claiming title from a common source.

Mitchell v. *Mitchell*, 1 Md. 44; *Anderson* v. *Smith*, 2 Mackey, 275; *Peck* v. *Heurich*, 6 App. D. C. 283.

In the absence of title in either party, if the plaintiff rests his right to prevail upon prior possession he must show either an actual ouster by defendant on the day named, or that the asserted prior possession had been continuous, and had not been abandoned.

Bradshaw v. *Ashley*, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297.

And in such case the possession relied upon must be clearly and unequivocally made out.

Lea v. *Hernandez*, 10 Tex. 137.

And it must appear to have been substantial, and not casual or sporadic.

Sabariego v. *Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461.

Defendant's possession, both at the origin of plaintiff and at the institution of the suit, having been established by plaintiff's witnesses, it was entitled to rely upon the presumption that, until proved otherwise, its possession was lawful and was accompanied by title. To overcome this presumption, it was necessary for plaintiff, not only to show plainly and distinctly the prior possession by the Southern Maryland Railroad Company, but also that such possession had been continuous, and had not been abandoned prior to the alleged ouster and entry into possession on the part of defendant.

Ibid.; *Akin* v. *Byrd*, 153 Pa. 23, 25 Atl. 866; *Wilson* v. *Palmer*, 18 Tex. 592.

A plaintiff claiming under a judgment grantee must be able to show prior possession in himself to recover from a defendant in actual possession (*Greenleaf* v. *Brooklyn, F. & C. I. R. Co.* 141 N. Y. 395, 36 N. E. 393); and this rule would seem to be also applicable to the case of a vendee at foreclosure sale.

Messrs. **Samuel A. Putnam** and **Charles Poe** argued the cause and filed a brief for defendant in error:

The court, in determining its jurisdiction, looks not at the remote, ulterior, or contingent effect of its judgment, but considers whether it has the right to entertain jurisdiction and render any judgment at all.

Grant ex dem. Meredith v. *McKee*, 1 Pet. 248, 7 L. ed. 131; *Farmers' Bank* v. *Hooff*, 7 Pet. 168, 8 L. ed. 646; *Ross* v. *Prentiss*, 3 How. 771, 11 L. ed. 824; *Troy* v. *Evans*, 97 U. S. 1, 24 L. ed. 941; *Elgin* v. *Marshall*, 106 U. S. 578, 27 L. ed. 249, 1 Sup. Ct. Rep. 484; *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564, 27 L. ed. 828, 2 Sup. Ct. Rep. 875; *Opelika City* v. *Daniel*, 109 U. S. 108, 27 L. ed. 873, 3 Sup. Ct. Rep. 70; *Bruce* v. *Manchester & K. R. Co.* 117 U. S. 514, 29 L. ed. 990, 6 Sup. Ct. Rep. 849; *Gibson* v. *Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *New England Mortg. Secur. Co.* v. *Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Hollander* v. *Fechheimer*, 162 U. S. 326, 40 L. ed. 985, 16 Sup. Ct. Rep. 795; *Willis* v. *Eastern Trust & Bkg. Co.* 167 U. S. 76, 42 L. ed. 83, 17 Sup. Ct. Rep. 739.

Where the value of the property in dispute is an issuable fact, this court will not sit to weigh the value of the opinions of experts shown by *ex parte* affidavits and counter affidavits, but will dismiss the writ of error, unless, upon the face of the record, it appears that the amount in dispute is large enough to confer jurisdiction.

Red River Cattle Co. v. *Needham*, 137 U. S. 632, 34 L. ed. 799, 11 Sup. Ct. Rep. 208.

As against a trespasser and intruder, it is not necessary for a plaintiff in ejectment to go to the trouble and expense of tracing its title back to a patent.

Bradshaw v. *Ashley*, 14 App. D. C. 485, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297.

Even if the *locus in quo*, as set forth in the declaration, were not identical with that shown by the proof, the defense should have been interposed by the disclaimer, and cannot be taken under the general issue plea of not guilty.

Crandall v. *Lynch*, 20 App. D. C. 73; *Greer* v. *Mezes*, 24 How. 268, 277, 16 L. ed. 661, 664.

The legal title to the property, and not a mere power of sale, was vested in the Union Trust Company of Philadelphia, trustee.

Williams v. *Jackson*, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. Rep. 814.

An irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such.

Brobst v. *Brock* (*Doe ex dem. Brobst* v. *Brock*) 10 Wall. 519, 19 L. ed. 1002; *Bryan* v. *Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Jones* v. *Mack*, 53 Mo. 147; *Brown* v. *Smith*, 116 Mass. 108.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action of ejectment in which the defendant in error, the original plaintiff, recovered judgment for the land in suit in the supreme court of the District. The judgment was affirmed by the court of appeals (23 App. D. C. 587), and the case was brought here.

There was a motion to dismiss upon the ground that it affirmatively appears from the record that the matter in dispute, exclusive of costs, does not exceed the sum of $5,000. But the reasonable inference from the record is the other way (*Harris* v. *Barber*, 129 U. S. 366, 32 L. ed. 697, 9 Sup. Ct. Rep. 314), and affidavits are submitted which sustain the inference which we should draw (*Red River Cattle Co.* v. *Needham*, 137 U. S. 632, 34 L. ed. 799, 11 Sup. Ct. Rep. 208).

At the trial the defendant presented no evidence, but asked the judge to direct a verdict in his favor, relying on somewhat technical criticisms of the plaintiff's case, and saving its rights by exceptions. We shall state such facts as are material.

The declaration contains nine counts, for nine parcels of land, which the plaintiff (de-
[249] fendant in error) contends were *formerly part of the roadbed of the Southern Maryland Railroad Company, and now are part of its own. The plaintiff sought to prove its title by putting in deeds of each of these parcels made to the last-named company in 1884, and evidence of possession on the part of the same, together with subsequent deeds finally conveying the land to the plaintiff. Of course this would be sufficient if made out. It is argued that the description in the first deeds is too vague to identify the land, and the argument is fortified by the testimony of a surveyor that "the deed is not definite enough to place it on the ground." But the deed was accompanied by plats to which they referred, and the same surveyor testified that "the plats are as near identical [with the witness's survey of the locus] as it is possible to make them," and more to the same effect. It is evident that the former words refer to the descriptive language of the deeds alone; and that when the descriptions are taken, as they should be, in connection with the plats, there is no difficulty with the deeds.

Next it is said that there was no evidence of possession on the part of the Southern Maryland Railroad. But the same surveyor testified that he knew the old Southern Maryland Railroad tracks out there, and had known them for thirteen years; and another surveyor testified that he was employed by that company in laying out its roadbed in 1886, that he remembered the line of this right of way, that the right of way of the Southern Maryland was 66 feet wide, and that the Chesapeake Beach Railway uses the right of way of the old Southern Maryland Railroad clear to the District of Columbia line. Without going into further detail or answering every minute criticism, we are of opinion that the judge was right in leaving the question to the jury, and that the jury were warranted in finding as they did. It is said that it must appear that the possession, if any, of the Maryland company, was not abandoned. *Sabariego* v. *Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461. But in a case like the present, at least, where the tracks of the railroad were on the land, and when the plaintiff exhibits a *series of deeds pur-[250] porting to convey the property, the last one to itself, it is to be presumed that possession followed the title until the dispossession by the defendant took place. *Lazarus* v. *Phelps*, 156 U. S. 202, 204, 205, 39 L. ed. 397, 398, 15 Sup. Ct. Rep. 271. See *Bradshaw* v. *Ashley*, 180 U. S. 59, 62, 66, 45 L. ed. 423, 428, 430, 21 Sup. Ct. Rep. 297. The defendant did not hold for such a length of time, free from dispute, that abandonment to it by the plaintiff could be inferred. The suit was begun on January 13, 1902, and the possession of the de-

fendant is not carried back beyond 1898, if so far.

The subsequent steps in the plaintiff's title are as follows: A decree of the supreme court of the District of Columbia, foreclosing a mortgage recited to have been made by the Southern Maryland Railroad, and to cover all its property then or thereafter acquired; a sale and conveyance in pursuance of the decree to one Gregory by a trustee appointed by the court; a certificate of the incorporation of the Washington & Potomac Railroad Company, reciting the foreclosure and sale of all the property of the Southern Maryland Railroad, and incorporating Gregory and others to take over the railroad; a conveyance of the property by Gregory to the new company, and a mortgage by it of the same property to the Union Trust Company of Philadelphia, both dated April 1, 1886, the date of its incorporation; a certificate of the incorporation of the plaintiff on July 24, 1901, reciting a decree of the United States circuit court for the district of Maryland, which foreclosed the last-named mortgage; reciting also a sale in pursuance of the decree, and incorporating the purchaser and others to take over the railroad; and, finally, a deed to the plaintiff, by the Union Trust Company, the trustee of the mortgage last mentioned.

The main objection urged to the title is that, as the record of the last foreclosure proceedings was not put in, it does not appear that the court attempted to foreclose property in the District of Columbia, and that as the decree is recited, it must be taken that the trustee was acting only by virtue of the power which the decree conferred. [251] But the trustee had the *legal title, and purported to convey all the property which it held. The source of its title was a conveyance to it by the owner. The decree of the court only determined a foreclosure and established the right of the trustee to convey without a breach of trust. Even if it is not to be inferred that the decree was as broad as it is recited to have been (see *Muller* v. *Dows*, 94 U. S. 444, 24 L. ed. 207), the deed of the Union Trust Company conveyed whatever title it had (*Williams* v. *Jackson*, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. Rep. 814). The suggestion that the instrument must be read as limiting itself by pure implication to rights conferred by the decree, and as excluding the only source of the grantor's title, does not merit extended discussion, but it may be mentioned that there is a covenant for future assurances, in general terms, not limited to any particular source. It is observed in one of the cases cited for the defendant that "the recital in the deed cannot enlarge or control the words of the grant." *Titcomb* v. *Currier*, 4 Cush. 591, 592. Still less can such a recital as this be taken to eliminate the only title which the grantor held. See further *Brobst* v. *Brock* (*Doe ex dem. Brobst* v. *Brock*) 10 Wall. 519, 19 L. ed. 1002; *Bryan* v. *Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803.

Other purely technical attempts to upset the verdict, so far as they need remark, may be disposed of in a few words. For some unexplained reason the plaintiff, in four of its counts, after describing the land, and identifying it by the above-mentioned conveyance to the Southern Maryland Railroad, identified it further as conveyed by the commissioners of the district on a certain date,—we presume on a tax sale. It was objected that the latter allegation disclosed a title outstanding in third persons. No evidence was gone into upon the subject. Of course the meaning of the count was not to allege or admit such an outstanding title in someone else when the main allegation was that the plaintiff "was lawfully seised" at the date of the defendant's entry. We shall not spend argument upon that.

The Southern Maryland road was authorized to extend into the District of Columbia by act of Congress. Whether the *later [252] roads had authority or not would not affect the title to the land.

The land seems to have been conveyed to the defendant in error after the plaintiff in error had taken possession; but that is immaterial. In the District of Columbia a conveyance by a disseisee is valid. *Matthews* v. *Hevner*, 2 App. D. C. 349, 357; *Roberts* v. *Cooper*, 20 How. 467, 483, 15 L. ed. 969, 974; *Peck* v. *Heurich*, 167 U. S. 624, 629, 630, 42 L. ed. 302, 304, 305, 17 Sup. Ct. Rep. 927. A question is raised as to improvements; but it was not raised below, and is not open here.

Judgment affirmed.

FRANCIS B. SWEENEY and Halbert J. Porterfield, Partners as Sweeney & Porterfield, *Plffs. in Err.*,

v.

CARTER OIL COMPANY.

(See S. C. Reporter's ed. 252–259.)

Courts—diverse citizenship as ground

NOTE.—*As to diverse citizenship as ground of Federal jurisdiction*—see Shipp v. Williams, 10 C. C. A. 247, and note; Mason v. Dullagham, 27 C. C. A. 296, and note; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108, and note; and Myers v. Murray, N. & Co. 11 L.R.A. 216, and note. And see note to Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; and M'Donald v. Smalley, 7 L. ed. U. S. 287.

for Federal jurisdiction.—Two citizens of different states may maintain an action against a citizen of a third state in the Federal circuit court for the district of the latter's residence under the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), conferring original jurisdiction on the circuit courts of suits in which there is a controversy between citizens of different states, to be brought in the district of the residence of either the plaintiff or the defendant.

[No. 32.]

Submitted October 30, 1905. Decided November 27, 1905.

IN ERROR to the Circuit Court of the United States for the Northern District of West Virginia to review a judgment dismissing, for want of jurisdiction, an action brought in that court against a citizen of that state, and domiciled in that district, by a citizen of the state of New York and a citizen of the state of Pennsylvania. *Reversed* and remanded for further proceedings.

Statement by Mr. Chief Justice **Fuller:**

This was an action of assumpsit brought in the circuit court of the United States for the northern district of West Virginia by, as described in the summons, "Francis B. Sweeney, a resident in and citizen of the state of New York, and Halbert J. Porterfield, a resident in and citizen of the state of Pennsylvania, partners, doing business under the firm name and style of Sweeney & Porterfield," against "Carter Oil Company, a corporation created, organized, and existing under and by virtue of the laws of West Virginia, and as such a citizen thereof," to recover damages in the sum of $20,000.

The declaration, filed May 4, 1903, fol-
[253] lowed the summons *as to the citizenship of the parties, and contained ten special counts, most of them laying the damages at $20,000, and the common counts. An account stated was annexed, giving items, running from 1900 to 1901, aggregating $20,912.42.

The record discloses that on February 3, 1904, the court entered an order overruling a motion "to dismiss this action for the want of jurisdiction, apparent upon the face of the proceedings in this, that the plaintiffs are residents of different states, seeking to sue a defendant of another state." On February 15, 1904, the court set aside that order, sustained the motion to dismiss, and entered judgment for defendant. May 10, 1904, the judge holding the circuit court filed a certificate "that the judgment of dismissal made in this cause on February 15, 1904, at the present term of this court, is based solely on the ground that the record does not show that the controversy is one, in my opinion, between citizens of different states, but that it appears from the record that one of the plaintiffs, to wit, Francis B. Sweeney, is a resident in and citizen of the state of New York, and that Halbert J. Porterfield is a resident in and citizen of the state of Pennsylvania, while the defendant is a corporation created and existing under and by virtue of the laws of the state of West Virginia, and domiciled in the northern district of West Virginia, and no other ground of jurisdiction appears from the record; and the case is dismissed only for the reason above stated; that is, that the controversy is not between citizens of different states, as is required by the Federal statutes to confer jurisdiction on this court, but one of the plaintiffs being a citizen of one state, to wit, the state of New York, and the other plaintiff being a citizen of the state of Pennsylvania, cannot, in my judgment, be joined as plaintiffs and sue in this court a defendant residing in the northern district of West Virginia, and consequently the proper citizenship of different states does not exist, and that the circuit court of the United States for the northern district of West Virginia has no jurisdiction." This writ of error was granted the same day.

Mr. **V. B. Archer** submitted the cause for plaintiffs in error. *Mr. W. S. Chesley* was with him on the brief.

Mr. **George L. Roberts** submitted the cause for defendant in error. *Messrs. Reese Blizzard* and *Charles Gibbs Carter* were with him on the brief.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The circuit court dismissed the case for want of jurisdiction in that the controversy was not between citizens of different states, within the meaning of the statute, because plaintiffs were citizens of different states as between themselves, and could not be joined in an action against a citizen of West *Vir-[255] ginia. That was the sole point determined below, and the correctness of the conclusion is the sole question for determination here.

Defendant does indeed argue that the judgment should be affirmed because the declaration, though stating a sum of money to be due plaintiffs in excess of $2,000, did not aver that this was "exclusive of interest and costs;" and did not aver that defendant was "a resident or inhabitant of the northern district of West Virginia," nor was

that fact "apparent from the record;" and because the citizenship of plaintiffs and defendant was not averred with sufficient directness. None of these points was raised below, and, as the record stands, they call for no consideration.

The judicial power under the Constitution extends to "controversies between citizens of different states."

The 1st section of the act of March 3, 1887 [24 Stat. at L. 552, chap. 373], as corrected by that of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), provides "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, . . . or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, . . . and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The controversy here was "between citizens of different states;" the jurisdiction of the circuit court was founded on diversity of citizenship; and the suit was brought in the district of the residence of the defendant.

[256] *We do not feel warranted in construing the words "controversy between citizens of different states" to mean "controversy between citizens of the same state and citizens of another state," and unless that is done this judgment must be reversed.

In our opinion, defendant, being a citizen of West Virginia, and a resident of the district in which it was sued, and plaintiffs being citizens of other states than West Virginia, the circuit court had jurisdiction.

The general subject was considered in *Smith* v. *Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303, the opinion of the court being delivered by Mr. Justice Miller. In that opinion it is pointed out that the first clause of the act of 1887 describes the jurisdiction common to all the circuit courts of the United States as regards the subject-matter of the suit, and as regards the character of the parties who, by reason of such character, may, either as plaintiffs or defendants, sustain suits in circuit courts; while the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits; and, after quoting the latter clause in full, Mr. Justice Miller said:

"In the case before us, one of the plaintiffs is a citizen of the state where the suit is brought, namely, the state of Missouri, and the defendant is a citizen of the state of Texas. But one of the plaintiffs is a citizen of the state of Arkansas. The suit, so far as he is concerned, is not brought in the state of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a state where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different states. In the present case, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, *any provision that [257] both plaintiffs may unite in one suit in a state of which either of them is a citizen."

Referring to the language of §11 of the judiciary act of 1789 [1 Stat. at L. 78, chap. 20], giving jurisdiction to the circuit courts, where "the suit is between a citizen of the state where the suit is brought and a citizen of another state," the following from the opinion of Chief Justice Marshall in *Strawbridge* v. *Curtiss*, 3 Cranch, 267, 2 L. ed. 435, was quoted: "The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the Federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts;" which construction, it was said, has been adhered to from that day to this, notwithstanding the statute has been re-enacted and recast several times since that decision. *New Orleans* v. *Winter*, 1 Wheat. 91, 4 L. ed. 44; *Susquehanna & W. Valley R. & Coal Co.* v. *Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Sewing Mach. Cos.' Case* (*Grover & B. Sewing-Mach. Co.* v. *Florence Sewing-Mach. Co.*) 18 Wall. 553, 21 L. ed. 914; and *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010,—were cited in reiteration of the rule

that "if there are several coplaintiffs, the intention of the act is that each plaintiff must be competent to sue; and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." And the rule was held applicable under the act of 1887, especially in view of the fact that that act was mainly designed to restrict the jurisdiction of the circuit courts.

But if these citizens of Missouri and Arkansas had sued the defendant, a citizen of Texas, in the circuit court of the United States for the district of his residence in Texas, we perceive no reason why that court would not have had jurisdiction.

And this would be so if that defendant had sued those plaintiffs in his district in Texas, if he there obtained service of process upon them.

In *McCormick Harvesting Mach. Co.* v. *Walthers*, 134 U. S. 41, 44, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485, 486, we said:
[258] "The judiciary act of 1789 provided 'that no civil suit should be brought before the circuit or district courts against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant or in which he should be found at the time of serving the writ,—1 Stat. at L. 79, chap. 20, § 12,—and the act of 1875 (18 Stat. at L. 470, chap. 137, § 1, U. S. Comp. Stat. 1901, p. 508) contained a similar provision. This liability of the defendant to be sued in a district where he might be found at the time of serving process was omitted in the act of 1887, but he still remained liable to suit in the district of the residence of the plaintiff as well as in his own district; and as he could not be sued anywhere else, we held in *Smith* v. *Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303, that where there were two plaintiffs, citizens of different states, the defendant, being a citizen of another state, could not be sued in the state of either of the plaintiffs. Mr. Justice Miller points out, in delivering the opinion of the court, that the evident purpose of Congress in the act of 1887 was to restrict rather than enlarge the jurisdiction of the circuit court, 'while,' he says, 'at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides.'" In that case plaintiff was a citizen of Nebraska and brought suit in the circuit court of the district of Nebraska against an Illinois corporation, service being made on defendant's managing agent in Nebraska, as provided by the state statute. Defendant answered and then on leave withdrew the answer, and filed a plea to the jurisdiction. The plea was overruled, and thereupon defendant went to trial on the merits, upon issue joined on that answer. It was held that the objection to the jurisdiction, if it could be urged at all, must be confined to want of power to entertain the suit outside of defendant's own district, and that it was without merit.

Many decisions in respect of removal of cases of diverse citizenship are to the same effect. Thus in *Removal Cases*, 100 U. S. 457, 25 L. ed. 593, the provision of the act of 1875 that as to suits "in which there shall be a controversy between citizens of different states, . . . either party may remove said suit *into the circuit court of the [259] United States for the proper district," was construed to mean "that when the controversy about which a suit in the state court is brought is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and, according to the facts, the parties to the suit arranged on opposite sides of that dispute. If, in such an arrangement, it appears that those on one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed." *Young* v. *Parker* (*Young* v. *Ewart*) 132 U. S. 267, 33 L. ed. 352, 10 Sup. Ct. Rep. 75; *Ballin* v. *Lehr*, 24 Fed. 193; *Pitkin County Min. Co.* v. *Markell*, 33 Fed. 386; *Roberts* v. *Pacific & A. R. & Nav. Co.* 104 Fed. 577.

The contention in the present case seems to be that because defendant could not sue plaintiffs in the circuit court of New York, or that of Pennsylvania, therefore plaintiffs could not sue defendant in the circuit court for the northern district of West Virginia. But this does not follow from the terms of the statute by which jurisdiction is conferred generally where plaintiffs are residents and citizens of states different from that of the residence and citizenship of defendant; and, moreover, defendant could, if it had a cause of action, have sued plaintiffs in the circuit court for the northern district of West Virginia, and proceeded with the action if they were served with process in such district. The clause vesting jurisdiction should not be confounded with the clause determining the particular courts in which the jurisdiction must be exercised.

Judgment reversed and cause remanded, to be proceeded in according to law.

[260] *JOHN J. COCHRAN and Fidelity & Deposit Company of Maryland, *Plffs. in Err.*,
v.
COUNTY OF MONTGOMERY. (No. 37.)

JOHN J. COCHRAN *et al.*, *Petitioners*,
v.
COUNTY OF MONTGOMERY. (No. 112.)

(See S. C. Reporter's ed. 260-274.)

1. **Error to circuit court of appeals—cases of diverse citizenship.**—The jurisdiction of the Federal circuit court depended entirely upon diversity of citizenship within the meaning of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), § 6, making the circuit court of appeals the court of last resort in such cases, where the cause was removed for prejudice or local influence from a state court, under the provision of the act of March 3, 1887 (24 Stat. at L. 553, chap. 373, U. S. Comp. Stat. 1901, p. 508), as corrected by the act of August 13, 1888, (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), grounds of suits embracing a controversy between a citizen of the state in which the suit is brought and a citizen of another state, by "any defendant, being such citizen of another state."

2. **Removal of causes—local prejudice or influence.**—A suit in which one of two defendants is a citizen of the same state as the plaintiff cannot be removed by the other defendant for prejudice or local influence from a state to a Federal circuit court, under the act of March 3, 1887, as corrected by the act of August 13, 1888, providing for removals on those grounds of suits embracing a controversy between a citizen of the state in which the suit is brought and a citizen of another state, by "any defendant, being such citizen of another state," since to hold otherwise would bring this provision into conflict with the rule that suits, to be removable, must be within the original jurisdiction of the circuit court.

[Nos. 37, 112.]

Argued November 2, 1905. Decided November 27, 1905.

IN ERROR and on Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Middle District of Alabama in favor of plaintiff in a suit which had been removed to that court from the City Court of Montgomery, in that state. Writ of error *dismissed* for want of jurisdiction. Judgment *reversed* on certiorari, and the cause remanded to the Circuit Court, with directions to remand to the state court.

See same case below, 62 C. C. A. 680, 128 Fed. 1019. For opinions on prior appeals, see 57 C. C. A. 261, 121 Fed. 17, 62 C. C. A. 70, 126 Fed. 456.

Statement by Mr. Chief Justice **Fuller:**

This action was brought January 21, 1902, in the city court of Montgomery, Alabama, by the county of Montgomery, one of the counties of the state of Alabama, against John J. Cochran, a citizen of that county and state, and the Fidelity & Deposit Company of Maryland, a corporation *of the [261] state of Maryland, Cochran being the treasurer of the plaintiff county, and the Fidelity & Trust Company of Maryland being the sole surety on the official bond of said Cochran as such county treasurer, to recover damages for certain alleged breaches of said official bond. Cochran was charged with the conversion of amounts belonging to the general fund of the county, and of amounts belonging to the road and bridge fund. Demurrers to the complaint were severally filed by defendants in the state court.

February 15, 1902, the Fidelity & Deposit Company presented to the district judge of the United States for the middle district of Alabama, holding the circuit court, its petition for the removal of the cause into the circuit court of the United States for that district, alleging, among other things, that the matter in dispute exceeded the sum of $2,000 exclusive of interest and costs, and that the said controversy is between citizens of different states, in that the plaintiff was, at the time of the commencement of said suit, and still is, a citizen of the state of Alabama, and your petitioner, The Fidelity & Deposit Company of Maryland, was, at the time of the commencement of said suit, and still is, a citizen of the state of Maryland, and of no other state, having its principal office in the city of Baltimore, in the state of Maryland, and that your petitioner desires to remove this suit, which is now pending and undetermined in said state court, before the trial thereof, into the circuit court of the United States to be held in the middle district of Alabama.

The petition then averred that from prejudice or local influence in favor of the plaintiff, and adverse to this defendant, it will not be able to obtain justice in said

NOTE.—*On removal of causes for prejudice or local influence*—see notes to Gaines v. Fuentes, 23 L. ed. U. S. 524; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; Torrence v. Shedd, 36 L. ed. U. S. 528; Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65; Huskins v. Cincinnati, N. O. & T. P. R. Co. 3 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; and Brodhead v. Shoemaker, 11 L.R.A. 567.

court or in any other state court to which the defendant may, under the laws of this state, have the right to remove said cause, on account of said prejudice or local influence; that the suit was against John J. Cochran, the treasurer of said county, and petitioner, a surety company and a surety on the official bond of said Cochran as such treasurer, to recover the sum of $120,000,
[262]*the full penalty of the bond; and that by reason of the nature of said suit, all the residents and citizens of said Montgomery county have a direct interest in the recovery by the said plaintiff of the amount claimed.

It was further alleged that Cochran was "practically financially irresponsible" and therefore "practically only a nominal party to the suit," because the surety company "would be obliged to meet practically the whole claim should judgment be rendered against defendants;" and then set forth certain circumstances tending to show that there was local prejudice against the surety company "in any county in the state of Alabama in which said case should be tried." On the filing of the petition the judge entered an order finding that it appeared to the court "that from local prejudice or local influence" the surety company would not be able to obtain justice in the city court of Montgomery, or in any other state court to which the company might have the right to remove the cause, and that the court was of opinion that it should be removed to the circuit court on the giving of bond in the penalty of $1,000, and ordered the removal of the cause accordingly. The case came on to be heard in the circuit court at the May term, 1902, when the plaintiff moved to remand upon the ground that the Federal court was without jurisdiction, one of the defendants being a citizen of the same state as the plaintiff. This motion was overruled. 116 Fed. 985. On the trial the plaintiff amended the complaint by adding four additional counts, to which demurrers were sustained; and the case was tried on the original complaint and the general issue and certain special pleas interposed by defendants. The result was a judgment in favor of plaintiff for the amount of the general fund converted, but, under the rulings of the court, there was no recovery on account of the road and bridge fund. On writ of error sued out by plaintiff this judgment was reversed and a new trial ordered by the court of appeals. 57 C. C. A. 261, 121 Fed. 17. On a second trial, May 28, 1903, the complaint was
[263]amended in certain particulars *and three new counts added. The second trial resulted in a judgment in favor of plaintiff for an amount less than the amount claimed. On this judgment cross writs of error were sued out from the circuit court of appeals, and the judgment reversed on the writ brought by plaintiff, and a new trial ordered. 62 C. C. A. 70, 126 Fed. 456. The third trial, February 3, 1904, resulted in a judgment in favor of plaintiff for the full amount of the road and bridge fund converted by Cochran, with interest, less certain admitted payments made by him, and not including the amount of the general fund, which had been, in the meantime, voluntarily paid by the company. On this last judgment, defendants sued out a writ of error to the court of appeals, and the judgment was affirmed. 62 C. C. A. 680, 128 Fed. 1019. And thereupon the present writ of error was allowed. The case is numbered 37. Application for certiorari was made, and is numbered 112.

Mr. **Edward H. Gans** argued the cause, and, with *Mr. Thomas A. Whelan*, filed a brief for plaintiffs in error and petitioners:

A nonresident of the state in which the suit is brought may remove the suit to another state for prejudice and local influence, even though sued with a resident defendant.

Fisk v. *Henarie*, 32 Fed. 417; *Whelan* v. *New York, L. E. & W. R. Co.* 1 L.R.A. 65, 35 Fed. 849; *Huskins* v. *Cincinnati, N. O. & T. P. R. Co.* 3 L.R.A. 545, 37 Fed. 507; *Wilder* v. *Virginia, T. & C. Steel & I. Co.* 46 Fed. 676; *Adelbert College* v. *Toledo, W. & W. R. Co.* 47 Fed. 836; *Hall* v. *Chattanooga*, 48 Fed. 599; *Detroit* v. *Detroit City R. Co.* 54 Fed. 1; *Haire* v. *Rome R. Co.* 57 Fed. 321; *Gann* v. *Northeastern R. Co.* 57 Fed. 417; *Jackson & S. Co.* v. *Pearson*, 60 Fed. 113; *Bonner* v. *Meikle*, 77 Fed. 489; *Bartlett* v. *Gates*, 117 Fed. 363; *Holmes* v. *Southern R. Co.* 125 Fed. 301; *Seaboard Air Line R. Co.* v. *North Carolina R. Co.* 123 Fed. 629.

If any suits are not removable under the 4th clause of the act of August 13, 1888, because one defendant is a citizen of the state in which the suit is brought and another a citizen of another state, the same rule, by virtue of the equivalent introductory language, should apply to the 3d clause.

But it has been held by an unbroken current of authority that, under the 3d clause, there may be a removal, even though one defendant is a citizen of the state in which suit is brought and another a citizen of another state.

Chesapeake & O. R. Co. v. *Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Connell* v. *Smiley*, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353; *Carothers* v. *McKinley Min. & Smelting Co.* 116 Fed. 951; *First Nat. Bank* v. *Bridgeport Trust Co.*

117 Fed. 969; *Sugar Creek, P. B. & P. C. R. Co.* v. *McKell*, 75 Fed. 34; *Lake Street Elev. R. Co.* v. *Farmers' Loan & T. Co.* 72 Fed. 804; *Vinal* v. *Continental Constr. & Improv. Co.* 34 Fed. 228.

Mr. **William L. Martin** argued the cause, and, with *Messrs. John G. Finley* and *Jesse F. Stallings*, filed a brief for defendant in error and respondent:

It is thoroughly settled that the circuit court of the United States has no judisdiction, either original or by removal from a state court, of a suit as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim; and that, if it does not appear at the outset that the suit is one of which the circuit court at the time its jurisdiction is invoked could properly take cognizance, the lack of jurisdiction cannot be supplied by anything set up in the application for removal, or in the defense interposed.

Colorado Cent. Consol. Min. Co. v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell* v. *Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Postal Teleg. Cable Co.* v. *United States* (*Postal Teleg. Cable Co.* v. *Alabama*) 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *East Lake Land Co.* v. *Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Borgmeyer* v. *Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Oregon Short Line & U. N. R. Co.* v. *Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Hanford* v. *Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Walker* v. *Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Minnesota* v. *Northern Securities Co.* 194 U. S. 48, 63, 64, 48 L. ed. 870, 877, 878, 24 Sup. Ct. Rep. 598.

It is also settled that, when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution and laws.

Western U. Teleg. Co. v. *Ann Arbor R. Co.* 178 U. S. 239, 243, 244, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867; *Lampasas* v. *Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; *Northern P. R. Co.* v. *Soderberg*, 188 U. S. 526, 528, 47 L. ed. 575, 580, 23 Sup. Ct. Rep. 365; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 190, 191, 48 L. ed. 140, 142, 143, 24 Sup. Ct. Rep. 63; *Bankers' Mut. Casualty Co.* v. *Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 371, 385, 48 L. ed. 484, 490, 24 Sup. Ct. Rep. 325; *Cosmopolitan Min. Co.* v. *Walsh*, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; *Sloan* v. *United States*, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570.

And when the jurisdiction of the circuit court is invoked on the ground of diverse citizenship, the judgment of the circuit court of appeals is final, even though another ground for jurisdiction in the circuit court may be developed in the course of the subsequent proceedings in the case.

Colorado Cent. Consol. Min. Co. v. *Turck*, and *Borgmeyer* v. *Idler*, *supra*; *Press Pub. Co.* v. *Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Spencer* v. *Duplan Silk Co. supra.*

To avoid the finality of the judgment of the circuit court of appeals, some other distinct ground of Federal jurisdiction than diversity of citizenship must have existed, and must have been relied on.

Benjamin v. *New Orleans*, 169 U. S. 161, 164, 42 L. ed. 700, 702, 18 Sup. Ct. Rep. 298.

The jurisdiction of the circuit court was none the less "dependent entirely" upon diverse citizenship because of the fact that the removal was upon the ground of prejudice or local influence.

Re Pennsylvania Co. 137 U. S. 451, 456, 34 L. ed. 738, 741, 11 Sup. Ct. Rep. 141.

There was no possible ground of jurisdiction in the circuit court other than diversity of citizenship. Upon that ground Federal jurisdiction was necessarily invoked and assumed,—whether correctly or erroneously is not conceived to be a pertinent inquiry to the consideration of this motion. The judgment of the circuit court of appeals is therefore final under § 6 of the act creating the circuit courts of appeals, and the writ of error should be dismissed for want of jurisdiction.

Colorado Cent. Consol. Min. Co. v. *Turck*, *Borgmeyer* v. *Idler*, *Press Pub. Co.* v. *Monroe*, and *Ex parte Jones*, *supra*; *Pope* v. *Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Spencer* v. *Duplan Silk Co. supra*; *Bankers' Mut. Casualty Co.* v. *Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 371, 48 L. ed. 484, 24 Sup. Ct. Rep. 325.

The requisite diverse citizenship precludes a common citizenship of opposing parties.

Strawbridge v. *Curtiss*, 3 Cranch, 267, 2 L. ed. 435; *New Orleans* v. *Winter*, 1 Wheat. 91, 4 L. ed. 44; *Susquehanna & W. Valley R. & Coal Co.* v. *Blatchford*, 11 Wall. 172, 174, 20 L. ed. 179, 180; *Sewing Mach. Co.'s Case* (*Grover & B. Sewing Mach. Co.* v. *Florence Sewing Mach. Co.*) 18 Wall. 553, 574, 21 L. ed. 914, 918; *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010; *Smith* v. *Lyon*, 133 U. S. 315, 317, 33 L. ed. 635, 636, 10 Sup. Ct. Rep. 303; *Hooe* v. *Jamieson*, 166 U. S. 395, 397, 41 L. ed. 1049, 1050, 17 Sup. Ct. Rep. 596; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 332, 333, 44 L. ed. 486, 491, 492, 20 Sup. Ct. Rep. 399.

The phrase in the local prejudice act of 1867, "a suit in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," was construed to have the same meaning as the shorter description, in the act of 1789, of "a suit between" such parties; and it was held that each term implied a proceeding in a court of justice by a party plaintiff against a party defendant; and, consequently, that all the defendants must be citizens of other states from that of any of the plaintiffs, and that one of several defendants could not remove the suit.

Hanrick v. *Hanrick*, 153 U. S. 192, 195, 38 L. ed. 685, 687, 14 Sup. Ct. Rep. 835; *Sewing Mach. Co.'s Case* (*Grover & B. Sewing-Mach. Co.* v. *Florence Sewing Mach. Co.*) 18 Wall. 553, 585, 21 L. ed. 914, 922; *Vonnevar* v. *Bryant*, 21 Wall. 41, 22 L. ed. 476.

The words of the act of 1867, "in which there is a controversy," were omitted from U. S. Rev. Stat. § 639, clause 3, U. S. Comp. Stat. 1901, p. 520, thereby returning to the shorter description contained in the act of 1789, "a suit between a citizen of the state in which it is brought and a citizen of another state," and were likewise held to require that all the necessary parties on one side of the suit should be citizens of different states from those on the other, and not to permit a removal because of a separate controversy between one of the defendants and the plaintiff.

Hanrick v. *Hanrick*, 153 U. S. 192, 196, 38 L. ed. 685, 687, 14 Sup. Ct. Rep. 835; *American Bible Soc.* v. *Price*, 110 U. S. 61, 28 L. ed. 70, 3 Sup. Ct. Rep. 440; *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54, 30 L. ed. 60, 6 Sup. Ct. Rep. 929; *Hancock* v. *Holbrook*, 119 U. S. 586, 30 L. ed. 538, 7 Sup. Ct. Rep. 341; *Young* v. *Parker* (*Young* v. *Ewart*) 132 U. S. 267, 270, 271, 33 L. ed. 352, 353, 10 Sup. Ct. Rep. 75; *Myers* v. *Swann*, 107 U. S. 546, 27 L. ed. 583, 2 Sup. Ct. Rep. 685.

Under the provisions of the act of 1875, for the removal of a controversy which is wholly between citizens of different states, it was held that the whole subject-matter of the suit must be capable of being finally determined between them, and complete relief afforded as to the separate causes of action, without the presence of other persons originally made parties to the suit; and that, when there was but one indivisible controversy between the plaintiffs and the defendants, as in the case of a suit for partition, the suit could not be removed by one of several plaintiffs or defendants.

Hanrick v. *Hanrick*, *supra*; *Blake* v. *McKim*, 103 U. S. 336, 26 L. ed. 563; *Torrence* v. *Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; *Bellaire* v. *Baltimore & O. R. Co.* 146 U. S. 117, 36 L. ed. 910, 13 Sup. Ct. Rep. 16; *Wilson* v. *Oswego Twp.* 151 U. S. 56, 38 L. ed. 70, 14 Sup. Ct. Rep. 259; *Merchants' Cotton Press & Storage Co.* v. *Insurance Co. of N. A.* 151 U. S. 368, 385, 38 L. ed. 195, 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367.

We have here no separable controversy. *Torrence* v. *Shedd*, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; *Wilson* v. *Oswego Twp.* 151 U. S. 56, 66, 38 L. ed. 70, 75, 14 Sup. Ct. Rep. 259; *Chicago, R. I. & P. R. Co.* v. *Martin*, 178 U. S. 245, 248, 44 L. ed. 1055, 1056, 20 Sup. Ct. Rep. 854; *Chesapeake & O. R. Co.* v. *Dixon*, 179 U. S. 131, 138, 45 L. ed. 121, 125, 21 Sup. Ct. Rep. 67; *Western U. Teleg. Co.* v. *Brown*, 32 Fed. 337; *Mutual Reserve Fund Life Asso.* v. *Farmer*, 23 C. C. A. 574, 36 U. S. App. 771, 77 Fed. 929; *Deere* v. *Chicago, M. & St. P. R. Co.* 85 Fed. 876.

The right of removal is expressly limited to cases of which the circuit courts are given original jurisdiction.

Re Pennsylvania Co. 137 U. S. 451, 454, 34 L. ed. 738, 740, 11 Sup. Ct. Rep. 141; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201, 208, 39 L. ed. 672, 675, 15 Sup. Ct. Rep. 563; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 461, 38 L. ed. 511, 514, 14 Sup. Ct. Rep. 654; *Texas & P. R. Co.* v. *Cody*, 166 U. S. 606, 609, 41 L. ed. 1132, 1134, 17 Sup. Ct. Rep. 703; *Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 189, 190, 46 L. ed. 144, 146, 147, 22 Sup. Ct. Rep. 47; *Minnesota* v. *Northern Securities Co.* 194 U. S. 48, 63, 48 L. ed. 870, 877, 24 Sup. Ct. Rep. 598; *Madisonville Traction Co.* v. *St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Reed* v. *Reed*, 31 Fed. 49, 51; *Laird* v. *Indemnity Mut. Marine Assur. Co.* 44 Fed. 712; *Dey* v. *Chicago, M. & St. P. R. Co.* 45 Fed. 82; *Anderson* v. *Bowers*, 43 Fed. 321; *Terre Haute* v. *Evansville & T. H. R. Co.* 106

Fed. 545; *Campbell* v. *Milliken*, 119 Fed. 982; *Weldon* v. *Fritzlen*, 128 Fed. 608.

[267] *Mr. Chief Justice **Fuller**, after making the foregoing statement, delivered the opinion of the court:

The first question is whether this court can entertain jurisdiction of this writ of error, and this must be answered in the negative if the ground on which the jurisdiction of the circuit court was invoked was "dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different states," because in such case the judgment of the circuit court of appeals was final. Act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 550).

By § 1 of the judiciary act of 1887 [24 Stat. at L. 552, chap. 373], as corrected in 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), the circuit courts of the United States are given "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and [1] arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority; or [2] in which controversy the United States are plaintiffs or petitioners; or [3] in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; or [4] a controversy between citizens of the same state claiming lands under grants of different states; or [5] a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, . . . and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

[268] *Section 2 (U. S. Comp. Stat. 1901, p. 509) of the act provides for the removal of causes, as follows:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state.

"And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

"And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause:

"*Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without *being affected by such prejudice or [269] local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

Section 3 (U. S. Comp. Stat. 1901, p. 510) of the act provides that, under the first three clauses of § 2, the petition for removal must be filed in the state court at the time or any time before the defendant is required, by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint.

In *Smith* v. *Rhines*, 2 Sumn. 338, Fed. Cas. No. 13,100, Mr. Justice Story held that under the judiciary act of 1789 [1 Stat.

at L. 73, chap. 20] such cases were only liable to removal from a state to the circuit court "as might, under the law, or, at all events, under the Constitution, have been brought before the circuit court by original process." And Mr. Justice Washington in *Beardsley* v. *Torrey*, 4 Wash. C. C. 286, Fed. Cas. No. 1,190, and Mr. Justice Thompson in *Ward* v. *Arredondo*, 1 Paine, 410, Fed. Cas. No. 17,148, expressed views to the same effect. In *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524, it was ruled that this was otherwise under the act of March 2, 1867 [14 Stat. at L. 558, chap. 196].

But the act of 1887 restored the rule of 1789, and, as we have heretofore decided, those suits only can be removed of which the circuit courts are given original jurisdiction. *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 461, 38 L. ed. 511, 514, 14 Sup. Ct. Rep. 654. And on the face of this record it is apparent that the jurisdiction of the circuit court, as invoked, could only rest on diversity of citizenship. The case does not come within any other ground of original jurisdiction as defined by the act. It is true that one of the defendants was a citizen of the same state as the county of Montgomery, but the learned judge below held that where removal was sought on the ground of prejudice or local influence, the right of removal was not affected by another defendant and plaintiff being citizens of the same state as that where the suit was brought. 116 Fed. 985.

[270] *Whether that view was correct or not, jurisdiction was exercised as resting on diversity of citizenship; that is, as between the plaintiff and the removing defendant.

But while the judgment of the circuit court of appeals must be regarded as final, and the writ of error dismissed, we deem it our duty to grant the writ of certiorari, to which the record on the writ of error may stand as a return, in order to pass upon the question of the jurisdiction of the circuit court, in the exercise of one of the essential functions of this court,—the determination of the jurisdiction of the courts below. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 195, 48 L. ed. 140, 143, 24 Sup. Ct. Rep. 63.

In applications for removal under clauses 1 and 2 of § 2 of the act of 1887, all the defendants were required to join in the application. *Chicago, R. I. & P. R. Co.* v. *Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *Gableman* v. *Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171. Under clause 3, relating to cases of separable controversy, and clause 4, all the defendants need not join. But the 4th clause, treating of removals because of prejudice or local influence, does not furnish a separate and independent ground of Federal jurisdiction, and, as Mr. Justice Bradley said in *Re Pennsylvania Co.* 137 U. S. 451, 456, 34 L. ed. 738, 741, 11 Sup. Ct. Rep. 141, "describes only a special case comprised in the preceding clauses." In that case we referred to the opinion of Mr. Justice Harlan in *Malone* v. *Richmond & D. R. Co.* 35 Fed. 625, as expressing the correct view of the law. The question was whether the pecuniary limit was applicable under the 4th clause, and that involved consideration of the other clauses. Mr. Justice Harlan there said:

"It is clear from the above clauses, construing them all together, that the right of removal, at any time before trial, on the ground of prejudice or local influence, is restricted, by the act of 1887, to suits in which there is a controversy between citizens of different states; also that such right, in suits of that character, involving no Federal question, now belongs only to the defendant who is a citizen, or to the defendants who are citizens, of a state other than that in which the suit is brought. *And [271] I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds $2,000, exclusive of interest and costs. The clauses of the 2d section of the act of 1887, defining the different kinds of suits that may be removed, preserve the same element of the value of the matter in dispute as is found in the 1st section, relating to the original jurisdiction of circuit courts. This is done by the provision giving the right of removal in suits 'of which the circuit courts of the United States are given original jurisdiction by the preceding [1st] section.' . . . The subsequent clause, relating to prejudice and local influence, does not describe a new class of suits, removable from the state courts, but only specifies a distinct ground for removing one class of the suits previously defined; namely, that class in which there is a controversy between citizens of different states. And that ground the defendant is at liberty to set up 'at any time before the trial;' whereas, by the 3d section of the act, the right to remove upon any other ground will be lost if not exercised at the time or before 'the defendant is required by the laws of the state or the rule of the state court' in which the suit is brought 'to answer or plead to the declaration or complaint of the plaintiff.' The clause prescribing prejudice or local influence as ground for the removal of

a suit 'in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state' cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which, by referring to the 1st section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice or local influence, as affecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000, exclusive of interest and costs."

The 1st subdivision of § 639 of the Revised Statutes was a re-enactment of the [272]12th section of the judiciary act; *the 2d subdivision, of the act of July 27, 1866 [14 Stat. at L. 306, chap. 288]; and the 3d subdivision, of the act of March 2, 1867. The act of March 3, 1875 [18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508], repealed the 1st and 2d subdivisions, but left subdivision 3 unrepealed. *Baltimore & O. R. Co.* v. *Bates*, 119 U. S. 464, 467, 30 L. ed. 436, 438, 7 Sup. Ct. Rep. 285. The act of March 3, 1887, repealed the act of 1867, or subdivision 3 of § 639. *Fisk* v. *Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. In describing the class of suits removable on the ground of prejudice or local influence, the language in the act of 1887 is identical with that of 1867; that is, suits "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." The settled construction of the language of the act of 1867 and of the Revised Statutes was that the clause included cases wherein the controversy was between citizens of the state wherein the suit was pending and citizens of other states. The use of the identical language in the act of 1887–1888 showed that Congress intended the same construction should be applied, although, under the act of 1887, the plaintiff could not remove a cause, while any defendant, being a citizen of a state other than that in which the suit was pending, might.

The circuit court was of opinion that the words "any defendant, being such citizen of another state, may remove," etc., implied that there might be defendants who were not citizens of another state and yet the cause be removable; but while the words, standing alone, are susceptible of that construction, we think it was not intended to change the meaning of the terms as previously determined (by the decisions under the act of 1789, and so on down), and that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is pending and a citizen or citizens of another or other states, and that the clause did not include cases wherein the controversy was partly between citizens of the same state. To hold otherwise brings the language of the clause into conflict with the rule *that a suit, to be re-[273] movable, must be within the original jurisdiction of the circuit court, departs from the settled former construction, and ignores the main purpose of the act of 1887, which was to restrict the jurisdiction of the circuit court. *Hanrick* v. *Hanrick*, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; *Anderson* v. *Bowers*, 43 Fed. 321; Moon, Removal of Causes, § 189 and notes.

And there does not seem to be any escape from this conclusion in view of the provision of the 1st section of the act of 1887, that when the jurisdiction is founded solely on diversity of citizenship, suit can be brought "only in the district of the plaintiff or the defendant."

If brought in the district of the plaintiff or plaintiffs, the defendant or defendants (the singular embraces the plural) must necessarily be a citizen or citizens of another state than that of plaintiff or plaintiffs. If brought in the district of defendant or defendants no removal can be had, because it is only defendants who are "nonresidents" who can remove under clause 2, or under clause 4, prejudice or local influence not being an independent ground of jurisdiction. But in order that a defendant entitled to remove might not be cut off from the exercise of that right by his codefendants declining to join in the application, the 4th clause provided that "any defendant" might remove, and out of abundant caution the words were added, "being such citizen of another state," apparently to prevent misconstruction of the words "any defendant," in possible enlargement of the jurisdiction.

The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction; and this was largely accomplished in the matter of removals by withholding the right from plaintiffs, and only according it to defendants when sued in plaintiffs' district.

In the present case suit was brought in the plaintiff's state against Cochran, a citizen of the same state, who was a necessary party, and the surety company, a citizen of Maryland. It could not have been brought in the circuit court for the *middle[274] district of Alabama. *Sweeney* v. *Carter Oil Co.* 199 U S. 252, *ante*, 178, 26 Sup. Ct. Rep. 55.

And this being so, the case was improvidently removed, and should have been remanded.

As the removal was made on the application of the surety company, that company must pay the costs of this court and of the circuit court.

Writ of error dismissed; certiorari granted, record on writ of error to stand as return to certiorari; judgment reversed, and cause remanded to Circuit Court with a direction to remand to the state court; costs of this court and of the Circuit Court to be paid by the Fidelity & Deposit Company.

HENRY FRENCH (Substituted in place of Sarah Woodward and John H. McGraw, as Administrator of the Estate of Henry S. Woodward, Deceased), *Plff. in Err.*,

v.

H. C. TAYLOR and Lida R. Taylor, His Wife, and J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey.

(See S. C. Reporter's ed. 274–279.)

Error to state court—Federal question—statutory construction.—A decision of a state court that the formalities required by the tax laws were fully observed does not present a Federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law.

[No. 57.]

Argued November 8, 1905. Decided November 27, 1905.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a decree of the Superior Court of King County, in that state, dismissing a suit to quiet title to real estate. *Dismissed* for want of jurisdiction.

See same case below, 33 Wash. 1, 73 Pac. 785; on rehearing, 33 Wash. 11, 75 Pac. 646.

Statement by Mr. Chief Justice **Fuller:**

This was a suit to quiet title to certain real estate, brought in the superior court of King county, Washington, by Sarah Woodward and Sarah Woodward as executrix of Henry S. Woodward, against H. C. Taylor and others. Sarah Woodward resigned her letters as executrix and John H. McGraw was appointed administrator with the will annexed, and thereupon was made a coplaintiff. The superior court entered *a decree of [275] dismissal and plaintiffs took the cause by appeal to the supreme court of Washington, which affirmed the judgment. 33 Wash. 1, 73 Pac. 785. A petition for rehearing was filed and denied. 33 Wash. 11, 75 Pac. 646. Henry French was substituted as appellant, and he brought this writ of error.

The case is stated by the supreme court thus:

"Several causes of action are alleged in the complaint. Each cause is to set aside a separate deed to the property in question. It is necessary to notice only the first cause alleged. For some time prior to the year 1891, Sarah Woodward was a nonresident of the state of Washington, and is still such nonresident. She was the owner of lot 8, in block 11, Maynard's plat to the city of Seattle. This property was assessed for general, state, and county taxes for the year 1891, in the name of C. Winehill. It does not appear that the taxing officers knew, when the assessment was made, that the property belonged to Mrs. Woodward. Subsequently the taxes for that year became delinquent, and the property was sold in 1894, under the provisions of the revenue act of 1893. . . . The county of King became the purchaser. Subsequently the county transferred the certificate of sale to the respondents, who thereafter obtained a tax deed. At the trial of the cause the lower court held that this tax deed conveyed a valid title, and dismissed the action. The points relied upon by appellants to secure a reversal are that the property was not assessed in the name of the owner, that no notice of the sale, or of the expiration of the time of redemption, or of the application for a deed, was given to the owner, and that, therefore the respondents acquired no title to the land by virtue of the sale and tax deed."

Mr. **Twyman O. Abbott** argued the cause and filed a brief for plaintiff in error:

A decision of the highest court of the

NOTE.—*On the general subject of writs of error from United States Supreme Court to state courts*—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; *Re* Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L.R.A. 329.

state may as effectually deprive a citizen of the protection of the 14th Amendment as may an act of the legislature.

Scott v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The Federal question was properly raised.

Bellingham Bay & B. C. R. Co. v. *New Whatcom*, 172 U. S. 314, 43 L. ed. 460, 9 Sup. Ct. Rep. 205; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Abbott* v. *National Bank of Commerce*, 175 U. S. 409, 44 L. ed. 217, 20 Sup. Ct. Rep. 153; *Williams* v. *Bruffy*, 102 U. S. 249, 26 L. ed. 135.

A decision of the Federal question in terms is not essential. If a decision of such question was necessarily involved in the judgment rendered, it is not a matter of importance that the state court avoided all reference to the question.

Mutual L. Ins. Co. v. *McGrew*, 63 L.R.A. 42, note, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375; *Chapman* v. *Goodnow* (*Chapman* v. *Crane*) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

We do not doubt that, when this court is considering an appeal directly from one of the Federal courts, it will be governed in its decision concerning matters relating to taxation by the rule adopted in the state court; but even to this broad rule there are exceptions.

Lewis v. *Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424.

If, however, the decisions of the state court concerning the validity of the assessment under the statute complained of are of any force in this court, we have abundance of authority from that court sustaining the position taken by the plaintiff in error, namely: That the name of the owner is a necessary prerequisite to a valid assessment.

Baer v. *Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Vestal* v. *Morris*, 11 Wash. 451, 39 Pac. 560; *Coolidge* v. *Pierce County*, 28 Wash. 95, 68 Pac. 391.

This rule has been followed and adopted in the Federal court in the following cases:

Northern P. R. Co. v. *Galvin*, 85 Fed. 811; *State Trust Co.* v. *Chehalis County*, 24 C. C. A. 282, 48 U. S. App. 190, 79 Fed. 282.

The rules of Federal decision where the opinion of the state court is a matter of importance are: 1. If the state decisions are conflicting, the Federal courts will follow their own judgment. 2. Even if the rule of the state court is settled, but was announced after the rights in question attached, the state decisions will not be binding.

Stutsman County v. *Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413.

Mr. **Richard Saxe Jones** argued the cause, and, with *Messrs. Jefferson Chandler* and *William H. Brinker*, filed a brief for defendants in error:

The authority conferred on a court to hear and determine cases in a state is not the kind of authority referred to in § 25 of the judiciary act of 1789; otherwise every judgment of the supreme court of a state would be re-examinable under the section.

Bethell v. *Demaret*, 10 Wall. 537, 19 L. ed. 1007; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

The judgment or decree of a state court cannot be re-examined in this court simply because a Federal question was presented to the state court for determination, but that court must also have decided it.

Crowell v. *Randell*, 10 Pet. 368, 9 L. ed. 458. See also note to *Mutual L. Ins. Co.* v. *McGrew*, 63 L.R.A. 42, div. III.

And in cases which seem to have varied from this rule this court has still held that the decision of the Federal question must necessarily have been involved in the judgment rendered.

Chapman v. *Goodnow* (*Chapman* v. *Crane*) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211.

See also note to *Mutual L. Ins. Co.* v. *McGrew*, *supra*.

The state court decided this case on local grounds alone, as it had no suggestion before it that a Federal question was involved.

Telluride Power Transmission Co. v. *Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

Where the decision of the supreme court of a state may have been based upon some other than the constitutional question, and the constitutional question does not clearly appear to have been determined by the supreme court of a state, a writ of error will be dismissed.

Ibid.

There was no Federal question involved in this case.

Leigh v. *Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *State ex rel. Hill* v. *Dockery*, 191 U. S. 165, 48 L. ed. 133, 24 Sup. Ct. Rep. 53, 63 L.R.A. 571.

Various notes in the Lawyers' Reports Annotated completely cover the questions involved.

Mutual L. Ins. Co. v. *McGrew*, 63 L.R.A. 33, note; *Home for Incurables* v. *New York*, 63 L.R.A. 329, note; *State ex rel. Hill* v. *Dockery*, 63 L.R.A. 571, note; *Hooker* v. *Los Angeles*, 63 L.R.A. 471, note; and *Apex Transp. Co.* v. *Garbade*, 62 L.R.A. 513, note.

No contention is made that the tax law itself is unconstitutional.

Bethell v. *Demaret*, and *New Orleans Waterworks Co.* v. *Louisiana*, *supra*.

A Federal question cannot be first raised in a petition for rehearing so as to give this court jurisdiction.

Capital Nat. Bank v. *First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Simmerman* v. *Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; *Susquehanna Boom Co.* v. *West Branch Boom Co.* 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 408; *Fowler* v. *Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112: *Mutual L. Ins. Co.* v. *McGrew*, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

Unless it is decided upon the petition, or necessarily involved in the decision thereon. This is not true in the case at bar.

Mallett v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Leigh* v. *Green*, *supra*; *Chicago, I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; *Fullerton* v. *Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

There is no Federal question in this cause decided by the state court. The decision is that taxation in Washington is *in rem*; its process is against the land, and not against the person. This is purely local law, and involves no Federal issue.

Wood v. *Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6.

The state court decided, also, that as a matter of fact, under the evidence before it the state law had been substantially complied with, and the court, having jurisdiction of the *res*, could lawfully sell. This is no Federal question.

Layton v. *Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Smiley* v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 25 Sup. Ct. Rep. 178.

If the decision of the state court might have been on any other than a Federal ground, jurisdiction fails.

Capital Nat. Bank v. *First Nat. Bank*, *supra*; *Allen* v. *Arguimbau*, 198 U. S. 154, 49 L. ed. 993, 25 Sup. Ct. Rep. 622; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* *supra*.

*Mr. Chief Justice **Fuller** delivered the [276] opinion of the court:

We understand it to be conceded, as it must be, that no Federal question was raised on the record prior to judgment unless by the 11th clause of paragraph 5 of the first cause of action set forth in the complaint. The paragraph asserted in substance the invalidity of the tax deed in that the names of the real owners of the property were not given and the name of a person was given as owner who was not such; that the return of the assessor was insufficient; that the certificate of the county auditor was not attached to each book containing the tax list; that the delivery of the assessment rolls to the county treasurer was not strictly in compliance with law; that the names of the real owners were not given in the "Tax Judgment Sales, Redemption, and Forfeiture Record;" that the certificate of purchase was insufficient; that personal notice of the application for the tax deed was not given; that the affidavit of notice was insufficient; that Taylor had not paid all the previous taxes; that the signature to the tax deed was not sufficient. Copies of certificates, affidavit, etc., were set out with these specifications.

Then followed subdivision 11: "That all the proceedings in this paragraph hereinbefore enumerated was and were in violation of article 5 and the 1st section of article 14 of the Amendments to the Constitution of the United States, and of § 11 of article 1 of the Constitution of the state of Washington, in this: That they constituted an attempt to deprive plaintiffs of their property without due process of law."

The second class of cases in which the judgments and decrees of state courts may be re-examined here under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), consists of those "where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of *their validity." [277]

Clause 11, thrown into paragraph 5, does not allege that the tax acts of the state of Wash-

ington for 1889, 1890, 1891, or 1893 are in themselves in conflict with the Constitution of the United States. Their validity was not drawn in question. Nor was the validity of an authority exercised under the state of Washington, for the power to hear and determine cases is not the kind of authority referred to. *Bethell* v. *Demaret*, 10 Wall. 537, 19 L. ed. 1007. It is certain acts of county officers and of defendants in error that are attacked by the clause as unconstitutional.

Indeed, counsel for plaintiff in error says in his brief that he does not contend "that the act itself is not sufficient to give due process," but he insists "that the manner of observance of that act is want of due process;" in other words, that the statutes had not been complied with. But the state supreme court held that the acts provided for taxation *in rem;* that notice was given as required; that giving the name of the owner was not essential to the validity of the assessment, and that the county officers and defendants in error had fully complied with the laws. So that subdivision 11, in attacking the proceedings, only objects to the determination of questions of local law or of fact, not in themselves reviewable here. *Castillo* v. *McConnico*, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229; *Leigh* v. *Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

In *Castillo* v. *McConnico*, in which it was held that it was not the province of the court to interfere with the policy of the revenue laws of the states, nor with the interpretation given to them by their courts, and that an assessment could not be regarded as not constituting due process of law within the 14th Amendment because of error as to the name of the owner, if the state law might have dispensed with any requirement of mention of the name, Mr. Justice White said:

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Amendment, and matters which may or may not be essential under the terms of a state as-
[278] sessing or taxing law. The two are *neither correlative nor coterminous. The first—due process of law—must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state; and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that to determine the existence of the one—due process of law—is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question, within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive."

In *Leigh* v. *Green*, it was held that a statute providing for taxation *in rem* was constitutional; that summary methods of seizure and sale could be had; that the court, having jurisdiction over the *res*, might proceed to adjudicate the right to the property; that the same could be sold and that a tax deed issued thereunder would be valid; and that such proceedings did not abridge the protection guaranteed by the Constitution against the taking of property without due process of law.

And this being so, it cannot be successfully contended that the right to due process of law under the 14th Amendment was specially set up or claimed by this 11th clause, and denied by the state supreme court.

It is said that Federal questions were raised on a petition for rehearing; but this is denied, and the petition is not in the record. But if it were true, the suggestion came too late, though if the supreme court had considered and decided such alleged Federal questions, we could take jurisdiction: but the *court did not do so. So as to the [279] petition for writ of error from this court, or the assignments of error here. They form no part of the record on which it is to be ascertained whether the state court decided a Federal question.

We are of opinion that no Federal question was raised at the proper time and in the proper way, and, moreover, that no Federal question was involved or decided.

Writ of error dismissed.

HARRY DONOVAN, George Callahan, Charles Lewis, M. M. Lee, Joseph Ward, W. H. Ashley, R. L. Taylor, I. Ganthier, I. Vaughn, *et al.*, *Petitioners*,

v.

PENNSYLVANIA COMPANY.

(See S. C. Reporter's ed. 279-305.)

1. Carriers—excluding hackmen from

NOTE.—*On use of carrier's premises by cabmen, hackmen, etc.*—see notes to Cole v. Row-

railway station and grounds.—A railway company which has made an arrangement with a transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of the passengers arriving there on its trains or on the trains of other railroad companies using the station may legally exclude from the station and depot grounds all other hackmen or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers.

2. **Carriers—interference by hackmen with passengers entering or leaving railway station.**—Licensed hackmen or cabmen, when not forbidden by valid municipal regulations, may, within reasonable limits, use the public sidewalk in front of, adjacent to, or about the main entrance to a railway passenger station in prosecuting their calling, but are not entitled to congregate upon such sidewalk so as to interfere with the ingress and egress of passengers and employees.

3. **Injunction—adequate remedy at law—continuous injury.**—The inadequacy of any remedy at law justifies injunctive relief against the constant, unlawful attempt of hackmen and cabmen to enter a railway passenger station and depot grounds to solicit patronage, and their use of the sidewalk in front of the station so as to interfere unduly with the ingress and egress of passengers.

[No. 5.]

Argued January 6, 1905. Decided November 27, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Illinois, Northern Division, enjoining cabmen from entering a railway station and grounds to solicit custom, and from congregating upon the sidewalk in front of the station so as to interfere with the ingress and egress of passengers and employees. *Affirmed.*

See same case below, 60 C. C. A. 168, 124 Fed. 1016. On first appeal, 61 L. R. A. 140, 57 C. C. A. 362, 120 Fed. 215.

The facts are stated in the opinion.

Messrs. **Richard J. Cooney** and *James R. Ward,* for petitioners:

No corporation or individual can acquire an exclusive right to the use of city streets for merely private purposes, and ordinances governing such use must be reasonable, not oppressive, or such as will create a monopoly or grant special privileges, or are in their nature class legislation, and must not be against public policy. They must operate impartially and they cannot discriminate between the same class, but must be uniform and apply to all alike.

Trotter v. *Chicago,* 33 Ill. App. 206, 136 Ill. 430, 26 N. E. 359; *Chicago Dock & Canal Co.* v. *Garrity,* 115 Ill. 155, 3 N. E. 448; *Tugman* v. *Chicago,* 78 Ill. 405; *Chicago* v. *Rumpff,* 45 Ill. 90, 92 Am. Dec. 200; *Kinmundy* v. *Mahan,* 72 Ill. 462; *East St. Louis* v. *Wehrung,* 50 Ill. 28; *Danville* v. *Noone,* 103 Ill. App. 290.

The occupations of hackmen, expressmen, and hotel runners are under the immediate control and supervision of the city of Chicago, and it is exclusively within its power to regulate and control these occupations.

Lindsay v. *Anniston,* 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545.

The use of the street with the consent and acquiescence of the municipal authorities cannot be enjoined at the suit of an abutting property owner.

Doane v. *Lake Street Elev. R. Co.* 165 Ill. 510, 36 L.R.A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Murphy* v. *Chicago,* 29 Ill. 279, 81 Am. Dec. 307; *Stetson* v. *Chicago & E. R. Co.* 75 Ill. 74; *Patterson* v. *Chicago, D. & V. R. Co.* 75 Ill. 588; *Chicago, B. & Q. R. Co.* v. *McGinnis,* 79 Ill. 269; *Peoria & R. I. R. Co.* v. *Schertz,* 84 Ill. 135; *Penn Mut. L. Ins. Co.* v. *Heiss,* 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138; *Corcoran* v. *Chicago, M. & N. R. Co.* 149 Ill. 291, 37 N. E. 68; *White* v. *Metropolitan West Side Elev. R. Co.* 154 Ill. 620, 39 N. E. 270; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Truesdale* v. *Peoria Grape Sugar Co.* 101 Ill. 561; *Dunning* v. *Aurora,* 40 Ill. 481; *Bliss* v. *Kennedy,* 43 Ill. 67; *Cook County* v. *Great Western R. Co.* 119 Ill. 218, 10 N. E. 564; *Tibbetts* v. *West & South Town Street R. Co.* 54 Ill. App. 180; *Chicago* v. *Union Bldg. Asso.* 102 Ill. 380, 40 Am. Rep. 598; *Clark* v. *Donaldson,* 104 Ill. 639; *Union Coal Co.* v. *La Salle,* 136 Ill. 119, 12 L.R.A. 326, 26 N. E. 506; *Hesing* v. *Scott,* 107 Ill. 600; *Miller* v. *Webster,* 94 Iowa, 162, 62 N. W. 648; *General Electric R. Co.* v. *Chicago City R. Co.* 66 Ill. App. 362; *Pennsylvania Co.* v. *Chicago,* 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825.

The respondent, in coming into the state of Illinois seeking to do business here, owes obedience to the Constitution and the laws of the state and the ordinances of the city of Chicago enacted in pursuance thereof, and is answerable, according to the laws of the state of Illinois and the ordinances of the city of Chicago, for acts of nonfeasance or of misfeasance committed in such city.

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en, 13 L.R.A. 848; and Donovan v. Pennsylvania Co. 57 C. C. A. 367.

On the jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L. R. A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L. R. A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

St. Louis v. *Western U. Teleg. Co.* 148 U. S. 102, 37 L. ed. 384, 13 Sup. Ct. Rep. 485; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161; *Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S. 137, 42 L. ed. 692, 18 Sup. Ct. Rep. 289.

To permit the respondent to exercise the power and privilege, and enjoy an immunity, denied to other common carriers, would be beyond the power of the general assembly.

Noel v. *People*, 187 Ill. 594, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Horwich* v. *Walker-Gordon Laboratory Co.* 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938.

The title to the sidewalks, and the fee of the streets and control thereof, at the entrance to and abutting the Union Passenger Station of the Pennsylvania Company, are vested exclusively in the city of Chicago for public use.

Pennsylvania Co. v. *Chicago*, 181 Ill. 296, 53 L.R.A. 223, 54 N. E. 825; *Barnes* v. *District of Columbia*, 91 U. S. 547, 23 L. ed. 442.

The respondent devotes its property to a use in which the public has an interest. It, in effect, grants to the public an interest in that use, and subjects its property to be controlled by such regulations as may be prescribed by law by the legislative authorities of the state, and the city of Chicago, to whom are delegated by the state the power and authority to enact and enforce such regulations.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 84, 46 L. ed. 99, 22 Sup. Ct. Rep. 30; *Brass* v. *North Dakota*, 153 U. S. 400, 38 L. ed. 760, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Budd* v. *New York*, 143 U. S. 531, 36 L. ed. 251, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Illinois C. R. Co.* v. *Willenborg*, 117 Ill. 209, 57 Am. Rep. 862, 7 N. E. 698.

The Pennsylvania Company could not lawfully, under the Constitution and laws of the state of Illinois, exclude from its Union Passenger Station in said city cabmen and carriage men duly licensed as such by the city of Chicago, and prohibit them from soliciting custom for their vehicles in said passenger station, such places being public highways and free to all persons, and, by contract, bestow the privilege upon the Parmelee Transfer Company, denied by it to petitioners, and thereby institute a partial hack service of its own, and discriminate against them, and build up a monopoly in the business, and directly or indirectly derive a profit from the maintenance of such monopoly.

Kalamazoo Hack & Bus Co. v. *Sootsma*, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; *Montana Union R. Co.* v. *Langlois*, 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; *McConnell* v. *Pedigo*, 92 Ky. 465, 18 S. W. 15; *Indianapolis Union R. Co.* v. *Dohn*, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937; *Cravens* v. *Rodgers*, 101 Mo. 247, 14 S. W. 106; *Lindsay* v. *Anniston*, 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545.

A court of equity is not open to the litigant whose acts are violations of law and opposed to public policy and the organic statute law of the state, and who seeks its sanction and aid to enforce a contract *ultra vires*, and maintain a monopoly. It will not grant such relief under such circumstances.

McConnell v. *Pedigo*, *Montana Union R. Co.* v. *Langlois*, *Indianapolis Union R. Co.* v. *Dohn*, *Cravens* v. *Rodgers*, and *Kalamazoo Hack & Bus Co.* v. *Sootsma*, *supra*.

The relation of carrier and passenger is not involved in this case, nor is it exercised upon this record; but the exercise of police power, and the authority to prevent and regulate monopolies, and regulate sidewalks and traffic on the same, are involved,—attributes of state sovereignty which belong exclusively to the state and its political subdivisions and agents.

United States v. *E. C. Knight Co.* 156 U. S. 11, 39 L. ed. 328, 15 Sup. Ct. Rep. 249; *Barnes* v. *District of Columbia*, 91 U. S. 547, 23 L. ed. 442; *Slaughter House Cases*, 16 Wall. 63, 21 L. ed. 404; *New York* v. *Miln*, 11 Pet. 139, 9 L. ed. 662.

If respondent is so injured that it has a right to complain, it has an adequate remedy at law, which precludes relief in equity.

Richards v. *Lake Shore & M. S. R. Co.* 124 Ill. 516, 16 N. E. 909; *Chicago, M. & St. P. R. Co.* v. *Darke*, 148 Ill. 226, 35 N. E. 750; *Lake Erie & W. R. Co.* v. *Scott*, 132 Ill. 429, 8 L.R.A. 330, 24 N. E. 78; *Chicago & A. R. Co.* v. *Robbins*, 159 Ill. 598, 43 N. E. 332; *Galt* v. *Chicago & N. W. R. Co.* 157 Ill. 125, 41 N. E. 643; *Rigney* v. *Chicago*, 102 Ill. 64; *Chicago & W. I. R. Co.* v. *Ayres*, 106 Ill. 511; *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 Ill. 157; *Chicago, R. I. & P. R. Co.* v. *Stein*, 75 Ill. 41; *Ottawa Gaslight & Coke Co.* v. *Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Illinois C. R. Co.* v. *Grabill*, 50 Ill. 242.

Where the relief prayed for, if granted, would be of great injury to the petitioners, and not of a corresponding benefit to the respondent, an injunction will be denied.

Pratt v. *New York C. & H. R. R. Co.* 90 Hun, 83, 35 N. Y. Supp. 577; *Gray* v. *Man-*

hattan R. Co. 128 N. Y. 509, 28 N. E. 498; *Harlan & H. Co.* v. *Paschall*, 5 Del. Ch. 435; *Fobes* v. *Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L.R.A. 453, 24 N. E. 919; *Jacksonville, T. & K. W. R. Co.* v. *Adams*, 28 Fla. 656, 14 L.R.A. 533, 10 So. 465; *Amerman* v. *Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 5 Inters. Com. Rep. 131, 64 Fed. 981; *Wason* v. *Sanborn*, 45 N. H. 171; High, Inj. 596.

The outside facilities at a depot must be equal; there can be no privileges shown there.

Godbout v. *St. Paul Union Depot Co.* 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835.

A railroad company or depot cannot make arbitrary rules discriminating as to who may occupy cab stands, and as to who shall solicit passengers therefrom.

Ray. Pass. Carr. §§ 113–115; 1 Fetter, Carr. Pass. § 245, p. 638; 26 Am. & Eng. Enc. Law, 2d ed. p. 505; *Montana Union R. Co.* v. *Langlois*, 9 Mont. 419, 8 L.R.A. 753, and note, 18 Am. St. Rep. 745, 24 Pac. 209; *Markham* v. *Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Cravens* v. *Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack & Bus Co.* v. *Sootsma*, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; *Marriott* v. *London & S. W. R. Co.* 1 C. B. N. S. 499; *Palmer* v. *London, B. & S. C. R. Co.* L. R. 6 C. P. 194; *Camblos* v. *Philadelphia & R. R. Co.* 9 Phila. 411, Fed. Cas No. 2,331; *New England Exp. Co.* v. *Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Summitt* v. *State*, 8 Lea, 413, 41 Am. Rep. 637; *State* v. *Reed*, 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308; *Indianapolis Union R. Co.* v. *Dohn*, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937; *Lucas* v. *Herbert*, 148 Ind. 64, 37 L.R.A. 376, 47 N. E. 146; *Cole* v. *Rowen*, 88 Mich. 219, 13 L.R.A. 848, 50 N. W. 138; *McConnell* v. *Pedigo*, 92 Ky. 465, 18 S. W. 15; *Pennsylvania Co.* v. *Chicago*, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; *Lindsay* v. *Anniston*, 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545; *Indian River S. B. Co.* v. *East Coast Transp. Co.* 28 Fla. 387, 29 Am. St. Rep. 258, 10 So. 480.

Messrs. **Frank J. Loesch, Edgar A. Bancroft,** and *Charles F. Loesch* for respondent:

Cabmen and expressmen have no right to enter a railroad station for the purpose of soliciting patronage there without the consent of the railroad company. The stations, like the railroads, are impressed with a public use, and are open to all having contractual relations with the company or its passengers; but this does not embrace the right to carry on any private business in any station or train without the consent of the company. It may grant an exclusive license to one person to solicit custom of incoming passengers in its station, and exclude all others from the like privilege.

Jencks v. *Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *Com.* v. *Power*, 7 Met. 596, 41 Am. Dec. 465; *Barker* v. *Midland R. Co.* 18 C. B. 46; *Marriott* v. *London & S. W. R. Co.* 1 C. B. N. S. 499; *Beadell* v. *Eastern Counties R. Co.* 2 C. B. N. S. 509; *Painter* v. *London, B. & S. C. R. Co.* 2 C. B. N. S. 702; *The D. R. Martin*, 11 Blatchf. 234, Fed. Cas. No. 1,030; *Barney* v. *Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Old Colony R. Co.* v. *Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Com.* v. *Carey*, 147 Mass. 40, note, 17 N. E. 97; *Fluker* v. *Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L.R.A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *Griswold* v. *Webb*, 16 R. I. 649, 7 L.R.A. 302, 19 Atl. 143; *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; *Smith* v. *New York, L. E. & W. R. Co.* 149 Pa. 249, 24 Atl. 304; *New York C. & H. R. R. Co.* v. *Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *New York C. & H. R. R. Co.* v. *Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *Brown* v. *New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69, Affirmed in 151 N. Y. 674, 46 N. E. 1145; *Summitt* v. *State*, 8 Lea, 413, 41 Am. Rep. 637; *Lucas* v. *Herbert* 148 Ind. 64, 37 L.R.A. 376, 47 N. E. 146 *New York, N. H. & H. R. Co.* v. *Scovil* 71 Conn. 136, 42 L.R.A. 157, 71 Am. S. Rep. 159, 41 Atl. 246; *Snyder* v. *Union Depot Co.* 19 Ohio C. C. 368; *Kates* v. *Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; *Godbout* v. *St. Paul Union Depot Co.* 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835; *New York C. & H. R. R. Co.* v. *Warren*, 31 Misc. 571, 64 N. Y. Supp. 781; *Boston & A. R. Co.* v. *Brown*, 177 Mass. 65, 52 L.R.A. 418, 58 N. E. 189; *Boston & M. R. Co.* v. *Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; *New York, N. H. & H. R. Co.* v. *Bork*, 23 R. I. 218, 49 Atl. 965; *St. Louis Drayage Co.* v. *Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Donovan* v. *Pennsylvania Co.* 61 L.R.A. 140, 57 C. C. A. 362, 120 Fed. 215; *Hedding* v. *Gallagher*. 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225.

Respondent has the legal right to free and unobstructed entrance to its passenger station from Canal street. Such right is a property right; and the obstruction of such entrance by the petitioners gathering there in large numbers to ply their vocations is a private nuisance. The allegations of respondent's bill are fully sustained by the proof.

Benjamin v. *Storr*, L. R. 9 C. P. 400; *Lyon* v. *Fishmongers Co.* L. R. 1. App. Cas. 662; *Fritz* v. *Hobson*, L. R. 14 Ch. Div. 542; *Jaques* v. *National Exhibit Co.* 15 Abb. N. C. 250; *Hallock* v. *Scheyer*, 33 Hun, 111; *Flynn* v. *Taylor*, 53 Hun, 167, 6 N. Y. Supp. 96, 127 N. Y. 596, 14 L.R.A. 556, 28 N. E. 418; *Callanan* v. *Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; *Cohen* v. *New York*, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700; *Carter* v. *Chicago*, 57 Ill. 283; *Field* v. *Barling*, 149 Ill. 557, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850; *Newell* v. *Sass*, 142 Ill. 104, 31 N. E. 176; *Hart* v. *Buckner*, 5 C. C. A. 1, 2 U. S. App. 488, 54 Fed. 925; *McDonald* v. *Newark*, 42 N. J. Eq. 136, 7 Atl. 855; 2 Dill. Mun. Corp. 4th ed. § 587, note, 656a; 1 Lewis, Em. Dom. 2d ed. pp. 170–196; *McQuaid* v. *Portland & V. R. Co.* 18 Or. 237, 22 Pac. 899; 1 Am. & Eng. Enc. Law, 2d ed. pp. 225, 238; Elliott, Roads & Streets, 2d ed. p. 761; *Branahan* v. *Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457; *Lahr* v. *Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528; *Hedding* v. *Gallagher*, 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225.

Injunction is the only adequate remedy in the case at bar.

1 Spelling, Inj. & Extr. Rem. 2d ed. §§ 338, 340; 1 Am. & Eng. Enc. Law, 2d ed. p. 225; 2 Lewis, Em. Dom. 2d ed. § 638; 1 High, Inj. §§ 816, 820; Hilliard, Inj. 2d ed. § 328; 2 Dill. Mun. Corp. 4th ed. § 661; Elliott, Roads & Streets, 2d ed. § 709; *Pennsylvania Co.* v. *Chicago*, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; *Carter* v. *Chicago*, 57 Ill. 283; *Edwards* v. *Haeger*, 180 Ill. 99, 54 N. E. 176; *Lowery* v. *Pekin*, 186 Ill. 387, 51 L.R.A. 301, 57 N. E. 1062; *Chicago General R. Co.* v. *Chicago, B. & Q. R. Co.* 181 Ill. 605, 54 N. E. 1026; *London & N. W. R. Co.* v. *Lancashire & Y. R. Co.* L. R. 4 Eq. 174; *New York C. & H. R. R. Co.* v. *Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *Brown* v. *New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69; *New York C. & H. R. R. Co.* v. *Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *New York C. & H. R. R. Co.* v. *Warren*, 31 Misc. 571, 64 N. Y. Supp. 781; *Snyder* v. *Union Depot Co.* 19 Ohio C. C. 368; *New York, N. H. & H. R. Co.* v. *Scovill*, 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; *Boston & M. R. Co.* v. *Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 189; *Goodson* v. *Richardson*, L. R. 9 Ch. 221; *Seattle Gas & Electric Co.* v. *Citizens' Light & P. Co.* 123 Fed. 588.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit involves some questions as to the relative rights of the parties in the use of a railroad passenger station and depot grounds, and in the use of the public sidewalk and street adjacent to such station and grounds.

The facts out of which the controversy has arisen are clearly established, and may thus be summarized:

By a lease executed in 1871 the Pennsylvania Company, a corporation of Pennsylvania, engaged in transporting passengers and freight by railroad, acquired the possession and control of the Pittsburg, Fort Wayne, & Chicago Railway and all its rolling stock and property,—the latter railway extending from Pittsburg to a passenger station at or near the corner of Canal and Adams streets, in Chicago.

In 1880 the lessee company erected on the leased premises a new passenger house, now known as the Union Passenger Station, which ever since has been and is now occupied and used by it and its tenants, the Chicago & Alton Railway Company, the Chicago, Burlington, & Quincy Railway Company, the Chicago, Milwaukee, & St. Paul Railway Company, and the Pittsburg, Cincinnati, Chicago, & St. Louis Railway Company. The companies just named occupy and use that station under a perpetual lease by which the Pennsylvania Company, as between it and its tenants, has charge of the station, with authority to control and manage all trains therein as well as all watchmen and employees in the business there transacted.

*This passenger station is the only termi-[281] nus in Chicago of each of those lines of railway, and through that station alone can the several companies using it conduct an exchange of passengers and baggage and the transportation and handling of the United States mail and express parcels.

The extent of the business done at that station is indicated by the statement that the Chicago & Alton Railway Company controls and operates in the transaction of what is commonly called interstate business over 1,000 miles of railway; the Chicago, Burlington, & Quincy Railway Company, over 7,000 miles; the Chicago, Milwaukee, & St. Paul Railway Company, over 6,000 miles; the Pittsburg, Cincinnati, Chicago, & St. Louis Railway Company, over 1,400 miles; and the Pennsylvania Company, over 1,000 miles.

At this station the average number of passengers arriving and departing is over 30,000 each day; the average number of parcels of baggage daily received and delivered is over 2,200, and the average number of tons of United States mail daily received and delivered is over 250. Passenger trains to the number of 250 arrive and depart each day. This statement does not include the

large number of express parcels daily handled at the station.

All tickets of interstate passengers arriving and departing from this station, known as through tickets, have attached to each a check or coupon for conveyance through Chicago to the station of the connecting line of railroad designated on such tickets, and not running into or out of the passenger depot of the Pennsylvania Company. The latter company and the other companies named have contracts for the use of a line of omnibuses or conveyances for the performance of the services called for by such coupons or checks, and those omnibuses or conveyances form the only regular connecting lines of transportation between the Pennsylvania Company's station and the stations of other railways in Chicago.

[282] *Besides the Pennsylvania Company's station there are five other railway stations in Chicago.

The main entrance to and exits from the Pennsylvania Company's station for passengers, for employees, and for the public using the station, is on Canal street, about 100 feet north of Adams street. Substantially all passengers, whether arriving or departing, pass through that entrance, which is at the head of a flight of stairs leading down to and up from the station platform upon which trains arrive and depart.

The present suit was instituted by the Pennsylvania Company against the defendant Donovan and others, citizens of Illinois, for the purpose of protecting that company in the enjoyment of certain alleged rights and privileges in respect of its passenger station and depot grounds in Chicago. The plaintiff alleged that those rights had been violated by the defendants, and, unless enjoined from so doing, they would continue to violate them, to its great damage.

After referring to its efforts for many years to protect incoming and outgoing passengers from extortion and annoyance practised by local hackmen, expressmen, and hotel runners congregating about its station, and noisily soliciting the patronage of passengers, the plaintiff, besides stating the above facts, alleged that it was compelled, in 1894, to institute a partial hack service of its own; and, for the purpose of protecting the rights of passengers, it made, on the 31st day of December, 1894, an arrangement, or contract, with one Eighme for the purpose of furnishing sufficient carriage and cab service to passengers arriving at its station, and gave to him for a carriage stand a small piece of ground, about 32 feet wide and about 10 feet long, in the northwest corner of its passenger station, at the corner of Madison street, near its power house, requiring him to keep at all times clean vehicles, carriages, and cabs with uniformed, honest, and competent drivers, who would be satisfactory to the company; to make charges for the use of such carriages and cabs only in accordance with the ordinances of the city of Chicago; that Eighme *had [283] been allowed to place an agent inside the company's station to notify passengers that suitable cabs and carriages could be obtained from such agent; that, by means of such arrangement, the company made full provision for the wants of incoming passengers desiring cabs or carriages for transportation from its station to any part of Chicago. The arrangement or agreement with Eighme was terminated by the company on the 31st day of January, A. D. 1902, and a similar arrangement was made with the Parmelee Transfer Company, which thereafter succeeded Eighme in the same business, and now carried it on in the same manner.

The plaintiff charged a conspiracy and confederation among the defendants—hack drivers and members of the Chicago Hack, Coupé, & Cab Drivers' Union—to injure its business and property rights, alleging that they daily gathered in numbers from eight to twenty men at a time, in rows and groups, upon the sidewalk in front of its main entrance, entered the company's station at its main entrance by twos and threes at a time, without plaintiff's consent and against its express objections, and in loud and boisterous voices and manner solicited incoming passengers and baggage for their vehicles; that defendants, by their numbers and noisy calls, harassed and annoyed passengers, sometimes forcibly laying hold of them when leaving the station in order to secure their patronage, to the annoyance and confusion of passengers, and to the injury and damage of the plaintiffs; that the number of the defendants, upon the arrival of each train at the entrance and within the station, soliciting businesses, had become so great that by their boisterous actions and obstruction of the sidewalk and the interior of plaintiff's station, without its consent, they had in large part deprived plaintiff of its lawful property rights in the street frontage, and of the free and full use of its station and property, and thereby created and continued a private nuisance damaging to the plaintiff's property, depriving it of the full, lawful, beneficial use of its station and street frontage, and of the main entrance thereto, and had prevented *and now daily pre- [284] vented it from securing to passengers a free and uninterrupted passage from and to its station and to arriving and departing trains; and that by such acts of the defendants great and substantial damages were inflicted upon plaintiff's property, different in kind and degree from that suffered by the

general public, incapable of computation, and which could not be compensated at law.

It was further averred in the bill that the defendants asserted the right—and acted upon that claim and assertion—to enter the station of the plaintiff at all times, in such numbers as suited their purposes, to remain there and occupy such portions of the station as they saw fit in soliciting the custom of incoming passengers, regardless of the consent or the regulations of the plaintiff, or the use to which its property is lawfully devoted, and to the prejudice of its duties and business as a common carrier, and by their actions largely deprived the plaintiff of the control of its property, to its irreparable loss and damage.

Alleging that its rights could not be effectively protected except by the decree of a court of equity, the plaintiff prayed that the defendants be perpetually enjoined from "entering the station" of the plaintiff "for the purpose of soliciting the custom of incoming passengers for cabs, carriages, express wagons, or hotels, respectively; and that the occupation of the sidewalk and street abutting the main entrance of your orator's said station by said defendants for the purpose of soliciting custom of passengers for their said cabs, carriages, express wagons, and hotels be decreed to be a nuisance to your orator, and damaging to its property; and that said defendants and each of them, and all persons acting in concert with them, whose names are unknown to your orator, may be perpetually enjoined from congregating singly or in larger numbers upon the said sidewalk at the main or any other entrance of your orator's said station for the purpose of plying their respective vocations as hackmen, cabmen, expressmen, or hotel runners, and from interfering with or soliciting the custom of any of the
[285] passengers *upon the sidewalk adjoining said station at any main or other entrance to said station; and that your orator may have such other and further relief in the premises as the nature of its case may require, and to your honors shall seem meet."

The defendants filed an answer, putting in issue the material allegations of the bill, and insisting upon their legal right to have their vehicles in the public street in front of the company's station, and to go upon the plaintiff's depot grounds or into its station, as well as to stand upon the sidewalk in front of the main entrance to the station, for the purpose of soliciting the business of incoming or outgoing passengers.

A motion for an injunction against the defendants was heard upon the pleadings and upon affidavits filed by the respective parties. The circuit court granted a preliminary injunction to the effect that the defendants and all persons claiming to act under their authority, direction, or control, or to whom notice of the court's order or injunction should come, refrain "from entering the passenger station of complainant at the corner of Adams and Canal streets, in the city of Chicago, to solicit custom of the incoming passengers for cabs, carriages, express wagons, or hotels, and do absolutely desist and refrain from congregating upon the sidewalk in front of, adjacent to, or about such entrances to said passenger station, and from soliciting the custom of passengers for cabs, carriages, express wagons, or hotels until the further order of the court in the premises."

The defendants appealed from that order, and it was affirmed in the circuit court of appeals, except the last clause thereof, which was modified by restraining the defendants "from congregating upon the sidewalk in front of, adjacent to, or about the entrances of appellee's [company's] passenger station . . . and from there soliciting the custom of passengers, *so as to interfere* with the ingress and egress of passengers and employees." 61 L. R. A. 140, 57 C. C. A. 362, 120 Fed. 215. Subsequently, a final decree was passed in the circuit court in conformity with the above order of the circuit court of appeals. *That decree, [286] upon appeal by the defendants, was affirmed in the latter court, and the case is now before this court upon writ of certiorari, sued out by the defendants.

As this case is before us on writ of certiorari, we can dispose of all questions arising on the record.

Upon the pleadings two principal inquiries arise: First, whether the Pennsylvania Company, having made an arrangement with the Parmelee Transfer Company to furnish, at its passenger station, from time to time, all vehicles necessary for the accommodation of passengers arriving there on its trains or on the trains of other railroad companies, may legally exclude from its depot grounds or passenger station all hackmen or expressmen coming to either *for the purpose only* of soliciting for themselves the custom or patronage of passengers. Second, whether, in virtue of its ownership of the passenger station and depot grounds in question, the railroad company is entitled, in prosecuting its business, to any greater privileges in respect of the use of the sidewalk and street in front of the main entrance to such station than belonged to the defendants in the prosecution of their business.

Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of

those functions or duties. In *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 382, 12 L. ed. 465, 482, this court held that a corporation engaged, under legislative authority, in the transportation of passengers and freight over navigable waters, was "in the exercise of a sort of public office, and has public duties to perform." In *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 694, 695, 21 L. ed. 382, 388, it was adjudged that a railroad, whether constructed by a private corporation or by in-
[293] dividuals under the authority of a *legislative grant, or by the state itself, was a public highway, and that the function performed by the corporation was that of the state, and the uses to which its property was devoted were of a public nature. In *Queensbury* v. *Culver*, 19 Wall. 83, 91, 22 L. ed. 100, 104, it was said that the construction or maintenance of a public highway was "for the promotion of a public use." So in *Pine Grove Twp.* v. *Talcott*, 19 Wall. 666, 676, 22 L. ed. 227, 233, which involved the validity of taxation, under legislative authority, to aid in the construction of a railroad by a corporation: "Though the corporation was private, its work was public, as much so as if it were to be constructed by the state." Again, in *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 657, 34 L. ed. 295, 302, 10 Sup. Ct. Rep. 965, 971: "The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner in the mode prescribed by law." To the same effect are *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 332, 41 L. ed. 1007, 1024, 17 Sup. Ct. Rep. 540; *Smyth* v. *Ames*, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465. Necessarily, the same principles apply in reference to the use of the company's station house and depot grounds; for they are held in the same right as are its road, its locomotives, and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway.

It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the *ends for which the[294] corporation was created, and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation. In *Western U. Teleg. Co.* v. *Pennsylvania R. Co.* 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, the court considered the nature of the interest which a railroad company had in its right of way. It was there said: "A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given." In that case the court referred, with approval, to the observation of the supreme court of Pennsylvania in *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457, to the effect "that a railroad company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of
it." So, in *Pittsburgh, *Ft. W. & C. R. Co.*[295] v. *Bingham*, 29 Ohio St. 370, 371, 23 Am. Rep. 751, the supreme court of Ohio said that "for all purposes not connected with the operation of its road, the right of the

company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes."

Applying these principles to the case before us, it would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily, as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnccessary, unreasonable, or arbitrary; on the contrary, it is easy to see how, in a great city, and in a constantly crowded railway station, such an arrangement might promote the comfort and convenicnce of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of pas-
[296] sengers *was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger, upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary.

Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses,—certainly, at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling. The defendants did not have, or profess to have, any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the state, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it *could accept the aid or [297]
stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passengers' Depot to other railway stations and to hotels or private houses in Chicago. But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company, by such use of its property, also derived pecuniary profit for itself, that was a matter of no concern to the defendants, and gave them no ground of complaint.

This question is not controlled by any statute of Illinois. Reference has been

made to the Illinois act as amended in 1883, by which it is provided that every railroad in that state shall, "at all junctions with other railroads, at all depots where said railroad companies stop their trains regularly to receive and discharge passengers in cities and villages, for at least one-half hour before the arrival of, and one-half hour after the arrival of, any passenger train, cause their respective depots to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid;" also, to the act of 1877, as amended in 1895, by which it is provided, "that all railroads in this state carrying passengers or freight shall, and they are hereby required to, build and maintain depots for the comfort of passengers and for the protection of shippers of freight, where such [298] railroad *companies are in the practice of receiving and delivering passengers and freight, at all towns and villages having a population of two hundred or more, on the line of their roads and roads leased and operated by them." Hurd's Rev. Stat. (Ill.) 1901, pp. 1378, 1385. Clearly, these statutes have nothing to do with the matter before us. They relate only to the comfort and convenience of passengers and shippers of freight, and do not confer or assume to confer any rights on hackmen or cabmen who seek to enter the depot grounds and station of the railroad company merely to solicit business for themselves. It does not appear that the state has undertaken by any statute to compel the railroad company to share the use of its depot grounds and station with hackmen and cabmen seeking to use them only to solicit custom for themselves. Whether such a statute would be valid, we need not now consider or determine.

In the *Express Cases*, 117 U. S. 1, 24, 29 L. ed. 791, 801, 6 Sup. Ct. Rep. 542, 554, 628, which involved a general inquiry as to the respective rights of railroad and express companies in respect of the use of railroads for the transportation of express parcels, this court said: "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

In *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 79, 87, 35 L. ed. 97, 100, 11 Sup. Ct. Rep. 490, one of the questions was as to the validity of a contract between a railroad company and the Pullman company, whereby the latter was given the exclusive right for fifteen years to furnish drawing-room and sleeping cars to be used by the former, and whereby, also, the railroad company stipulated *that during that term it would not con- [299] tract to give a like privilege to other sleeping-car companies. That contract was assailed as one in restraint of trade and as being against public policy. This court said: "The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty arising from the public nature of its employment to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty as a carrier of passengers was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them. *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628."

The views we have expressed find more or less support in numerous adjudged cases, some of which are cited in the margin.† There are cases to the contrary, but, in our opinion, the better view—the one sustained by the clear weight of *authority and [300] by sound reason and public policy—is that which we have expressed.

The defendants cite, as supporting their contention, *Pennsylvania Co.* v. *Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825. But that case did not involve any question as to the right of licensed cabmen to enter the station house of a railroad company, against its objection, solely for the purpose of soliciting the custom of passengers. What appears in the opinion of the majority, and in the particular cases cited by the learned

†Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; Com. v. Power, 7 Met. 596, 41 Am. Dec. 465; Barney v. Oyster Bay S. B. Co. 67 N. Y. 301; Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; Com.

state court, on that point, was, we feel constrained to say, outside of the issues presented, and cannot be deemed authoritative upon the question now being considered. The sole issue in that case was as to the validity of certain ordinances of the city of Chicago relating to the use by hackmen of the public street and sidewalk in front of the company's station,—a question wholly different from the one relating to the special arrangement between the railroad company and the Parmelee Transfer Company. If the question had been before the state court, and it had adjudged that a railroad corporation could not grant to one person or company the exclusive right within its station to solicit the custom of passengers (the subject not being covered by any valid statute), then it would have been necessary to consider whether the subject was not one of general law, in respect of which the courts of the United States were entitled to exercise their independent judgment, in light of the settled principles that must always control the determination of the legal rights of parties. No such question is now presented.

The next question to be examined is that which involves the respective rights of the parties in the use of the public street and sidewalk in front of the company's passenger station.

We have seen that the original temporary restraining order of the circuit court was, in general terms, to the effect that the defendants desist from congregating upon the sidewalk in front of, adjacent to, or about the entrance to the company's passenger station, and from soliciting the cus-[301]tom of passengers *for cabs, etc., until the further order of the court; and that this order was so modified in the circuit court of appeals as to restrain only *such congregating* by defendants upon the sidewalk *as would interfere* with the ingress and egress of passengers and employees. We take it that the final decree recognized the right of the defendants in prosecuting their business to congregate, in reasonable numbers, upon the sidewalks in front of, adjacent to, or about the entrance of the company's station, and from there soliciting the custom of passengers, providing such use of the sidewalks did not obstruct the ingress and egress of passengers and employees.

As the railroad company did not appeal from the final decree of the circuit court, it cannot, upon this appeal, complain of any of its provisions. The defendants did appeal, and they object to the decree relating to the use of the sidewalk and street in front of the main entrance to the passenger depot.

That the railroad company, by its agents and employees, are entitled, in prosecuting its business, to use, in all appropriate ways, the sidewalk and street in front of its station and depot grounds, cannot be doubted,—that right being appurtenant to the lands upon which its station house and depot grounds stand. Passengers may, therefore, in their own right, as well as in right of the company, use the sidewalk in order to gain access to the depot grounds and station, or to reach the public street when leaving the station.

Referring to the rights of abutting owners, the supreme court of Illinois, in *Field* v. *Barling*, 149 Ill. 556, 571, 24 L. R. A. 406, 411, 41 Am. St. Rep. 311, 37 N. E. 850, said: "The dedication of the street by the plat, the sale of lots with reference to it, conveyance of abutting lots, and the payment of the money for the conveyances, were elements sufficient to create the right. The right may be regarded in the nature of an incorporeal hereditament. It becomes appurtenant to the lots. As to the rights secured, they are plain: to have the street kept open, so that free access may be had to and from lots abutting on the street." In the later case of *Pennsylvania Co.* v. *Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825, above *cited, that court adjudged[302] that the title to the streets in Chicago was vested in the city, and "it has the conservation, control, management, and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes; but must hold and control the possession exclusively for public use, for purposes of travel and the like." The general doctrine is correctly stated in Dillon on Municipal Corporations: "For example,

v. Carey, 147 Mass. 40, note, 17 N. E. 97; State ex rel. Sheets v. Union Depot Co. 71 Ohio St. 379, 68 L. R. A. 792, 73 N. E. 633; Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co. 99 Va. 111, 50 L. R. A. 722, 37 S. E. 784; Fluker v. Georgia R. & Bkg. Co. 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; Griswold v. Webb. 16 R. I. 649; 7 L. R. A. 302, 19 Atl. 143; Summitt v. State, 8 Lea, 413, 41 Am. Rep. 637; New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; Kates v. Alabama Baggage & Cab. Co. 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; Godbout v. St. Paul Union Depot Co. 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835; Boston & A. R. Co. v. Brown, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189; Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; New York, N. H. & H. R. Co. v. Bork, 23 R. I. 218, 49 Atl. 965; St. Louis Drayage Co. v. Louisville & N. R. Co. 5 Inters. Com. Rep. 137, 65 Fed. 39; Hedding v. Gallagher, 72 N. H. 377, 64 L. R. A. 811, 57 Atl. 225.

an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. . . . When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property." Again: "But it was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it, and that these rights, whether the bare fee of the streets was in the lot owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself." 2 Dill. Mun. Corp. 4th ed. §§ 587*b*. 656*a*. So, in Lewis on Eminent Domain, where the adjudged cases are referred to and examined: "When the owner of a tract of land lays the same out into lots and streets, and sells the lots, the purchasers of such lots acquire, as appurtenant thereto, a private right of way and access over the streets. This private right arises without any express grant, and in the absence of any statute. The law presumes that the parties had in mind the advantages to be derived from the use of the proposed streets, and implies a right to such use as a part of the grant. . . . Therefore, in the case of such a grant, there arises by operation of law a private right to use the streets in connection with the lots of each proprietor, which is as inviolable as any other right of property. . . . The existence of these [303] private rights *and easements is, therefore, entirely independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street, whether a fee or less." Lewis, Em. Dom. 2d ed. § 91*f* and authorities cited in notes. See also *Newell* v. *Sass*, 142 Ill. 104, 31 N. E. 176.

But the right of the railroad company, as abutting owner, and the rights of passengers, are not, in their nature, paramount to the rights of others of the general public to use the sidewalk in question in legitimate ways and for legitimate purposes. Licensed hackmen and cabmen, unless forbidden by valid local regulations, may, within reasonable limits, use a public sidewalk in prosecuting their calling, provided such use is not materially obstructive in its nature; that is, of such exclusive character as, in a substantial sense, to prevent others from also using it upon equal terms, for legitimate purposes. Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established; subject, of course, to such valid regulations as may be prescribed by the constituted authorities for the public convenience; this, to the end that, as far as possible, the rights of all may be conserved without undue discrimination.

By the Illinois statutes it is provided that the city council in cities may regulate the use of streets and sidewalks, and license, tax, and regulate hackmen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation. Hurd's Rev. Stat. (Ill.) 1901, pp. 285, 287. And by ordinance of the city council of Chicago it is provided that "any licensed hackney, coach, cab, or other vehicles for the conveyance of passengers, may stand, while waiting for employment, at the following places, and for the period of time hereinafter provided: . . . Stand No. 4. The east side of Canal street, occupying 110 feet between Adams and Madison streets, as the superintendent of police shall direct . . . Stand No. 6. *At all rail- [304] road depots ten minutes previous to the arrival of all passenger trains." Rev. Code of Chicago, § 498. The validity of this ordinance has been sustained by the supreme court of Illinois. *Pennsylvania Co.* v. *Chicago*, 181 Ill. 299, 53 L. R. A. 223, 54 N. E. 825. Perceiving nothing in the above provisions inconsistent with any right secured by the Constitution of the United States, we accept the decision of the state court as authoritative upon this point. When, therefore, licensed hackmen and cabmen, at appropriate times, placed their vehicles in the public street, next to the sidewalk, in front of the company's passenger house, they did not violate the regulations established by the city council. Nor, so far as the plaintiff is concerned, did they violate such regulations, when, leaving their vehicles in the public street, at the appointed places, they stood near by them for a reasonable time upon the sidewalk, awaiting the coming of passengers from the station house. What they could not legally do—what the final decree properly forbade them to do—was to *congregate* upon the sidewalk in front of, adjacent to, or about the passenger house, *so as to interfere* with the ingress and egress of passengers. Of course, any use of the sidewalk in whatever way that would unnecessarily or unduly obstruct and interfere with passengers in their going

or coming would be inconsistent with the rights of such passengers as well as an infringement of the right of the company, as abutting property owner, to have, by its agents and employees, for the purposes of its business, reasonable access to and from the sidewalk and the public street.

It only remains to inquire as to the competency of a court of equity to give the railroad company the relief it sought. The defendants insist that equity cannot properly interfere. But the inadequacy of a legal remedy in such a case as this one is quite apparent. According to the record the attempt of the defendants, despite the objections of the company, to use its station house and depot grounds for the purpose of meeting passengers and soliciting their patronage, was of constant, daily, almost hourly occurrence. The case was one of a
[305] continuing *trespass, involving injury of a permanent nature. A suit at law could only have determined the particular wrong occurring on a particular occasion, and would not reach other wrongs of like character that would occur almost every hour of each day, as passengers arrived at the station of the company. The same state of things existed in reference to such use of the sidewalk in front of the passenger station as unduly interfered with the rights of passengers arriving and departing. Only a court of equity was competent to meet such an unusual emergency, and by a comprehensive decree determine finally and once for all the entire controversy between the parties, thus avoiding a multiplicity of suits, and conserving the public interests. No remedy at law would be so complete or efficacious as a suit in equity in such a case as this one. *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; *Smyth* v. *Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418. The supreme court of Illinois well said in *Chicago General R. Co.* v. *Chicago, B. & Q. R. Co.* 181 Ill. 605, 611, 54 N. E. 1026: "When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law." See also *Newell* v. *Sass*, 142 Ill. 104, 115, 116, 31 N. E. 176; *Carpenter* v. *Capital Electric Co.* 178 Ill. 29, 36, 43 L. R. A. 645, 69 Am. St. Rep. 286, 52 N. E. 973; *Lowery* v. *Pekin*, 186 Ill. 387, 398, 51 L. R. A. 301, 57 N. E. 1062.

The decree of the Circuit Court of Appeals is affirmed.

*CALIFORNIA REDUCTION COMPANY [306]
et al., Petitioners,
v.
SANITARY REDUCTION WORKS OF SAN FRANCISCO.

(See S. C. Reporter's ed. 306–325.)

1. **Municipal corporations — sanitary regulations—disposal of garbage.**— The adoption of ordinances granting an exclusive privilege for fifty years to dispose of garbage and refuse matter by cremation or reduction, and requiring the delivery of all such material at the crematory or reduction plant, there to be destroyed at the expense of the person, company, or corporation conveying the same, was within the authority of the board of supervisors of the city and county of San Francisco—under Cal. Const. 1879, art. 11, § 11, Cal. Stat. 1863, p. 540, Cal. Stat. 1893, p. 288—to make and enforce, within the city and county, all such reasonable sanitary and other regulations as are not in conflict with any general statute or with the Constitution, and which have for their object the preservation of the public health.

2. **Constitutional law—due process of law—municipal disposal of garbage.**— Municipal ordinances requiring all garbage and other refuse matter to be delivered at a specified crematory or reduction plant, there to be cremated or destroyed at the expense

NOTE.—*On municipal power over nuisances affecting highways and waters*—see note to Hagerstown v. Witmer, 39 L.R.A. 649.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L.R.A. 655, and note; *Re* Gannon, 5 L.R.A. 359, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; and Gilman v. Tucker, 13 L.R.A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Monopoly in contract or ordinance for removal of garbage.

The weight of authority is decidedly to the effect that a municipal ordinance or contract conferring an exclusive privilege to remove garbage and filth is a valid exercise of the police power. *Re* Vandine, 6 Pick. 187, 17 Am. Dec. 351; Walker v. Jameson, 140 Ind. 591, 28 L.R.A. 679, 37 N. E. 402, 39 N. E. 869; Morgan v. Cincinnati, 12 Ohio L. J. 41; State v. Robb (Me.) 60 Atl. 874; State v. Orr, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269; California Reduction Co. v. Sanitary Reduction Works, 61 C. C. A. 91, 126 Fed. 38; Dupont v. District of Columbia, 20 App. D. C. 477; Gardner v. Michigan, 199 U. S. 325, *post*, 212, 26 Sup. Ct. Rep. 106; Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 49 Am. St. Rep. 684, 60 N. W. 355. And see note to the case last cited in 27 L.R.A. 540.

The gathering of garbage is not a trade, business, or occupation in any proper sense; and such employment does not come under the doctrine respecting monopolies or legislation

of the person, company, or corporation conveying the same, are not wanting in the due process of law required by U. S. Const., 14th Amend., as taking private property for public use without compensation, even if some of the substances so destroyed may have had some elements of value.

[No. 25.]

Argued October 26, 27, 1905. Decided November 27, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California, enjoining violations of municipal ordinances for the disposal of garbage. *Affirmed.*

See same case below, 61 C. C. A. 91, 126 Fed. 29.

The facts are stated in the opinion.

Mr. **Richard T. Harding** argued the cause, and, with *Messrs. Garret W. McEnerney, Charles Page,* and *Edward J. McCutchen,* filed a brief for petitioners.

Ordinances like the one here involved are unconstitutional because they involve a confiscation of property.

State v. *Robbins,* 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; *Meyer* v. *Jones,* 20 Ky. L. Rep. 1632, 49 S. W. 809; *Iler* v. *Ross,* 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; *River Rendering Co.* v. *Behr,* 77 Mo. 91, 46 Am. Rep. 6; *Knauer* v. *Louisville,* 20 Ky. L. Rep. 193, 41 L.R.A. 219, 45 S. W. 510, 46 S. W. 701; *State* v. *Morris,* 47 La. Ann. 1664, 18 So. 710; *Underwood* v. *Green,* 42 N. Y. 140; *Schoen* v. *Atlanta,* 97 Ga. 697, 33 L.R.A. 804, 25 S. E. 380; *Gregory* v. *New York,* 40 N. Y. 273.

Authority to grant a franchise never carries with it power to grant an exclusive franchise.

Minturn v. *Larue,* 23 How. 435, 16 L. ed. 574; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

Wherever an incorporated company in any action asserts a right against another person, based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power.

Zanesville v. *Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55; 4 Thomp. Corp. § 5340; *Waterloo Turnp. Road Co.* v. *Cole,* 51 Cal. 386.

Scavenger work has a well accepted and defined meaning, and the occupation or business, lowly though it be, has existed and has been recognized and regulated for ages.

Iler v. *Ross, supra.*

To justify the exercise of the police power, the public interest must require the interference and the measures adopted must be reasonably necessary for the accomplishment of the purpose.

Lawton v. *Steele,* 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The right to follow any of the common occupations of life is an inalienable right.

Allgeyer v. *Louisiana,* 165 U. S. 578–589, 41 L. ed. 832–835, 17 Sup. Ct. Rep. 427.

Messrs. **Sheldon G. Kellogg** and **Aldis B. Browne** argued the cause, and, with *Messrs. C. L. Tilden* and *Alexander Britton,* filed a brief for respondent:

The action of the board of supervisors was a valid exercise of the police power.

Slaughter-House Cases, 16 Wall, 36, 62, 21 L. ed. 394, 404; *Hannibal & St. J. R. Co.*

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in restraint of trade. Grand Rapids v. De Vries, *supra.*

Holding the contrary view is *Re* Lowe, 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710, where an ordinance making it unlawful to engage in the business of a scavenger without having a license, and giving to licensed scavengers, two or more of whom shall be appointed by the mayor, the exclusive privilege of removing garbage from private premises as well as from the streets, was held invalid as an attempt to create a monopoly of a lawful calling, the state Constitution providing that special privileges or immunities shall not be granted by any tribunal or agency except the legislature.

And a municipal ordinance directing the proper officers to enter a contract with one or more persons for the collection and disposal of garbage at the expense of the owners, and prohibiting, under penalty, all persons not having such a contract from engaging in the business, was held invalid as tending to create a monopoly, in Kussel v. Erie, 8 Pa. Dist. R. 105.

So, in State v. Hill, 126 N. C. 1139, 50 L. R.A. 473, 36 S. E. 326, an ordinance requiring a license for doing scavenger work in the city, and providing that all persons proposing to do such work must submit bids, and that the board of health shall decide who are competent bidders, and fixing the times at which closets shall be cleaned, was held void as in derogation of common right.

A distinction between noxious and unwholesome substances which are a nuisance *per se* and a menace to public health, and such innoxious substances as ashes, cinders, stable manure, or other substances not in themselves nuisances, though if allowed to accumulate in unreasonable quantities they would become such, or which may be utilized for some beneficial purpose, is drawn in Iler v. Ross, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869, which holds that, while an exclusive privilege to one person to remove substances of the class first described may be granted by a city as an exercise of the police power, a city cannot grant a monopoly to one individual by contract to enter upon the private premises of the city's inhabitants, and, at their expense, collect and remove substances of the second class mentioned.

v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Lawton* v. *Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Dupont* v. *District of Columbia*, 20 App. D. C. 477; Dill. Mun. Corp. § 141; *Harrington* v. *Providence*, 20 R. I. 235, 38 L.R.A. 305, 38 Atl. 1; *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933; *Ex parte Lacey*, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; *Tenement House Department* v. *Moeschen*, 179 N. Y. 325, 103 Am. St. Rep. 910, 72 N. E. 231.

In the city and county of San Francisco the board of supervisors was and is the body or board which formed the legislative department of the government of that municipality.

McDonald v. *Dodge*, 97 Cal. 112, 31 Pac. 909; *Harrison* v. *Roberts*, 145 Cal. 173, 78 Pac. 537; *Ex parte Shrader*, 33 Cal. 279.

There can certainly be no question that the police power of a state may be delegated to a city so far as it is necessary to protect the health of its inhabitants.

Norfolk v. *Flynn*, 101 Va. 473, 62 L.R.A. 771, 99 Am. St. Rep. 918, 44 S. E. 717.

An examination of the so-called dead-animal cases demonstrates that the principles underlying all these decisions are in no respect violated by the San Francisco orders.

Iler v. *Ross*, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; *Knauer* v. *Louisville*, 20 Ky. L. Rep. 193, 41 L.R.A. 219, 45 S. W. 510, 46 S. W. 701; *Meyer* v. *Jones*, 20 Ky. L. Rep. 1632, 49 S. W. 809; *River Rendering Co.* v. *Behr*, 77 Mo. 91, 46 Am. Rep. 6; *State* v. *Morris*, 47 La. Ann. 1660, 18 So. 710; *Schoen* v. *Atlanta*, 97 Ga. 697, 33 L.R.A. 804, 25 S. E. 380; *Campbell* v. *District of Columbia*, 19 App. D. C. 131; *Dupont* v. *District of Columbia*, *supra*; *Alpers* v. *San Francisco*, 32 Fed. 503; *National Fertilizer Co.* v. *Lambert*, 48 Fed. 458.

The following cases relating to garbage contracts and ordinances indicate a remarkable unanimity of opinion on the main questions now before this court:

Walker v. *Jameson*, 140 Ind. 591, 28 L. R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; *Grand Rapids* v. *De Vries*, 123 Mich. 570, 82 N. W. 269; *Dupont* v. *District of Columbia*, *supra*; *People* v. *Gardner*, 136 Mich. 693, 100 N. W. 126; *State* v. *Orr*, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; *Ex parte Casinello*, 62 Cal. 538; *Kilvington* v. *Superior*, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; *State* v. *Robb* (Me.) 60 Atl. 874; *Re Zhizhuzza* (Cal.) 81 Pac. 955.

Exclusive garbage contracts were upheld in the following cases:

Grand Rapids v. *De Vries*, *Walker* v. *Jameson*, and *Dupont* v. *District of Columbia*, *supra*; *Smiley* v. *MacDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *Coombs* v. *MacDonald*, 43 Neb. 632, 62 N. W. 41; *People* v. *Gardner*, *supra*; *State* v. *Payssan*, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481; *State* v. *Orr*, *supra*. See also *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Bancroft* v. *Thayer*, 5 Sawy. 502, Fed. Cas. No. 835; *Dickinson* v. *Cunningham*, 140 Ala. 527, 37 So. 345; *Leeper* v. *State*, 103 Tenn. 500, 48 L.R.A. 167, 53 S. W. 962; Cooley, Const. Lim. 5th ed. 225, note 1.

And exclusive dead-animal contracts have been upheld in the following cases:

Alpers v. *San Francisco*, and *National Fertilizer Co.* v. *Lambert*, *supra*; *Louisville* v. *Wible*, 84 Ky. 290, 1 S. W. 605.

Private property is not taken without compensation.

People v. *Gardner*, *Dupont* v. *District of Columbia*, *National Fertilizer Co.* v. *Lambert*, and *State* v. *Orr*, *supra*; *Harrington* v. *Providence*, 20 R. I. 235, 38 L.R.A. 305, 38 Atl. 1; *Baker* v. *Boston*, 12 Pick. 183, 22 Am. Dec. 421; *Lawton* v. *Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 255, 41 L. ed. 979, 991, 17 Sup. Ct. Rep. 581.

There is no interference with the occupation of scavengers.

Grand Rapids v. *De Vries*, *supra*; *River Rendering Co.* v. *Behr*, 7 Mo. App. 345.

There is no valid objection to the charge authorized to be made upon those delivering the garbage.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Raymond* v. *Fish*, 51 Conn. 80, 50 Am. Rep. 3; *King* v. *Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Walker* v. *Jameson*, *supra*; *Meyer* v. *Jones*, 20 Ky. L. Rep. 1632, 49 S. W. 809; *Smiley* v. *MacDonald*, *Dupont* v. *District of Columbia*, and *People* v. *Gardner*, *supra*; *Willis* v. *Standard Oil Co.* 50 Minn. 290, 52 N. W. 652. See also *Norfolk* v. *Flynn*, 101 Va. 473, 62 L.R.A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; *Morgan's L. & T. R. & S. S. Co.* v. *Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The term of fifty years was within the discretion of the municipality to grant.

Slaughter-House Cases, *Smiley* v. *MacDonald*, and *Dupont* v. *District of Columbia*, *supra*.

A municipality has the same right to exercise the police power in matters within its jurisdiction as the state.

Louisville v. *Wible*, and *Barbier* v. *Connolly, supra; Yick Wo* v. *Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Ex parte Lacey*, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933; *Ex parte Shrader*, 33 Cal. 279.

Mr. Justice **Harlan** delivered the opinion of the court:

The board of supervisors of the city and county of San Francisco, by ordinance adopted February 17th, 1896, and known
[307]*as order No. 2965, granted to F. E. Sharon, his associates and assigns, the sole and exclusive right and privilege, for a term of fifty years, to cremate and destroy, within that city and county, by crematories or by a process of reduction, house refuse, dirt, ashes, cinders, sludge, crockery, tins, bones, and other like matter, dead animals (not provided for by contract or franchise theretofore granted), putrid vegetable matter, fish, flesh, and food condemned by the board of health of the city and county as unfit for human food,—the grantees, their associates and assigns, having the right to charge and collect therefor not exceeding the sum of 20 cents per load.

The grantees, their associates and assigns, were required to have in operation, within two years after the granting of the above privilege or franchise, a suitable building or buildings, with necessary crematories, machinery, tools, and appliances necessary to cremate and destroy by cremation, or by a process of reduction, all obnoxious germs and elements contained in house refuse and other substances above mentioned,—the works to be such as would suffice for the cremation or reduction of at least 300 tons per day of such substances.

By the same ordinance it was made unlawful, after erection of such works, for any person or corporation to remove through the public streets from any houses, hotels, markets, hospitals, factories, restaurants, stores, or other like building or place, in the city and county, any of the substances above specified, except in closed vehicles and wagons constructed so as to conceal the contents from public view, and to effectually prevent any smell escaping therefrom, as well as to prevent the dropping of any portion of such material or substances on the public streets,—such vehicles and wagons to be constructed in accordance with specifications approved by the board of health of the city and county.

The ordinance also made it unlawful, after the buildings referred to had been constructed, for any person or corporation
[308]*to dump or place upon any land, water, or water ways within the city and county, any such substances, and required that they should be forthwith delivered to the above crematory, "and there, at the expense of the person or corporation so conveying the same, be cremated or destroyed, or subjected to such disposition and treatment as will at once secure and effect a complete combustion of all gases and odors arising therefrom."

The grantees, their associates and assigns, were required, within twenty-four hours after receiving any of the material or substances above specified, to "cremate or reduce the same, or shall subject the same to such process as will secure the complete combustion of all gases or odors arising therefrom," and to maintain and operate their plant and crematories, or other apparatus, "so as to prevent any obnoxious smells or gases being emitted either from the deposits of such matter or substances on their premises, or from the process of cremation or other treatment thereof, or from the residuum remaining after cremation or treatment as aforesaid; also, that in the operation of said works, no smoke or soot shall be emitted so as to constitute a nuisance."

The ordinance further provided that the grantees, their associates and assigns, should, from and after December 1st, 1902, have the sole and exclusive right and privilege, during the remainder of the term of their franchise, "to remove and dispose of all dogs killed at the public pound, and all animals impounded and not redeemed by the owners thereof, and which are valueless and cannot be sold; also, to remove and dispose of the carcasses of all dead animals in said city and county not slain for human food, which shall not be removed and disposed of by the owners thereof, so as not to become a nuisance, within six hours after the death of the same."

It was further provided that the grantees, their associates and assigns, should be subject to all health and sanitary regulations in force during the existence of said franchises; and should receive no compensation whatever from the city and *county for [309]
services performed by them in disposing of the specified material and substances.

For the privileges or franchise granted by this ordinance, Sharon and his associates paid the sum of $2,510 in cash, and stipulated to pay for fifteen years 2 per centum, and for the remaining term of thirty-five years 5 per centum, of the gross amount of their receipts from the business.

The Sanitary Reduction Works, a corporation of California, became the assignee and successor in interest of the franchise or privileges granted to Sharon, his associates and assigns, and notified the board of super-

visors of the completion of their works, and of their readiness to receive, cremate, and destroy all such substances as were specified in order No. 2965. The cost of such works, the present plaintiff alleged, exceeded the sum of $200,000.

Thereupon the board of supervisors, on November 1st, 1897, adopted order No. 12 (second series), which provided that no person, company, or corporation should, on or after November 8th, 1897, deposit, dump, or cause to be dumped or deposited upon any street, lot, land, water, or water ways within the city and county or from any wharf or bulkhead on the water front of the city and county, any of the above substances or material, and that all such substances or matter should be delivered at and to the crematory of the Sanitary Reduction Works, "and there, at the expense of the person, company, or corporation so conveying the same, be cremated and destroyed, or subjected to such disposition and treatment as will secure and effect a complete combustion of all gases and odors arising therefrom." Any violation of that order was declared to be a misdemeanor, punishable by a fine of not exceeding $250, or by imprisonment for a term not exceeding one hundred days, or by both such fine and imprisonment.

The present suit was brought by the Sanitary Reduction Company against the California Reduction Company, and about one hundred and fifty individuals.

[310] *The defendant corporation was organized under the laws of Colorado, at the instance of certain citizens of California, for the purpose, we may assume from the record, of removing, by boats and barges, large quantities of the material and substances specified in the orders of the board of supervisors from the city and county of San Francisco, and depositing them on lands in the county of San Mateo and elsewhere than at the works of the Sanitary Reduction Company, thereby preventing the same from being delivered to, and incinerated and destroyed by, the latter company, under its contract with the city and county of San Francisco.

The individual defendants are subjects of the Kingdom of Italy, and owners of licensed wagons used in their calling as scavengers in the city and county of San Francisco. It seems that a very few of them—not more than about a half dozen—are householders in that city and county.

Between the California Reduction Company and the individual defendants there is a written agreement, dated November 22d, 1898, requiring the former, within thirty days thereafter, to provide one or more suitable buildings, wharves, or other places, for the reception from the latter "of all garbage, ashes, refuse, butchers' offal, dirt, sludge, crockery, tins, or other like matter, or any putrid animal or vegetable matter, or any fish, flesh, or food, or any dead animals; which said buildings, wharves, or other place or places shall be so located that the average travel to the same shall not exceed the average haul to the Sanitary Reduction Works by more than a quarter of a mile." By that agreement the individual defendants bound themselves to deliver at the buildings or places provided by the defendant corporation all such material or substances gathered by them from time to time in the city and county. The individual defendants also stipulated in the agreement that they would not deliver any of the above material or substances to any other party than the California Reduction Company, nor at any other place than the one designated and chosen by that company.

*The pleadings and the evidence in the [311] cause show that the defendants had entered upon the execution of their agreement and the transaction of the business to which it related. No question is made as to the right of the plaintiff to exercise whatever privileges had been legally granted to Sharon, his associates and assigns.

The object of the suit by the plaintiff corporation was to obtain a decree restraining the defendants, by injunction, from removing from the city and county of San Francisco, or depositing or dumping at any other place than at the works of the plaintiff, any of the garbage or other materials specified in the orders of the board of supervisors, or from infringing, directly or indirectly, the exclusive rights, privileges, and franchises secured to the plaintiff as above stated.

The circuit court, Judge Morrow presiding, passed a decree giving the relief asked. 94 Fed. 693. That decree was affirmed in the circuit court of appeals, Judge Hawley delivering the opinion of the court. 61 C. C. A. 91, 126 Fed. 29.

The defendants insist that the ordinances in question are invalid for the want of power in the board of supervisors to adopt them. This objection does not seem to be well taken. By the California Constitution of 1849 it was provided that "the legislature shall have power to provide for the election of a board of supervisors in each county, and these supervisors shall jointly and individually perform such duties as may be prescribed by law." [Art. 10, § 5.] Subsequently, by an act approved April 25th, 1863, it was provided that "the board of supervisors of the *city and county of San [316] Francisco shall have power, by regulation

or order, . . . to authorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases; to provide, by regulation, for the prevention of contagious diseases; to provide, by regulation, for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of said city and county," etc. Cal. Stat. 1863, p. 540. Again, in the state Constitution of 1879, it was provided that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." Art. 11, § 11. Further, by an act approved March 23d, 1893, it was provided, among other things, that every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or "to exercise any other privilege whatever hereafter proposed to be granted by the board of supervisors, common council, or other governing or legislative body of any county, city and county, city, town, or district, shall be granted upon the conditions in this act provided, and not otherwise." One of those conditions was that the fact that such franchise or privilege had been made, together with a statement that it was proposed to grant the same, should be advertised,—the franchise or privilege to be awarded to the highest bidder. Cal. Stat. 1893, p. 288.

It may be here observed that, under the charter of San Francisco, the board of supervisors for the city and county of San Francisco constituted the legislative department for that municipality. *McDonald* v. *Dodge*, 97 Cal. 112, 114, 31 Pac. 909; *Harrison* v. *Roberts*, 145 Cal. 173, 78 Pac. 537.

In the above constitutional and statutory provisions is found full authority for the board to make and enforce, within the city and county of San Francisco, all such reasonable sanitary and other regulations as
[317] are not in conflict with any general *statute or with the Constitution, and which have for their object the preservation of the public health, by whatever cause endangered. It was substantially so ruled in the circuit court of the United States, northern district of California, in *Alpers* v. *San Francisco*, 32 Fed. 503, Mr. Justice Field delivering the opinion of the court. The ruling in that case was followed in *National Fertilizer Co.* v. *Lambert*, 48 Fed. 458. See also *People ex rel. Dean* v. *Contra Costa County*, 122 Cal. 421, 55 Pac. 131.

It is said that the grant to Sharon, his associates and assigns, was, in no sense, a franchise. It is true that the title of the act of 1893 refers only to franchises. But the body of the act shows that the legislature intended to embrace privileges exercised under public authority, and not alone what may be, strictly, franchises. The right which was granted to Sharon, his associates and assigns, was certainly a privilege, and the board of supervisors had power to grant it in order to protect the public health. But, independently of the above statutes, the board had power, under the Constitution of the state, to make such sanitary regulations as were not inconsistent with the general laws, and that broad power carried with it the power, by contract and ordinance, to guard the public health in all reasonable ways.

The defendants criticize the ordinances because they give the exclusive privileges in question for a period of fifty years. But whether the period during which such privileges might be exercised should be long or short was a matter in the wise discretion of the board, and determinable wholly upon grounds of public policy. It may be that grants by public authority of privileges to be exercised for the benefit or in behalf of the public ought never to be for long periods. But it suffices to say that no such consideration can control the action of the judiciary.

The defendants insist that the ordinances in question are in violation of the 14th Amendment of the Constitution, in that they deprive the householders of San Francisco of property *of value, by transferring [318] it to the Sanitary Reduction Works, without requiring compensation to be made; this, it is contended, being in violation of the 14th Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

We do not perceive that the defendant corporation of Colorado and the individual defendants who are not householders are entitled to raise any such question. If householders do not complain, but by silence assent to what the board did, it is not for others to say that the property of householders is taken for public use without compensation; for householders, if so minded, may waive any right they have to compensation for their property destroyed to protect the public health. The individual defendants, in their answer, claim to be householders in San Francisco. But it seems that only about six of them are householders. The presence, however, of that number as defendants makes it appropriate to consider the objection just stated upon its merits.

In determining the validity of the ordinances in question it may be taken as firmly

established in the jurisprudence of this court that the states possess, because they have never surrendered, the power—and therefore municipal bodies, under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonable, necessary, and appropriate for the protection of the public health and comfort; and that no person has an absolute right "to be at all times and in all circumstances wholly freed from restraint;" but "persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and general prosperity of the state,"—the public, as represented by its constituted authorities, taking care always that no regulation, although adopted for those ends, shall violate rights secured by the fundamental law, nor interfere with the enjoyment of individual rights beyond the necessities of the case. Equally well settled is the principle that if a regulation enacted by competent public authority avowedly for the protection of the public health has a real, substantial relation to that object, [319]*the courts will not strike it down upon grounds merely of public policy or expediency. *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 470, 471, 24 L. ed. 527, 529, 530; *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Lawton* v. *Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Atkin* v. *Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27, 49 L. ed. 643, 650, 25 Sup. Ct. Rep. 358. In the recent case of *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235, 49 L. ed. 169, 174, 25 Sup. Ct. Rep. 18, 20, this court said that "every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community."

The record abundantly discloses the grounds upon which the board of supervisors proceeded, in adopting the ordinances in question.

The preamble to order No. 2965 shows that, in the judgment of the board, the only effective mode to dispose of house refuse, butchers' offal, garbage, putrid or offensive animal or vegetable matter, refuse, ashes, or other like matter, and to prevent such substances from being deposited in or upon the lots, lands, and public streets of the city and county, or in the waters of the bay, to the prejudice of the public health, was by cremation or by some process of chemical reduction. The conviction of the board that decided action on the subject was imperatively demanded for the general good seems to have strengthened; for order No. 12, adopted a year later, stated in its preamble that, from time to time, during previous years, the dumping of garbage, dirt, offal, house refuse, matter, ashes, cinders, sludge, acids, or like matter, to fill in lots, and particularly in filling in water lots, had become so objectionable and deleterious to the public health that the attempt was made to mitigate such nuisances by covering them over with sand; that it had, however, become apparent that lots so filled and covered had thrown off obnoxious gases, deleterious to the public health, and, when epidemic diseases were prevalent, would become a *fruitful source of danger to [320] the sanitary wellbeing of citizens; and that the board of health had called attention to and condemned the disposing of garbage and refuse matter for the purpose of filling in lots. Such were the reasons which moved the board of supervisors to adopt that order making it unlawful to deposit any of such substances upon streets, lots, or lands, or in any water or water way, within the city and county, and requiring that they be delivered at the plaintiff's works, to be there cremated and destroyed, or subjected to such disposition and treatment as would effect a complete combustion of all gases and odors arising therefrom.

We perceive no ground to doubt the good faith of the board of supervisors; nor can we say that the mode adopted for the suppression of the evils in question was arbitrary, or did not have a real, substantial relation to the protection of the public health.

Many of the questions involved in municipal sanitation have proved to be difficult of solution. There is no mode of disposing of garbage and refuse matter, as found in cities and dense populations, which is universally followed. In some cities garbage receptacles, properly covered, are provided, sometimes by the householder, sometimes by the municipal authorities or the garbage collector. But even such devices often prove to be worthless for want of proper attention to them by householders. Then, the question arises for the consideration of the municipal authorities as to the frequency of the removal of garbage. The practice is not at all uniform. In some cities, it is collected seven times a week; in others, six, four, and three times a week. Again, questions arise as to the mode in which garbage should be collected; and the statement is made by those who have inves-

tigated the subject, that while "there appears a well-nigh unanimous demand on the part of health officers, and oftentimes of the public generally, for the municipal collection of garbage," the "problem of garbage disposal has not been solved." Chapin, Municipal Sanitation in the United States,
[321] p. 670. Similar observations *might be made in reference to what is commonly called "dry refuse," which, in many cities, includes ashes and all the rubbish accumulated in private houses, stores, market houses, and like places.

These references to the different methods employed to dispose of garbage and refuse have been made in order to show that the board had before them a most difficult problem—unsolved by experience or science—as to the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage, refuse, and other materials found on private premises, and in hotels, restaurants, and like places. The state, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the board of supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law. The general result which the board of supervisors sought to bring about was by cremation, or by such other treatment of the materials as would effect a complete combustion of all gases and odors arising therefrom. "Cremation," it is said, "is exclusively employed for getting rid of the garbage in England and on the continent of Europe, and is rapidly coming into use in the United States,"—the destruction by fire being theoretically "an ideal way, from a sanitary standpoint, for the disposal of garbage." Chapin, Municipal Sanitation in the United States, p. 714.

The defendants insist that the requirement that the substances mentioned should be delivered at the plaintiff's works for cremation or destruction, at the expense of the person, company, or corporation conveying the same, was a taking of private property for public use without compensation. We cannot assent to this view. It is the duty, primarily, of a person on whose premises are garbage and refuse material, to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his
[322] *premises, at his own expense, and forbidden to keep them, or allow them to be kept, in such condition as to create disease. He may, therefore, have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health. If the householder himself removed them from his premises, it must have been at his own expense; and the scavenger who took to the crematory the material from the premises of origin, under some arrangement with the householder, was, in effect, the representative, in that matter, of the householder, and was performing a duty resting upon the householder. So that if the requirement that the person conveying the material should pay a given price for having it cremated or destroyed, in effect put some expense on the householder, that gave him no ground for complaint; for it was his duty to see to the removal of garbage and house refuse having its origin on his premises. Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt. The whole arrangement may be fairly regarded as one in the interest and for the convenience of the householder. He gets his proportionate benefit of any revenue derived by the city, and at the same time shares the protection given to him by the community. Nor did the destruction of garbage and refuse, at an approved crematory, amount, in itself, and under the circumstances disclosed, to a taking of private property for public use without compensation, even if some of the substances destroyed at the crematory had a value for certain purposes. The authorities were not bound, prior to the removal of such substances from the premises on which they were found, to separate those that were confessedly worthless from those which might be utilized. The garbage and refuse matter were all together, on the same premises, and, as a *whole or in the mass,[323] they constituted a nuisance which the public could abate or require to be abated, and to the continuance of which the community was not bound to submit. And when the obnoxious garbage and refuse was removed from the place of their origin, and put in covered wagons to be carried away, the municipal authorities might well have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized, and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse con-

stituting the nuisance, from which the danger came, was carried to a crematory, where it could be promptly destroyed by fire, and thus minimize the danger to the public health.

Be all this as it may, the cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes. With the knowledge of the householder the scavenger receives the garbage and refuse matter; that which, if separated, might have value, being mingled with that which is, in itself, noxious and worthless. The entire mass goes into the same covered wagon, and the authorities are not bound, before its destruction at the crematory, to cause the good to be separated, from the bad, but could require, as the ordinances in question did, that the substances be promptly conveyed to the designated crematory and destroyed by fire. Such a disposition of the contents cannot be regarded as a taking of private property for public use without compensation.

[324] *This court has said that "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." *Crowley* v. *Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13. In *Mugler* v. *Kansas*, 123 U. S. 623, 664, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273, it appeared that certain distillery property in Kansas was purchased at a time when it was lawful in that state to manufacture and sell spirituous liquors, but which property, by reason of the subsequent prohibition of such manufacture and sale, had become of no value, or had materially diminished in value. The owner insisted that, by the necessary operation of the prohibitory statute, his property was, in whole or in part, taken for public use without compensation. But this court said: "The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." In Sedgwick's Treatise on Statutory and Constitutional Law the author says that "the clause prohibiting the taking of private property without compensation is not intended as a limitation . . . of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general *power over private property [325] which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." Pp. 434, 435.

Without further discussion we hold, for the reasons stated, that the circuit court and circuit court of appeals properly refused to adjudge that these ordinances were invalid.

Other questions have been discussed by counsel, but they do not require special notice at our hands. We are content with the disposition made of them in the courts below.

The decree of the Circuit Court of Appeals is affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

JAMES GARDNER, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF MICHIGAN.

(See S. C. Reporter's ed. 325–335.)

1. Constitutional law—due process of law—municipal disposal of garbage.—An ordinance conferring on a city contractor the exclusive right to collect and dispose of garbage is not, so far as it relates to the

NOTE.—*On municipal power over nuisances affecting highways and waters*—see note to Hagerstown v. Witmer, 39 L.R.A. 649.

As to what constitutes due process of law—

refuse from the tables of hotels, wanting in the due process of law required by U. S. Const., 14th Amend., as depriving the owner of his property without compensation, although such refuse may be valuable as food for swine, or for the manufacture of merchantable grease and other products.

2. **Constitutional law—equal protection of the laws—local regulations for the selection of jurors.**— Litigants and persons accused of crime in Wayne county, Michigan, are not denied the equal protection of the laws by Mich. Pub. Acts 1893, p. 337, as amended by Pub. Acts 1895, p. 69, under which the jury lists are made up and returned by a board of jury commissioners appointed by the governor with the consent of the senate, and may include persons whose names do not appear on the assessment roll, while, by the general laws of the state, the officers authorized to make and return the jury lists are elected by the people in their several townships and in city wards, and the jurors must be of those who are assessed on the assessment roll.

[No. 62.]

Submitted November 9, 1905. Decided November 27, 1905.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment affirming a conviction in the Recorder's Court in the city of Detroit, in that state, of a violation of an ordinance relating to the collection and disposal of garbage. *Affirmed.*

See same case below, 136 Mich. 693, 100 N. W. 126.

The facts are stated in the opinion.

Mr. **Fred A. Baker** submitted the cause for plaintiff in error:

The record in this case shows that the refuse from the kitchens and tables of residences, hotels, and restaurants is valuable (1) as food for swine, and (2) for the manufacture of merchantable grease and other products. These facts are also a part of the common knowledge of the country, and of which this court will take judicial notice.

Schollenberger v. *Pennsylvania* (*Paul* v. *Pennsylvania*), 171 U. S. 1, 7, 8, 43 L. ed. 49, 51, 52, 18 Sup. Ct. Rep. 757.

The ordinance is in excess of and beyond the police power of the state because it does not discriminate between those who properly care for and transport garbage and those who do not.

Smith v. *St. Louis & S. W. R. Co.* 181 U. S. 248, 255, 45 L. ed. 847, 850, 21 Sup. Ct. Rep. 603.

In the following cases this court held state quarantine or inspection laws void as going beyond the police power:

Henderson v. *New York* (*Henderson* v. *Wickham*), 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527.

In *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, a statute was held void which provided that no fresh meats should be sold in the state, unless the animals from which they were taken were inspected in the state before they were slaughtered.

In *Schollenberger* v. *Pennsylvania* (*Paul* v. *Pennsylvania*) 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, a state statute which prohibited the manufacture or sale within the state of oleomargarine was held invalid.

Every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.

Plessy v. *Ferguson*, 163 U. S. 537, 550, 41 L. ed. 256, 261, 16 Sup. Ct. Rep. 1138.

The case is within the rule laid down in *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539.

In *Re Lowe*, 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710, an ordinance of the city of Topeka authorized the mayor, with the consent of the council, to appoint and license two or more suitable persons, corporations, or firms, to act as city scavengers, and prohibited any other person from engaging in the business without procuring an appointment and license therefor. The court held the ordinance void because it attempted to create a monopoly of a lawful calling, and was in restraint of trade.

See also *Gregory* v. *New York*, 40 N. Y. 273; *State, Nicoulin, Prosecutor*, v. *Lowery*, 49 N. J. L. 391, 8 Atl. 513; *Richmond* v. *Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *Re Nash*, 33 U. C. Q. B. 181; *Reg.* v. *Johnston*, 38 U. C. Q. B. 549.

In *Iler* v. *Ross*, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869, an ordinance of the city of Omaha gave the exclusive right to a city contractor to remove dead animals, garbage, ashes, filth, offal, or other refuse matter from the city, and it was held void.

A dead horse is not *per se* a nuisance, and an owner who will make proper dis-

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see Kuntz v. Sumption, 2 L.R.A. 655, and note; *Re* Gannon, 5 L.R.A. 359, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; and Gilman v. Tucker, 13 L.R.A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On monopoly in contract or ordinance for removal of garbage—see note to California Reduction Co. v. Sanitary Reduction Works, *ante*, 204.

position of the carcass cannot be deprived of his property right.

Campbell v. *District of Columbia*, 19 App. D. C. 131.

The act of the Michigan legislature creating the board of jury commissioners for the county of Wayne denies to accused persons and other litigants in that county the equal protection of the laws.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

Messrs. **T. E. Tarsney** and **John B. Corliss** submitted the cause for defendant in error. *Messrs. Corliss, Leete, & Joslyn* were on the brief:

The city may seize, control, remove, and dispose of all garbage, or it may enter into a contract with one or more persons to do it. Such action is not objectionable as creating a monopoly or infringing the rights of property. Such action by municipalities is not a violation of the constitutional inhibitions against the taking of, or injury to, private property without compensation, or without due process of law.

Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; *State* v. *Orr*, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; *Dupont* v. *District of Columbia*, 20 App. D. C. 477; *Fischer* v. *St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *California Reduction Co.* v. *Sanitary Reduction Works*, 61 C. C. A. 91, 126 Fed. 29.

The constitutional right of trial by jury is not infringed by the act of the Michigan legislature creating the board of jury commissioners for the county of Wayne.

People v. *Harding*, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; *People* v. *Reilly*, 53 Mich. 260, 18 N. W. 849.

Mr. Justice **Harlan** delivered the opinion of the court:

This appeal raises for consideration the question whether a certain ordinance of the city of Detroit, relating to the collection and disposition of garbage within that city, is repugnant to the 14th Amendment of the Constitution of the United States.

By the ordinance in question it was made the duty of the occupant or occupants of every dwelling house or other building in the city of Detroit to provide a suitable and water-tight box or other vessel of a convenient size to be handled by the garbage collector, in which such occupant or occupants should cause to be placed or deposited "all offal, garbage, and refuse animal and vegetable matter of the premises." Such occupants were required to keep the box or other vessel in the alley in rear of their premises, or at a place on the premises most accessible to the person collecting the garbage and offal; and it was made unlawful to put anything but refuse animal and vegetable matter in the vessel used for garbage and offal. If the vessel was placed in the alley, it must be provided with a tight cover, properly hinged, and located next to the lot line, from which it should not project more than two feet into the alley. § 1.

The remaining sections of the ordinance are in these words:

"§ 2. The word 'garbage' shall be held to include every refuse accumulation of animal, fruit, or vegetable matter that *attends [327] the preparation, use, cooking, dealing in or storing of meat, fish, fowl, food, fruit, or vegetables, including dead animals and condemned foods found within the city limits. All garbage shall be collected in water-tight closed metal boxes, and such boxes shall be purified as often as the health officer may direct, and shall have painted thereon the word 'Garbage.'

"§ 3. It is hereby made the duty of the contractor with the city of Detroit for the collection and removal of garbage and dead animals to collect and remove, in accordance with the ordinances and contract of the city, all garbage, dead animals, fish, and refuse animal and vegetable matter found within the city limits. No other person or party except the city contractor or its agents shall carry, convey, or transport through the streets, alleys, or public places of the city of Detroit such materials, and it shall be unlawful for any person to interfere in any manner with the collection and disposal of such materials by the city contractor.

"§ 4. It shall be unlawful for any person to deposit, throw, or place any garbage, fish, dead animals, or refuse animal or vegetable matter in any avenue, alley, street, or other public place within the city of Detroit; nor shall any person place such materials upon any private property, whether owned by such person or not, unless the same shall be inclosed in proper vessels or boxes, as provided in § 1.

"§ 5. The collection and removal of garbage shall be under the supervision of the board of health, and it shall be the duty of the board of health and police department, through their proper officials and agents, to enforce the provisions of this ordinance." Revised Ordinances of 1895, as amended in 1901.

The city of Detroit rests the authority of its council to pass this ordinance upon its charter, which contains the following provisions: "The council shall have power to provide for the preservation of the general health of the inhabitants of the city, and to

make regulations to secure the same; . . . to abate or remove any nuisance; . . . to prohibit and prevent any person from having on his premises any substance [328] or thing *that is unwholesome or nauseous; and to authorize the removal thereof; . . . The common council is also empowered to enact and provide, by appropriate ordinance, for the manner of collecting, transporting, conveying, and handling of garbage and all animal and vegetable matter and refuse in said city; . . . and to require all persons in said city to dispose of the same in the manner provided by said common council in said ordinance for the removal and destruction thereof, and to impose and enforce appropriate penalties for any violation of said ordinance." Charter of the city, chap. 7, § 43, par. 130.

By additional legislation in 1889 the common council was given the power "to advertise for proposals, and contract for the removal, disposition, and destruction of garbage and all animal and vegetable refuse for a term of years."

In 1901 the city and the Detroit Sanitary Works, a corporation of Michigan, entered into a written agreement, by which the latter undertook to collect, remove, and dispose of all garbage and dead animals within the limits of the city of Detroit for the term of ten consecutive fiscal years, beginning July 1st, 1901. In consideration of the faithful performance of the conditions and specifications specified in the agreement, the city agreed to pay to the sanitary company the sum of $515,000, in equal monthly instalments of $4,291.66⅔ during the continuance of the contract.

The agreement between the city and the sanitary works contained, among others, the following provisions: "1. Garbage shall be understood to consist of all refuse animal or vegetable matter, including dead animals, found within the city limits, coming from private or public premises within the city. 2. The time for making the collection of garbage and dead animals shall be as follows, to wit: (*a*) Within and upon the public markets daily. (*b*) Within the two-mile circle as shown from the maps of the city, and from all hotels, restaurants, hospitals, slaughterhouses, and all other places where animals, game, or fowl are killed [329] within the said city of Detroit, *collections daily. (*c*) Within all other portions of the city, collections three times in each week, times as nearly equally divided as possible. The work of collecting said garbage shall be performed to the satisfaction and under the provision of the board of health. (*d*) The board of health shall have authority to order daily collections outside of the two-mile circle whenever, in its judgment, it is necessary. The health officer shall also have authority to order extra collections to be made at any time when necessary, the contractor shall be required to cause such collections to be made within three hours of the time when such order is received by him. (*e*) Garbage shall be collected in and transported through the streets of the city in vehicles with water-tight closed metal boxes. 3. All garbage must be taken at least 2 miles outside the limits of the city of Detroit, and disposed of in such manner as to entail no damage or claim against the city of Detroit for such disposal. 4. It is expressly agreed that no garbage or other refuse collected by said contractor shall be dumped into the Detroit river or any of its tributaries, or into Lake Eric or any other lake. The common council reserves the right to make such rules and regulations with reference to the collection of the garbage as may, from time to time, be deemed necessary. No employee of the contractor shall receive in the city of Detroit less than one and fifty one-hundredths dollars ($1.50) per day. In case said second party shall fail to collect garbage or dead animals in accordance with this contract, and such failure shall continue for the period of twenty-four (24) hours after a written notice from the board of health of the city of Detroit, then, and in such case, said second party shall be liable to and shall pay to the said party of the first part the penalty of two dollars ($2.00) for each and every such failure so to do."

Upon the complaint of an agent of the sanitary works, Gardner, the plaintiff in error, was arrested by warrant issued out of the recorder's court of Detroit, charged with having violated the above ordinance by unlawfully and wilfully carrying, *conveying, [330] and transporting garbage through the streets and alleys of Detroit, he not being the city contractor or its agent.

The defendant pleaded not guilty, was tried and found guilty by a jury, and fined $10.

There was no dispute at the trial as to the facts. It appeared that the defendant gathered and transported refuse from the tables of hotels, of the kinds described in the statute as garbage, acting in such matter, not for the city contractor, but for the person who bought such material from the proprietors of the hotels. He violated the statute, and was liable to the prescribed penalty unless the ordinance was invalid. The judgment of conviction in the recorder's court was affirmed by the supreme court of Michigan, all the judges (except one who did not sit) concurring. 11 Det. L. N. 166, 100 N. W. 126.

The contention of the accused at the trial

was that the garbage or swill accumulated at hotels was property, and that the 3d section of the ordinance, directing the city contractor to collect and remove it, deprived the owner of his property without compensation, and therefore was in violation of the 14th Amendment of the Constitution of the United States.

This contention was overruled by the trial court, the judge saying to the jury: "The defendant in this case was transporting what confessedly was garbage. It is well settled that no one may claim damages because of enforced obedience to a police regulation designed to secure and protect public health. It is manifest that, were individuals permitted to escape the regulation fixed by the common council, and dispose of garbage as they severally saw fit, all system in the collection and removal of refuse matter would be destroyed. Even if this garbage have some value for some such use as that to which the respondent's employer put it,—the feeding of hogs,—the courts will not, at the expense of the public health, recognize that this refuse matter, in its legal aspect, [331]is property. No property *right has, therefore, been violated." The supreme court of the state thus disposed of the question: "The defendant attacks the validity of the ordinance as it relates to garbage or refuse from the tables of hotels. Similar ordinances have been before the court and sustained in *People* v. *Gordon*, 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658, and *Grand Rapids* v. *De Vries*, 123 Mich. 570, 82 N. W. 269. In these cases the question of whether there is a property right in refuse was not raised in the form in which it is here presented, although, in the case last cited, it was quite plainly implied that the common council, in the exercise of the police power, had the right to treat as a nuisance all such refuse as is unfit for human food. The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors, calculated to affect the public health. If, in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation. Horr & B. Mun. Pol. Ord. § 220. The precise question involved in the present case was considered in the well-reasoned opinion of Judge Shepard in *Dupont* v. *District of Columbia*, 20 App. D. C. 477, and the conclusion reached fully sustains the holding of the trial judge."

Upon the general subject of the exercise of police powers by municipalities proceeding under legislative sanction for the protection of the public health, the views of this court have been set forth in the case of *California Reduction Co.* v. *Sanitary Reduction Works* (just decided), 199 U. S. 306, *ante*, 204, 26 Sup. Ct. Rep. 100, and what has been said in the opinion in that case is, we think, decisive against the present defendant. It is appropriate, however, to make some observations in reference to certain features of the present case.

The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels, and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids *the [332]taking by any state of private property for public use without compensation. Of course, all know that such a use of refuse is not uncommon in some localities, although modern investigation shows that a good deal may be said against such a practice. It is believed by some that the feeding of garbage to swine produces an inferior quality of pork. There is authority for the statement that in 1889 the Massachusetts board of health reported, as the result of its investigation, that garbage-fed hogs were afflicted with trichinosis to the extent of 13 per cent. In some states it is forbidden by statute to feed garbage to milch cows, and in some cities it is forbidden to sell milk from garbage-fed cows. Chapin, Municipal Sanitation in the United States, 699, 700. We do not, of course, express any opinion as to these matters, and refer to them only in order to bring out the thought that the question before the municipal authorities of Detroit was one in respect of which there was room for difference of views as to what means were best for the protection of the public health. Looking at the matter in a practical light, we are unable to say that the means devised by the city council, and indicated by its action, were plainly unreasonable or unnecessary, or did not have a real, substantial relation to the protection of the public.

Touching the suggestion that garbage and refuse are valuable for the manufacture of merchantable grease and other products, it is sufficient, in view of what we have said in the other case, to remark that it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city, on the premises of householders and otherwise, would endanger the public health by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of, even if it contained some elements of value. In such circumstances, the property rights of

[333] individuals in the noxious *materials described in the ordinance must be subordinated to the general good. If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner, on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question. Those ordinances cannot, therefore, according to well-settled principles, be held to be wanting in the due process of law required by the Constitution.

The defendant further contends, as he contended in the supreme court of the state, that the act of the Michigan legislature, creating the board of jury commissioners for Wayne county, in which the present trial occurred, denies to accused persons and other litigants in that county the equal protection of the laws. The ground of this contention is, that by the general laws of the state, the officers authorized to make and return the jury list were elected by the people in their several townships and in city wards (Const. art. 11, § 1, *People ex rel. Atty. Gen.* v. *Detroit*, 29 Mich. 108), and required that jurors should be of those who are assessed on the assessment roll; while, by the Wayne county jury law of 1893, as amended in 1895 (Pub. Acts 1893, p. 337; id. 1895, p. 69), the jury lists are made up and returned by a board of seven jury commissioners, appointed by the governor, with the consent of the senate, and the names of persons to be returned need not appear on the assessment rolls. This difference between the general law relating to jury trials and the special law relating to Wayne county, it is said, constitutes a discrimination against the people of that county, and amounts to a denial to them of the equal protection of the law. This view does not commend itself to our judgment. It is fully met and shown not to be sound by the judgment in *Missouri* v. *Lewis* (*Pearman* v. *Lewis*) 101 U. S. 22, 31, 25 L. ed. 989, 992, where Mr. Justice Bradley, speaking for the court, and referring to the 14th Amendment, said: "The last restric-

[334] tion, *as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system fo one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

[335] *Perceiving no error in the record touching any Federal question, *the judgment is affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent from the opinion so far as it relates to the ordinances in question.

F. H. HARTMAN, *Plff. in Err.*,

v.

BUTTERFIELD LUMBER COMPANY.

(See S. C. Reporter's ed. 335–341.)

Public lands—conveyance pursuant to contract made before patent—validity as against one claiming under patentee.—One claiming under a trust deed from the patentee, with knowledge of a prior conveyance of the timber and a right of way, cannot challenge the validity of such conveyance because it was made pursuant to an agreement entered into prior to the patent, in consideration of an advance of money to

enable the entryman to perfect his entry and obtain the patent.

[No. 44.]

Argued and submitted November 7, 1905. Decided November 27, 1905.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which reversed a decree of the Chancery Court of Lincoln County, in that state, dismissing a bill to establish the right to timber and a right of way under a conveyance from a patentee pursuant to an agreement entered into prior to the patent, and entered a decree in accordance with the prayer of the bill. *Affirmed.*

See same case below, 82 Miss. 494, 100 Am. St. Rep. 644, 34 So. 328.

Statement by Mr. Justice **Brewer:**

In December, 1892, Esau Harness received a patent from the United States for 160 acres of land in Lincoln county, Mississippi. On January 28, 1893, he conveyed to the Norwood & Butterfield Company all the pine timber on the land "and a right of way through and across the land for roads, trams, or railroads, 100 feet wide." This in-
[336] strument was filed *for record February 10, and the complainant below (defendant in error here) subsequently obtained a deed from the Norwood & Butterfield Company. On January 30, 1893, the patentee conveyed his entire interest in the land as security for supplies and merchandise to be furnished by Hartman, the plaintiff in error (defendant below), during the year 1893. This deed was filed for record January 31, 1893. On December 14, 1894 the trustee therein named sold and conveyed the land to Hartman.

This suit was brought in the chancery court of Lincoln county, Mississippi, to establish the prior right of the complainant to the timber and right of way. The bill charged that the defendant had actual notice of the conveyance from the patentee to the Norwood & Butterfield Company when he accepted the trust deed from the patentee, and therefore that he was subordinated in right to those claiming under the first conveyance, although it was not placed on record until after the execution and record of the deed of trust. It appeared in the testimony that, prior to the patent, the patentee had contracted with the Norwood & Butterfield Company to convey to it the timber and right of way. He himself testified that he had made such a contract, both before and after he had received the patent. The supreme court of the state, deciding in favor of the complainant (82 Miss. 494, 100 Am. St. Rep. 644, 34 So. 328), considered the effect of the contract made before the patent upon the validity of the subsequent conveyance to the Norwood & Butterfield Company, saying:

"We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and void, and made void also the subsequent sale of the timber to reimburse for that advance. We are not in accord with that view. U. S. Rev. Stat. §§ 2290, 2291, 2296, U. S. Comp. Stat. 1901, pp. *1389, 1390, 1398, with Gould & Tucker's [337] notes, vol. 1, p. 537. On the testimony we cannot escape the conviction that the appellee had such notice as should put any reasonable man on inquiry, which would have disclosed the existence of the conveyance of the timber and right of way by Esau to the grantor of appellants.

"Reversed, and decree here in accordance with the prayer of the bill."

Mr. **Pleasant Z. Jones** submitted the cause for plaintiff in error.

Mr. **Holmes Conrad** argued the cause and filed a brief for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

For the purposes of this case it may be conceded that the contract made before the patent was, by virtue of the policy of the United States, as disclosed in its statutes, void, and could not have been enforced by the Norwood & Butterfield Company, but the contract was not inherently vicious or immoral. It was simply void because in conflict with the Federal statutes. *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905. When the patent issued, the full legal title passed to the patentee. He could do with the land that which he saw fit,—sell or give it away; and, if he voluntarily conveyed it, he could not thereafter repudiate the conveyance. He may well have thought that, having received money from the company to enable him to pay for the land, it was equitable that he should convey that interest which he had agreed to convey. At any rate, he had a right to exercise a choice in the matter, and, having exercised it, he, at least, cannot complain. Whether the government could challenge the conveyance we need not determine; for if it had any right to interfere, it has not chosen to do so. It is generally true that an executed contract, voluntarily executed, without fraud or duress, is binding, and cannot be repudiated by the

party who executed it. In *Bibb* v. *Allen*, 149 U. S. 481, 497, 37 L. ed. 819, 825, 13 Sup. Ct. Rep. 950, Mr. Justice Jackson, speaking for the court, thus stated the law:

[338] *"It is well settled by the authorities that the defense of the statute of frauds cannot be set up against an executed contract. *Dodge* v. *Crandall*, 30 N. Y. 294, 304; *Brown* v. *Farmers' Loan & T. Co.* 117 N. Y. 266, 273, 22 N. E. 952; *Madden* v. *Floyd*, 69 Ala. 221, 225; *Gordon* v. *Tweedy*, 71 Ala. 202, 214; *Huntley* v. *Huntley*, 114 U. S. 394, 400, 29 L. ed. 130, 131, 5 Sup. Ct. Rep. 884; Browne, Stat. Fr. § 116. This rule proceeds and rests upon the principle that there is 'no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party morally but not legally bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not, by reason of some technical rule of law, have been enforced by action.' *Newman* v. *Nellis*, 97 N. Y. 285, 291."

St. Louis Hay & Grain Co. v. *United States*, 191 U. S. 159, 163, 48 L. ed. 130, 132, 24 Sup. Ct. Rep. 47.

It is also well settled that one whose interest in land is acquired subsequently to a conveyance thereof by the owner has no higher right to question the conveyance than his grantor had. This does not conflict with the rule that a conveyance fraudulent against creditors may be set aside at their instance, for their rights exist prior to the conveyance; or if not, the conveyance was made with the purpose on the part of the grantor of defrauding them out of debts subsequently contracted. Nothing of that kind appears here. Hartman, at the time of the conveyance, had no claim against the patentee. The conveyance was not made with the purpose of subsequently contracting a debt and defrauding him out of payment thereof. His trust deed was executed after the conveyance to the Norwood & Butterfield Company, and for the purpose of securing debts thereafter to be contracted, and he took with knowledge of the conveyance.

The judgment of the Supreme Court of Mississippi was right, and it is affirmed.

[339] *Mr Justice **White**, dissenting:

The reasons for my dissent are stated, not only because of what seems to me is the encouragement afforded to frauds on the homestead law by the ruling now made, but also because of the possible injurious consequences to arise from the application hereafter of the assumed legal principles upon which the ruling is based.

These are the facts: Harness entered the homestead. Before he had performed the conditions required by the law of the United States to entitle him to a patent, he made a contract with the Norwood & Butterfield Company, to convey to them, when he received a patent, the pine timber on the land and a right of way through and across the land for roads, trams, or railroads, 100 feet wide. Harness ultimately filed the proofs required by the acts of Congress; in other words, made an affidavit, as required by law, to the effect that he had the sole interest in the land, and that there was an absence of interest in anybody else. Obtaining the patent, he made the stipulated conveyance to the Norwood & Butterfield Company, who afterwards conveyed to the Butterfield Lumber Company, defendant in error. Before this deed, however, was recorded, as required by the laws of Mississippi, Harness mortgaged the land to Hartman, plaintiff in error, and the mortgage was at once recorded. Thereafter the deed was recorded. Soon afterward the Butterfield Company filed its bill in a court of chancery in Mississippi, to establish its alleged prior rights under the deed from Harness, and it was averred that Hartman accepted the mortgage to him with notice of the prior transfer, and therefore took subject to the deed.

That a Federal question was present is conceded, in view of the fact that the Mississippi court applied the laws of the United States in determining the validity of the contract and the deed. Having decided that they were valid, and that Hartman had notice of the transaction before the execution of the mortgage, the state court further held that the rights *of Hartman were subordinate [340] to those conferred by the contract and deed. I do not stop to demonstrate that a contract made by a homesteader to convey to another, when a patent is obtained, a right to strip the land of all the timber, and to vest in such party a right of way for a tramway to make the removal of the timber effectual, is void under the homestead laws of the United States. This I do not feel called upon to do, because the court, in deciding this case, expressly assumes that the contract to convey the timber was void, and bases its ruling upon that assumption, citing *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905. But, at the same time, it is declared that, although the contract was void, by virtue of the policy of the United States, as disclosed in its statutes, such contract was not inherently vicious or immoral. The deduction seems to me to be unwarranted. Considering a contract of this nature, in *Anderson* v. *Carkins*, it was said:

"There can be no question that this contract contemplated perjury on the part of

Anderson, and was designed to thwart the policy of the government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity."

And the doctrine of *Anderson* v. *Carkins*, which is conceded applies to this case, was reiterated in *Adams* v. *Church*, 193 U. S. 510, 515, 48 L. ed. 769, 771, 24 Sup. Ct. Rep. 512.

It having been impossible for the homesteader, without fraud and perjury, to execute the contract to strip the land of its timber, and give a right of way for a tramway to make the stripping effectual, it seems to me that it cannot be said that it was not immoral and vicious. And when the necessary effect of the contract is thus fixed, it is submitted that it becomes at once patent that decisions holding that executed contracts are not affected by the statute of frauds have no application to this case, for, as said by Mr. Justice Jackson, in the case relied upon to demonstrate the doctrine (*Bibb* v. *Allen*, 149 U. S. 497, 37 L. ed. 825, 13 Sup. Ct. Rep. 950): "Contracts not in [341] conformity *with the statute (of frauds) are only voidable, and not illegal."

It is said, however, that Harness made a deed in accordance with the contract, and this suit involves not the contract, but the deed. But unless this proceeds upon the assumption that the contract was merely voidable, and not illegal, as being contrary to public policy, it seems to me to be a plain misconception. This is said, since it cannot be that a court of equity will not enforce the specific performance of a contract which is void, as against public policy, but yet will lend its aid to one of the parties by enforcing a deed which permits the fruits of the void contract to be realized.

As said in *Deweese* v. *Reinhard*, 165 U. S. 386, 41 L. ed. 757, 17 Sup. Ct. Rep. 340,—a case concerning the homestead laws:

"A court of equity acts only when and as conscience commands; and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

And especially must this be true where, as here, one of the parties to an illegal and void transaction invokes the aid of equity to give efficacy to perjury and a violation of public policy.

But it is asserted that whatever may be the right of the United States to assail the conveyance in question, neither the grantor nor his assignee has such right. Here again, it seems to me clear that the distinction has been lost sight of which exists between contracts which are merely voidable and those which are void because contrary to public policy. That in a case of the latter character either party to the unlawful transaction or those in privity with them may be heard to contest the right of one of the wrongdoers to the active aid of a court of equity in making the illegal act effective has long since been decided by this court. *Harkness* v. *Underhill*, 1 Black, 316, 325, 17 L. ed. 208, 213.

I therefore dissent.

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*GUSTAV E. HAFEMANN, *Plff. in Err.*, [342]

v.

FRED A. GROSS, Albert F. Gross, and Louis H. Gross.

(See S. C. Reporter's ed. 342–352.)

Public lands—contracts giving others than the pre-emptor benefit of entry.—A contract by which one proceeding under the pre-emption law agreed, in consideration of an advance of a portion of his expenses to be incurred in perfecting the entry, to pay a specified sum for locating him on the land, and a further amount, to be determined by the proceeds of any sale which he might make after acquiring title, is not invalid, under U. S. Rev. Stat. § 2262, requiring every pre-emptor to make affidavit before entry that "he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

[No. 64.]

Argued and submitted November 9, 1905.
Decided November 27, 1905.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court for the County of St. Louis, in that state, in favor of plaintiffs in an action to recover a portion of the proceeds of a sale by a patentee from the United States, pursuant to an agreement made before entry. *Affirmed.*

See same case below, 92 Minn. 367, 100 N. W. 1. On first appeal, see 91 Minn. 1, 97 N. W. 430.

Statement by Mr. Justice **Brewer:**

By the admissions in the pleadings in this case, on December 1, 1890, the defendants in

error, together with one Edmund F. Gross, as parties of the first part, entered into a contract with the plaintiff in error which stipulated: "That for and in consideration of the covenants hereinafter mentioned, the parties of the first part agree to pay one-fourth of all expenses accruing to the party of the second part in making final proof to S. W. ¼ of the N. W. ¼, the N. ½ of the S. W. ¼, and the S. W. ¼ of the S. W. ¼ of sec. 14, all in township 58, north of range 19 west, in St. Louis county, Minnesota, and receiving title thereto, and the party of the second part agrees and binds himself to pay to the parties of the first part $100 in cash upon the delivery of these presents for locating him on said land, and he further agrees to give the parties of the first part one-fourth part of the price and proceeds that may hereafter be obtained for the sale of said land after he has obtained title thereto from the United States, deducting the one-fourth expense as above provided, and can find a purchaser for and sell the same at its proper value."

The parties of the first part fully complied with all the stipulations of this contract.
[343] The plaintiff in error, who at the *time of the contract, was proceeding under the pre-emption law, made his final proofs, and on December 19, 1891, received a patent. On October 18, 1895, he sold the pine timber on the land and paid to the parties of the first part one fourth of the amount received by him therefor. Edmund F. Gross subsequently assigned to Albert F. Gross, one of the defendants in error, all of his right, title, and interest in the contract. On July 17, 1902, the plaintiff in error sold and conveyed the land to the Onondaga Iron Company. This action was brought in the district court of the county of St. Louis, Minnesota, to recover one-fourth part of the moneys received by him on said sale. Judgment was entered in the district court in favor of the plaintiffs (91 Minn. 1, 97 N. W. 430, 92 Minn. 367, 100 N. W. 1), which was affirmed by the supreme court of Minnesota, and thereupon this writ of error was sued out.

Mr. **Roger S. Powell** argued the cause and filed a brief for plaintiff in error:

"Title" is defined as the means whereby the owner of lands has the just possession of his property

2 Bl. Com. 195. But Blackstone is there treating the subject of tenures.

But "title" has also respect to that which is the subject of ownership.

Springfield F. & M. Ins. Co. v. *Allen*, 43 N. Y. 389, 3 Am. Rep. 711.

"Title," as applied to lands, signifies either a party's right to the enjoyment thereof, or the means whereby such right is approved, or by which it is evidenced.

Pratt v. *Fountain*, 73 Ga. 261.

One may have an equitable title in the land; that is, the legal title may be vested in one person, and the beneficial interest in the land may inure to another person, who may be named in the deed, or who may not be named at all, whose right may exist by parol,—that is, by the word of mouth, not shown by any written evidence.

Beringer v. *Lutz*, 188 Pa. 364, 41 Atl. 643.

The same situation in legal contemplation is made to appear in the case at bar by the written contract as was shown to exist wholly by parol in the case of *Wolford* v. *Farnham*, 44 Minn. 159, 46 N. W. 295, in which case it was held that the party holding a similar beneficial interest to the one discussed here was the owner and holder of the equitable title to the land.

See also *Randall* v. *Constans*, 33 Minn. 329, 23 N. W. 530.

This contract contains the evils in full flower, described by the court in the case of *Myers* v. *Croft*, 13 Wall. 291–296, 20 L. ed. 562, 563, as being the evils which it was the design and purpose of the pre-emption law to cut out.

It has been held in the case of *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905, that a contract, whereby one about to enter a homestead agreed to convey it to another, was against public policy and void, and not enforceable in equity. This decision was based on the construction of the statute relating to homestead entries; but the provisions of the pre-emption statute are even more stringent.

Mellison v. *Allen*, 30 Kan. 384, 2 Pac. 97.

A contract by a settler upon public land of the United States, made before the pre-emption of it, to convey to another an interest in the land in consideration for money loaned or advanced him to pre-empt it, is in violation of the statute, and void. It amounts to a contract in which one party undertakes to bribe, and the other agrees to commit perjury. There is no remedy in law or equity on such contracts.

Marshall v. *Cowles*, 48 Ark. 362, 3 S. W. 188.

A pre-emptor under the act of Congress of September 4th, 1841, who had not entered and paid for the land occupied by him, agreed to convey part of it to plaintiff. Afterwards, for the purpose of enabling him to make the oath required by the act of Congress to secure the pre-emption right, he induced plaintiff to surrender the evidence of the agreement, he promising orally that after his entry he would renew it.

The plaintiff had paid him $150 on the original agreement. It was held that the agreement was against public policy and void; and no action could be maintained to recover damages for its nonperformance, or to recover back the money paid on it.

Saint Peter Co. v. *Bunker*, 5 Minn. 192, Gil. 153.

Money paid upon a contract with a pre-emptor to sell his pre-emption claim before his entry and payment cannot be recovered.

Bruggerman v. *Hoerr*, 7 Minn. 337, 82 Am. Dec. 97, Gil. 264.

The advance of money to a pre-emptor to pre-empt land on an agreement that, in consideration thereof, he will convey part of the land pre-empted to the party advancing the money, furnishes no legal cause of action.

Ferguson v. *Kumler*, 11 Minn. 104, Gil. 62.

A contract by a pre-emptor about to pre-empt land, by which he agrees to give another an interest in the land, is utterly void, and incapable of becoming the foundation for any rights.

Evans v. *Folsom*, 5 Minn. 422, Gil. 342.

The earlier decisions in this state held that a mortgage of pre-empted lands, executed by the pre-emptor after making his proofs, but before patent issued, pursuant to an agreement made before the proofs, is void.

McCue v. *Smith*, 9 Minn. 252, 86 Am. Dec. 100, Gil. 237; *Woodbury* v. *Dorman*, 15 Minn. 338 Gil. 272.

Mr. **Thomas J. Davis** submitted the cause for defendants in error. *Mr. John E. Davies* was with him on the brief:

The supreme court of the state of Minnesota has repeatedly held that any agreement made prior to the entry or the purchase of land under the pre-emption act, by the entry man, to convey the title, or any portion thereof, to the land so acquired, is null and void and against public policy.

Saint Peter Co. v. *Bunker*, 5 Minn. 192, Gil. 153; *Bruggerman* v. *Hoerr*, 7 Minn. 337, 82 Am. Dec. 97, Gil. 264; *Ferguson* v. *Kumler*, 11 Minn. 104, Gil. 62; *Evans* v. *Folsom*, 5 Minn. 422, Gil. 342.

In its earlier decisions the same court held that a mortgage given on land by a pre-emptor, acquired under the pre-emption laws of the United States pursuant to an agreement made prior to the acquiring of the title to the land, was invalid, and not enforceable.

Woodbury v. *Dorman*, 15 Minn. 338, Gil. 272; *McCue* v. *Smith*, 9 Minn. 252, 86 Am. Dec. 100, Gil. 237.

Later the Minnesota court reversed the position taken in the two last-cited cases, and in the case so reversing its former holdings it expresses itself as follows: The question is, Was there any contract or agreement by which the pre-emptor fixed this result? Did the pre-emptor contract or agree that the title to be acquired—that is to say, the fee—should inure to the benefit of another? In other words, Did the pre-emptor contract or agree to do anything which, when done, would pass the title in whole or in part to another, so that the pre-emptor would, as to such whole or part, be a mere conduit of the title?

Jones v. *Tainter*, 15 Minn. 512, Gil. 423.

In the case of *United States* v. *Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575, Justice Brewer, writing the opinion in construing part of the timber and stone act, and which is analogous to, and almost word for word the same as, the statute under consideration, says: The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, —the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, the act is satisfied.

This opinion is cited with approval in the case of *United States* v. *Mackintosh*, 29 C. C. A. 176, 56 U. S. App. 483, 85 Fed. 333.

The only agreement or contract forbidden by the statutes is one by which the title may inure in whole or in part to the benefit of any person except the applicant himself. If the agreement or contract is not of this nature, it cannot be in violation of the statute. The statute itself makes a specific designation of the kind of agreement or contract that is forbidden. It will be observed from its language that the agreement or contract which may inure to the benefit of some other person than the applicant must affect, in whole or in part, the title to the land.

Kingston v. *Eckman*, 22 Land Dec. 234; *Dawson* v. *Higgins*, 22 Land Dec. 544.

If the contention of the plaintiff in error is correct, an action of specific performance of the contract will lie on the part of the defendants in error, compelling the plaintiff in error to convey to them one fourth of the land. But such an action will not lie, and the courts have decided that such a contract conveys no interest in lands whatsoever.

King v. *Millard*, 15 R. I. 426, 7 Atl. 405; *Ellsworth* v. *Pomeroy*, 26 Ind. 158; *Gross* v. *Hafemann*, 91 Minn. 1, 103 Am. St. Rep. 471, 97 N. W. 430.

The contract created no community of interest in lands between the plaintiff in error and the defendants in error.

Ellsworth v. *Pomeroy, supra.*

An action would not lie on the part of the defendants in error against the plaintiff in error to compel him to sell the land if a purchaser could be found for the same at its proper value. Their only remedy would be, if they had any, in damages against the plaintiff in error for failure to perform the contract.

King v. *Millard, supra.*

Mr. Justice **Brewer** delivered the opinion of the court:

The case turns upon the construction of the contract and its alleged conflict with § 2262, Rev. Stat., the pertinent part of which is:

"Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated. . . . That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by [344] which the title which *he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

The defendants in error insist that the title was to be in no manner affected by the contract; that it was simply a promise on the part of the pre-emptor to pay a certain sum of money, the amount thereof to be determined by the proceeds of a sale which he might subsequently make; that he was under no obligations to make any sale, and, if he did not, they would have no claim upon him. On the other hand, the plaintiff in error invokes the doctrine laid down in *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905, that, by the terms of the contract, the title which he acquired from the government was in part to inure, indirectly, at least to the other parties to the contract. He insists that the purpose of Congress was to secure to the pre-emptor the full benefit of the property patented to him; that this purpose is emphasized by the use of the words "directly or indirectly;" and that any contract by which third parties were to acquire a portion of the property or a share in the proceeds of any sale of the property was really a contract which operated indirectly to transfer the title in part to such third party. Under such construction a contract by which the pre-emptor should agree to mortgage the land after acquiring title would be void, because, on failure to pay, and by foreclosure of the mortgage, the mortgagee might acquire title.

The question is not free from doubt. The contract did not directly affect the title; that was to be absolutely vested in the patentee, undisturbed by any claim of the defendants in error. He was not bound to do anything by which any portion of the title should pass to them, directly or indirectly. On the other hand, its effect was to cast a limitation on the full benefit of the property, for, while the patentee was under no obligation to sell, he was required to divide the proceeds if and when he made a sale.

It may be well to examine the decisions of the courts, Federal as well as state, and also the rulings of the Land Department. *Before doing so, however, we quote the cor- [345] responding provisions of the Federal statutes respecting homesteads. Rev. Stat. §§ 2290, 2291, and 2295, U. S. Comp. Stat. 1901, pp. 1389, 1390, 1398. In his application for a homestead entry the applicant must make affidavit that his "application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." And before a certificate or patent is issued he must make affidavit "that no part of such land has been alienated, except as provided in section 2288 (U. S. Comp. Stat. 1901, p. 1385)." That section refers to the transfer for church, cemetery, or school purposes, or for the right of way of railroads. The land shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." [Rev. Stat. § 2296, U. S. Comp. Stat. 1901, p. 1398.]

Under these provisions it has been held that a contract to convey the whole or part of the land, made prior to the perfection of his equitable right, by one seeking pre-emption or a homestead, is void, will not be enforced in the courts (*Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed 272, 10 Sup. Ct. Rep. 905), and, if known to the Department, will prevent the passing of the legal title. Such has been the uniform ruling of the Land Department, as well as of the courts, state and Federal.

With respect to a mortgage or deed of trust executed under like circumstances, the decisions of the Land Department have been all to the effect that such mortgage or deed of trust is not an alienation within the scope of the homestead statute, or forbidden by the pre-emption law, especially where, in the case of a pre-emption, the mortgage is given to secure money borrowed to complete the purchase of the land. See, in reference to

pre-emptors, *Larson* v. *Weisbecker*, 1 Land Dec. 409, Opinion of Secretary Teller; *Re Ray*, 6 Land Dec. 340, Opinion of Acting Secretary Muldrow; *Haling* v. *Eddy*, 9 Land Dec. 337, Opinion of Secretary Noble; *Murdock* v. *Ferguson*, 13 Land Dec. 198, Opinion of Secretary Chandler. With reference to a homestead entryman, see *Mudgett* v. *Dubuque & S. R. Co.* 8 Land Dec. 243, Opin-
[346] ion of Secretary Vilas; *Dawson* v. *Higgins, 22 Land Dec. 544, Opinion of Secretary Smith; *Kezar* v. *Horde*, 27 Land Dec. 148. Opinion of Secretary Bliss. In addition, see *Lawson* v. *Reynolds*, 28 Land Dec. 155, in which Secretary Hitchcock held that a "written agreement executed by a homesteader, and operating as a mere lease of a part of the premises and the grant of an easement, the use of which would tend to improve and increase the value of the land as a homestead, is not an alienation of any part of such land, and no bar to the perfection of the entry." See also *Kingston* v. *Eckman*, 22 Land Dec. 234, in respect to an entry under the timber and stone act of June 3, 1878 (20 Stat. at L. 89, chap. 151), as amended by the act of August 4, 1892 (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1434), the provisions of which statute in reference to the oath of the applicant are similar to those in the pre-emption act.

There has been some division in the courts upon the question. In *Brewster* v. *Madden*, 15 Kan. 249, the supreme court of that state, in an opinion delivered by the writer of this, held that a mortgage given by a pre-emptor prior to the entry of the lands was void, reaching this conclusion largely on the proposition that, at the time the pre-emption act [5 Stat. at L. 453, chap. 16] was passed (1841), mortgages, always in form conveyances, were then regarded by the profession generally as conditional alienations. To like effect were the early rulings of the supreme court of Minnesota (*McCue* v. *Smith*, 9 Minn. 252, 86 Am. Dec. 100, Gil. 237; *Woodbury* v. *Dorman*, 15 Minn. 338, Gil. 272), though these rulings were subsequently distinctly overruled by the same court. *Jones* v. *Taintor*, 15 Minn. 512, Gil. 423; *Lang* v. *Morey*, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88. *Bass* v. *Buker*, 6 Mont. 442, 12 Pac. 922, deciding the same way, was also overruled in *Norris* v. *Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121. The large majority of state decisions follow these later rulings. See, in case of pre-emptions, *Wilcox* v. *John*, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. 880; *Christy* v. *Dana*, 34 Cal. 548; *Christy* v. *Dana*, 42 Cal. 174; *Camp* v. *Grider*, 62 Cal. 20; and in reference to homesteads, *Fuller* v. *Hunt*, 48 Iowa, 163; *Dickerson* v. *Bridges*, 147 Mo. 235, 48 S. W. 825; *Weber* v. *Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; *Spiess* v. *Neuberg*, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; *Kirkaldie* v. *Larrabee*, 31 *Cal. [347] 455, 89 Am. Dec. 205; *Orr* v. *Stewart*, 67 Cal. 275, 7 Pac. 693; *Stark* v. *Duvall*, 7 Okla. 213, 54 Pac. 453. In *Orrell* v. *Bay Mfg. Co.* 83 Miss. 800, 36 So. 561, the court held that the prohibition of the alienation of public land by parties who have taken the preliminary steps to acquire the same under the homestead laws, and who have not perfected their entries, has reference to an absolute sale of the land, or some part of it, and in that case the leasing of trees on the land for turpentine purposes, and the sale of trees, was held not an alienation within the meaning of the statute.

Obviously, the trend of the authorities is strongly in favor of the proposition that a mortgage or deed of trust by one seeking an entry under the pre-emption or homestead laws of the United States, made prior to the perfection of his equitable right, is valid. These authorities would fully sustain the decision of the supreme court of Minnesota in the present case.

Further, in the case at bar, there was no mortgage, deed of trust, or agreement for a specific lien of any kind. It was simply a promise to pay money in case of a sale by the patentee, the amount of the payment to be determined by the sum received on the sale. It was a promise which, in no event, could be enforced against the land. It was only a personal obligation of the patentee. It might never be enforceable against him, and could not be except upon his sale of the land. Of course, it would not be contended that a mere promise to pay money by one seeking to acquire title under a homestead was not binding, and if the only effect of the contract is to measure the sum which the patentee agrees to pay by that which he may receive when he sells the land, it cannot be held that a contract has been made for an alienation of the title in whole or in part, or that the land was not acquired for the sole use and benefit of the patentee.

The judgment of the Supreme Court of Minnesota was right, and it is affirmed.

*Mr. Justice **White**, with whom concur [348] Mr. Justice **McKenna** and Mr. Justice **Holmes**, dissenting:

The power to evade the restrictions imposed by Congress upon the right to acquire land by pre-emption, which, it seems to me, must result from the construction now given to the act of Congress as applied to the contract in controversy, causes me to state the reasons for my dissent.

There is no controversy as to the applicable statute, and no question of fact as to the existence and terms of the contract. The

bald question, therefore, is, Was the contract in conflict with the requirements of § 2262, Rev. Stat.?

By that section the pre-emptor, before being allowed to enter land, was obliged to make oath, as follows:

"That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself."

By the contract here in question, which was entered into prior to the making of the statutory affidavit, the defendants in error, and one other person—whose interest has since been acquired by one of the defendants in error—agreed to pay one-fourth part of the expenses of the plaintiff in error, the proposed pre-emptor, to be incurred by him in perfecting his entry, he, on the other hand, agreeing to pay $100 in cash "for locating him on said land," and binding himself to give to the other parties to the agreement "one-fourth part of the price and proceeds that may hereinafter be obtained for the sale of said land after he has obtained title thereto from the United States, deducting the one-fourth expense as above provided, and can find a purchaser for and sell the same at its proper value."

[349] *My mind cannot perceive how this contract can be held valid, testing its provisions by the statutory prohibitions, for it is settled that the requirement of specific statements in the affidavit implies a prohibition against the doing of that which the pre-emptor must swear in the affidavit that he had not done.

Let me consider what the statute thus requires the pre-emptor to swear, in connection with the contract, in order to test the conflict between them. The pre-emptor must swear "that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use." Could this statement have been truthfully made in view of the agreement by which the pre-emptor bound himself after his purchase, if he sold the land, to pay to the other parties to the contract one-fourth part of the purchase price? Further, the statute requires the pre-emptor to swear "that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." Was the affidavit made by the pre-emptor in this case true when, at the time it was made, he had executed a contract or agreement by which, when the property was sold, one fourth of the price should go to the benefit of the other parties to this contract? Concede that technically the contract did not purport to be an agreement on the part of the pre-emptor to convey the legal title to one-fourth part of the land to the other parties to the agreement,—can it in reason be said that the agreement did not directly or indirectly provide that the title, when acquired, should inure in whole or in part to the benefit of other contracting parties? To my mind the statute seems so plain, and the terms of the contract to be so clearly in violation of its provisions, that there can reasonably be no room for construction.

But it is said the statute simply prohibits agreements on *the part of the pre-[350] emptor by which the title which he might acquire would inure in whole or in part to the benefit of any other person than himself; therefore, to constitute a violation of the statute, it must be found that the contract bound the pre-emptor, after he had acquired the land, to convey a one-fourth interest in the title to the land. But this disregards the fact that the statute expressly forbids the doing of the prohibited thing, either "directly or indirectly;" and prohibits "any agreement or contract," in any way or manner whatsoever, by which the title to be derived from the government of the United States should inure, in whole or in part, to the benefit of any person except the pre-emptor. It is clear, to my mind, that the words "directly or indirectly and in any manner" were obviously intended to embrace evasions and subterfuges by which the policy of the statute might be frustrated,—that is, the prohibition against giving to another person than the pre-emptor the benefit, in whole or in part, of the results of acquiring the land from the United States.

In *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905, dealing with an affidavit of a homesteader, where the requirements were less stringent than exacted in pre-emption cases, it was decided that the existence of an agreement to convey, after patent, a part of the land to another, was void as against public policy. To me that case is decisive of this. It is said, however, there the obligation was to convey the land, whilst here there was no obligation on the part of the pre-emptor to convey or to sell the land after he acquired it, but only an obligation, if he did sell, to pay the one fourth of the proceeds. But it cannot be meant by this to say that there was

no contract, because the agreement was so purely potestative on the part of the pre-emptor as not to imply an obligation, since the contract is enforced by the decree now rendered. Suppose, however, that the contract could be divided, and held to imply an obligation to pay over to another a portion of the purchase price, after the obtaining of a patent, only in case the pre-emptor chose to sell,—does such construction relieve [351] the contract from *the prohibitions of the statute? It seems to me not, because to so hold would simply be to permit mere form, and not substance, to control. In *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, the question was whether Congress could, in levying an income tax, include as part of the taxable income revenues derived from real estate. It was held that it could not be done, because substance was to control; and that to include rents in the income taxed was to impose a direct burden on the owner of the real estate. After quoting from Co. Litt. 45, the declaration "for what is the land but the profits thereof," and a passage in Jarman on Wills, stating that a devise of the rents and profits or of the income of lands passes the land itself, both at law and in equity, the court said (p. 581, L. ed. p. 819, Sup. Ct. Rep. p. 689):

"The real question is, Is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

This being the rule settled by this court, simply as to the right to receive the fruits of real estate, I do not perceive why, in view of the sweeping prohibitions of the act of Congress, the existence of a continued obligation to pay over the price of real estate to another person when sold does not amount to an agreement giving to such person, at least indirectly, an interest in the land itself.

Having said that, in my opinion, there was no ambiguity in the statute as applied to the contract, it seems to me unnecessary to consider the decided cases. But I refer briefly to them. True it is that there are rulings of state courts and of the Land Department, holding that an agreement to execute a mortgage upon pre-empted land is not within the prohibition of the statute. When the opinions so holding are analyzed it will be seen that they proceed upon the theory *that the spirit of the statute does [352] not embrace transactions of that character. For the purposes of this case, however, it does not seem to me essential to say whether or not such rulings are correct, as an agreement to mortgage to repay a given sum advanced, to enable the pre-emptor to improve the land, might well be held not to be within the spirit of the prohibitions of the statute, and yet such rulings would not be controlling as to an agreement like the one here in question, especially if the contract is construed as amounting to a perpetual obligation to transfer to a third person, upon a sale of the land, a given portion of the price. Such a contract at once puts the person in whose favor it is made in the attitude, not of a lender, entitled to receive back his loan with simple interest, but in the position of a speculator, who is to benefit from the enhancement in value of the land which may arise in the future, without reference to the amount of any expenditure by him made,—a character of transaction which it was the express purpose of the act of Congress to forbid. *Myers* v. *Croft*, 13 Wall. 295, 20 L. ed. 563. And, from another point of view, such a transaction puts the pre-emptor making it in a position where his plain interest is not to improve and develop the land to its full capacity, because the labor expended for that purpose would ultimately inure, in case of a sale of the land, to the benefit of a third person.

Deeming that the contract in question was within the prohibitions of the act of Congress, and void as against public policy, I do not think the court should lend its aid to its enforcement, and I therefore dissent; and am authorized to state that Mr. Justice **McKenna** and Mr. Justice **Holmes** concur therein.

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*ROYAL INSURANCE COMPANY, *Plff.* [353]
in Err.,
v.
ROBERT A. MILLER, Special Master of the Caja de Ahorros and Lucas Amadeo.

(See S. C. Reporter's ed. 353–371.)

1. Bankruptcy—authority of special master to collect assets.—The mere designation of a person as "special master" in the order of appointment in bankruptcy pro-

NOTE.—*As to mortgages on crops*—see note to Loftin v. Hines, 10 L.R.A. 490.

As to mortgages on future crops—see note to Dickey v. Waldo, 23 L.R.A. 449, and Butt v. Ellett, 22 L. ed. U. S. 183.

On the rights of mortgagee to benefit of insurance taken in the name of mortgagor—see note to Chipman v. Carroll, 25 L.R.A. 305.

ceedings does not deprive him of the express authority conferred by such order to sue to collect all the assets of the bankrupt estate.

2. **Insurance—property covered—products of growing crop.**—A policy of insurance on a stock of sugar and molasses "deposited" in the sugar manufactory upon a sugar plantation covers sugar and molasses coming into the sugar house as a result of the manufacture of a crop which was growing when the insurance was effected, where the risk under the policy was not to attach until a date fixed at more than two months after the date of the policy.

3. **Mortgage—right of mortgagee to insurance on harvested crop.**—The avails of insurance on sugar and molasses coming into the sugar house on a sugar plantation as the result of the manufacture of a crop growing thereon when the insurance was effected inure to the benefit of the mortgagee in a mortgage of the realty and the fruits thereof if the loss occurred after the execution of the mortgage, under the Porto Rico mortgage law of 1880, which subjects to a mortgage of real property the crops growing or harvested when the mortgage falls due, "but not yet removed or warehoused," and the indemnities awarded or due the owner of the realty either for the insurance or for the crops, provided the damage occurred after the creation of the mortgage.

4. **Mortgage—right of mortgagee to sue for insurance without exhausting other remedies.**—The mortgage creditor in a mortgage governed by the civil law may sue for the avails of insurance subject to his mortgage without first exhausting his remedies against other property embraced by the mortgage.

5. **Mortgage—right of mortgagee to sue for insurance—effect of existing summary remedy.**—The existence under the Spanish law of a summary remedy to enforce a mortgage does not prevent the mortgage creditor from suing in the ordinary way for the avails of insurance subject to his mortgage.

6. **Limitation of actions—prescription for personal actions in Porto Rico.**—The prescription of twenty years generally applicable to personal actions under the Spanish law prior to the promulgation of the Civil Code is the prior law which, under the provision of that Code that a prescription which began to run before its publication shall be governed by the prior laws, must govern an action in Porto Rico for a loss under a policy of insurance occurring before the royal decree of 1889, extending the Civil Code to that island.

7. **Appeal and error—harmless error.**—Error committed by the trial court either in admitting evidence or in the legal effect given to the evidence admitted concerning acts which were held adequate to interrupt the course of prescription is not ground for reversal, where the appellate court decides that a longer period of prescription controlled, concerning which the acts of interruption were wholly irrelevant, although the defeated party, relying on the certainty of a reversal because of such errors, may have neglected to make a full defense, or to assign other substantial errors in the appellate court.

8. **Action—joinder of new party by amendment.**—The joinder by amendment of the assignee of a policy of insurance as a party plaintiff in a suit in Porto Rico by a mortgage creditor of the assured to enforce his rights under the mortgage to the avails of the insurance cannot be deemed a clear abuse of the trial court's discretion, where the assignee's rights are alleged to be subordinate to those of the mortgage creditor, in view of the provision of the Law of Civil Procedure for Cuba and Porto Rico, art. 156, that "causes of action against several persons, or by several persons against one, arising from the same source of title, or based upon the same cause of action, may be joined and brought in one action."

9. **Pleading—traverse of amended declaration.**—The plea of the general issue, filed to a declaration before the allowance of an amendment joining as party plaintiff in a suit for insurance the person to whom a transfer of the policy is alleged, will not be regarded as traversing the amended declaration, where the record shows that the case was tried on the theory that the transfer was not disputed, but was an established fact.

[No. 7.]

Argued October 17, 18, 1905. Decided November 27, 1905.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment entered upon a verdict in favor of plaintiffs in an action on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. **Frederic D. McKenney** argued the cause, and, with *Messrs. Francis H. Dexter, John Spalding Flannery,* and *Wayne MacVeagh,* filed a brief for plaintiff in error.

Mr. **Fritz v. Briesen** argued the cause and filed a brief for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

Whether a judgment upon a verdict enforcing against the plaintiff in error a contract of fire insurance is erroneous is the general question for decision. The record is confused, the pleadings involved, and the errors assigned numerous. We shall, therefore, at the outset, state the contracts with which the controversy is concerned, the pleadings, and such uncontroverted facts as are essential to be borne in mind in order to comprehend the issues raised by the assignments of error.

On September 15, 1884, the Royal Insurance Company issued its fire policy in favor of Antonio Amadeo, "estate owner of Quebrada Arenas Maunabo," to the amount of £1,600, "on stock of sugar and molasses deposited in the sugar manufactory on the estate Quebrada Arenas," the risk only to begin two months and four

days thereafter, *viz.*, on November 19, 1884, and embracing the period between that date and November 19, 1885.

On September 19, 1884, four days after the taking out of the policy, Antonio Amadeo, the insured, by a notarial act acknowledged that he had received a loan [355] from the Caja de *Ahorros, a bank of Ponce, Porto Rico, amounting to $15,036.27, which he obligated himself to repay in two instalments, due in February and March, 1885. It was recited in the act that the money was lent to enable Amadeo "to attend to the developing and keeping of a sugar plantation by him owned." The act also described the plantation as the estate of Quebrada Arenas, gave the quantity of land, which it was declared was all planted in cane, except where used for pasturage, and where covered by a sugar manufactory and other appurtenant buildings. A mortgage in favor of the lender was granted by the notarial act upon all the property described "and the fruits thereof."

On the 6th of February, 1885, the sugar manufactory on the estate of Quebrada Arenas was burned, and there was destroyed in the factory sugar and molasses alleged to be equal in value to the sum of the insurance. It was shown that some of the sugar and molasses was in hogsheads and some was in pans and other apparatus, going through the process of manufacture.

Prior to the year 1901, in a court of the island of Porto Rico, the Caja de Ahorros was declared a bankrupt, and trustees were appointed and took charge of its assets. In the year 1901 proceedings were begun in the United States district court for Porto Rico by creditors of the bankrupt against the trustees, and Robert A. Miller was appointed a special master, with power to collect the assets of the bankrupt estate. On April 23, 1902, Miller, as special master, commenced this action on the policy. The declaration averred the appointment of Miller, and the authority given him to collect the assets of the Caja de Ahorros. The execution of the policy of insurance and mortgage of the plantation was then recited, and it was averred that the Caja de Ahorros, as a mortgage creditor, was entitled to the avails of the policy of insurance, and therefore had a right to enforce the same.

The declaration was demurred to, first, on the ground that Miller, as special master, was without authority to sue; and, [356] *second, that the action was prescribed, no reference being made to the period of limitation relied upon. A general demurrer was also filed. The court overruled the special demurrers and sustained the general demurrer because of the want of precision in some of the averments of the declaration, which was afterwards remedied by amendment.

To the declaration as amended three pleas were filed,—the general issue, a prescription of six years, and a prescription of fifteen years. A demurrer was sustained to the plea of six years, joinder was had on the general issue, and a replication was filed setting up various acts which it was alleged were interruptive of the alleged bar of fifteen-year limitation. Subsequently an additional plea was filed, averring in substance that on September 3, 1884, Antonio Amadeo, by way of pledge, had assigned the policy of insurance in question to a bank styled the Credito Mercantil free from any claim of the Caja de Ahorros, the alleged mortgage creditor, and that by judicial proceedings the policy had been sold and purchased by said Credito Mercantil, and as neither the Caja de Ahorros or Miller were the transferees of the Credito Mercantil, the plaintiff was not entitled to recover. A replication was filed denying all the averments of the plea, but admitting that Antonio Amadeo, on a date not named, had deposited the policy as collateral security with the Credito Mercantil, and that that corporation had, after the fire, bought in the policy at a judicial sale by it provoked, and had subsequently transferred the policy to one Lucas Amadeo. Upon this replication issue was joined by the defendant. Subsequently the court allowed Lucas Amadeo to become a party plaintiff, and permitted amendments to the declaration to accomplish this result. These amendments averred the delivery of the policy as collateral security by Antonio Amadeo to the Credito Mercantil, the date not being given, the sale, long after the fire, of the policy under judicial proceedings, and its purchase by the Credito Mercantil, and the subsequent transfer thereof by the Credito Mercantil to Lucas Amadeo. It being besides *alleged that by the effect of [357] this transfer Lucas Amadeo became a part owner of the policy "subject to the mortgage of the insured to Caja de Ahorros." No answer was filed to the amended complaint. An exception was, however, noted to the action of the court in permitting Lucas Amadeo to be joined as plaintiff.

The cause came on for trial. After the impaneling of a jury the court allowed the defendant to file six additional pleas, which were to be considered as traversed upon the record, and which were, in substance, as follows: 1st. That the plaintiff was not entitled to recover on the policy be-

cause Antonio Amadeo, in obtaining the insurance, had misdescribed the property or concealed material facts. 2d. That no recovery could be had in favor of the Caja de Ahorros or Miller, because no other person than Antonio Amadeo had any interest in the policy by operation of law, and no other person had any right in the policy by a conventional assignment from the insured, or, if there had been such an assignment, no notice thereof had been given the company, and its consent had not been indorsed on the policy, as required by its terms. 3d. Because Antonio Amadeo had materially increased the risk, without the knowledge and consent of the defendant, after the issue of the policy. 4th. That recovery could not be had, because the insured had not, within fifteen days after the fire, furnished adequate proof of loss, as required by the policy. 5th. That recovery could not be had, because petroleum and other inflammable oils had been stored upon the premises, contrary to the terms of the policy. 6th. Because the claim made by the insured following the fire was false and fraudulent, and the fire occurred by the incendiarism of the insured.

At the trial, evidence having been admitted tending to show the bringing by Miller, special master, of a suit in the district court of the United States to foreclose the mortgage against the plantation executed by Amadeo, it was stipulated by both parties that no sale of the plantation to en-
[358] force the *mortgage thereon had yet been made. There was a verdict and judgment in favor of Miller, special master, and Lucas Amadeo, for the amount of the policy and interest.

Putting out of view for the present the question of the correctness of the action of the court in allowing Lucas Amadeo to be made a party plaintiff, it results that the issues arising on the trial were all embraced under the following headings:

1. Had the plaintiff capacity to sue, even if a cause of action in favor of the Caja de Ahorros was shown by the declaration? or

2. If Miller had the capacity to sue, did the Caja de Ahorros, as a result of the mortgage, acquire any right in or to the avails of the policy of insurance, and if so, did such right arise by operation of law, without the existence of a transfer by the insured of his rights under the policy and the acceptance of such transfer by the company?

3. If the right to enforce the policy obtained by operation of law, without assignment by the insured, could the Caja de Ahorros enforce the right by suing on the policy, and without previously exhausting its remedies against the other property embraced by the mortgage?

4. Even if the Caja de Ahorros was vested with the rights of the insured, and could exert such rights by suit on the policy without previously exhausting the other mortgaged property, had there been such misrepresentations by the insured in taking the policy, or such failure after taking it to comply with its terms, as precluded the right to recover?

5. In any event, was the action barred by the prescription of fifteen years?

And as the foregoing questions embrace every proposition covered by the errors assigned, except as to the right to join Lucas Amadeo as a party plaintiff, we come to consider the questions in the order stated, before passing on the error alleged to have arisen from an asserted improper joinder of parties.

First. The court found that the appoint-
[359] ment of Miller as *special master gave him express authority to sue to collect all the assets of the Caja de Ahorros. As the record of the appointment of Miller, although introduced in evidence, does not form a part of the bill of exceptions, we must assume that the ruling of the court was correct; and, this being assumed, it obviously results that the court below rightly held that the mere designation as special master did not have the effect of depriving Miller of the substantial powers conferred upon him by the decree of the court appointing him.

Second. The proposition that the Caja de Ahorros acquired no right to the policy of insurance in virtue of the mortgage involves two contentions, which require distinct consideration; the one, the proper construction of the policy; and the other, the operation of the law of Porto Rico upon the policy when properly construed. The first rests upon the assertion that the sugar and molasses covered by the policy was a distinct lot of sugar and molasses warehoused on the plantation at the time of the issue of the policy, and therefore had no legal relation to a subsequent mortgage of the plantation itself; and the second, that, in any event sugar and molasses in the manufactory on the plantation was movable property, not susceptible of being mortgaged under the law of Porto Rico.

The policy covered a "stock of sugar and molasses deposited in the sugar manufactory on the estate of Quebrada Arenas." It is true that the word "deposited," when standing alone, might well be considered as referring to exclusively sugar and molasses then existing, and in the sugar house. But the correctness of this construction is

negatived by the fact that the risk under the policy was not to attach at the date of the policy, but in two months and four days thereafter. When this period of the commencement of the risk is considered in connection with the place at which the property insured was situated, *viz.*, a sugar manufactory upon a sugar plantation, on which there was a growing crop, we think the policy must be held to have covered sugar to come into the sugar house on the plantation as the result of the future operation of the factory. And [360]*this conclusion is fortified by the indefinite description given of the property insured, which was not of a given number of commercial packages of sugar and molasses, held in a warehouse, but merely a stock of sugar and molasses, a description embracing such stock in whatever form existing, and which might be in the factory at the time the risk attached.

Additional force to the construction we give the policy likewise results from the course of the trial below; since it appears that no objection was noted to the introduction of testimony showing that the property destroyed, for which a claim under the policy had been made by the insured, consisted of sugar and molasses which was in the sugar house as the result of the process of manufacture of the growing crop therein carried on; and moreover, no instruction was asked upon the hypothesis that if the property destroyed was of that character, it was, for that reason alone, not covered by the insurance, or embraced in the mortgage.

The policy, then, embracing a stock of sugar and molasses to come into the sugar house on the plantation as the result of the manufacture of the crop which was growing thereon at the time the policy was issued, the question then is, Did the mortgage creditor, in virtue of the mortgage, acquire a right to the avails of the policy?

Undoubtedly, as a general rule under the Spanish law in force in Porto Rico at the time of the giving of the mortgage, only real property was the subject of mortgage. Mortgage law of 1880, art. 114; mortgage law of 1893, art. 110, War Department translation. But by that law a mortgage extended to the "natural increase, improvements, growing crops, and rents not collected when the obligation falls due, and the value of indemnities allowed or due the owner for insurance on the property mortgaged, or by virtue of condemnation by right of eminent domain." Mortgage law of 1880, art. 118; mortgage law of 1893, art. 110. And the mortgage law of 1880 as well as the mortgage law of 1893, moreover, provided as follows:

*"In accordance with the provisions of the [361] preceding article, the following shall be considered mortgaged together with the estate, provided they belong to the owner of the estate, although they are not mentioned in the contract.

. . . . . .

"3. Crops which, at the time the obligation falls due, are growing on the trees and plants, or have already been harvested, but not yet removed or warehoused.

. . . . . .

"5. Indemnities awarded or due the owner of the mortgage realty, either for the insurance thereof or for the crops, provided the damage occurred after the creation of the mortgage, or on account of condemnation of the land by the right of eminent domain. Mortgage law of 1880, art. 119; mortgage law of 1893, art. 111."

To grasp the import of the provisions just quoted a general understanding of the system of mortgages prevailing in the countries governed by the civil law is necessary. By that law the title to mortgaged property remains in the mortgagor, and the effect of the mortgage is not, therefore, to deprive the mortgage debtor of his right to administer the property before the obligation falls due. In other words, whilst the mortgage dismembers the ownership by depriving the owner of the right of *abusus*, and therefore devests him of the perfect ownership, it leaves him the imperfect ownership, with the full *usus* and *fructus* of the property mortgaged. Generally, in such countries, and by operation of law, growing crops are included in a mortgage; yet, as such crops are naturally thereafter to become movable by their harvesting as an incident of administration and of the *usus* and *fructus*, the right of the owner to realize by gathering the crops and disposing of the same before the mortgage becomes due exists, such gathering and realizing being considered as a mobilization of the crop, therefore taking it beyond the scope of the mortgage. See Code Napoleon, art. 2118; Paul Pont, Privileges et Hypotheques, vol. 1, p. 353, §§ 360, 362. Indeed, under the Napoleon *Code this power of the debtor to [362] administer the mortgaged property by an act of administration, done without fraud and in good faith, is, by a writer on that Code, asserted to be so complete that his right to produce the mobilization of a crop is deemed to arise by a mere sale of the crop as growing, without any actual concurrent severance of the crop from the realty. Ibid. No. 363.

It will be observed that although, gener-

ally speaking, the Spanish law, in force in Porto Rico, conforms to the theories just stated, it restricts the right of administration and power to mobilize a growing crop to narrower limits than is the case under the Code Napoleon. Thus, by the terms of paragraph 3 of the Code for Porto Rico, the power of the mortgage debtor to administer is controlled by a provision causing crops which are harvested at the time the mortgage falls due to remain subject to the mortgage, despite the harvesting, provided they have not yet been "removed or warehoused." And it will also be observed that paragraph 5 of the same Code, as to indemnities arising from insurance on crops, further restricts the power of administration vested in the mortgagor by declaring that, as to indemnities arising from insurance on the crops, the right of the mortgage creditor attaches, even although, at the time of the loss, the mortgage debt had not become due, provided the damage occurred "after the creation of the mortgage." This meaning, plainly resulting from the terms of paragraph 5, is also sustained, as we shall have occasion hereafter to show, by the act governing in Porto Rico concerning the procedure for the enforcement of mortgages, wherein the right is conferred upon the mortgage creditor to impound the avails of insurance upon crops destroyed by fire before the coming due of the obligation, but not collected before such maturity. In other words, the right of the mortgage debtor under the power of administration and by virtue of paragraph 3, to mobilize the crop, and thus remove it from the operation of the mortgage, ceases to exist, by the very terms of paragraph 5, upon the destruction
[363] by fire of the mortgaged *crop, the law treating such destruction as irrevocably fixing the character of the crop as immovable. and causing the indemnity as its representative to be no longer subject to mobilization.

The crop here in question was one of growing cane, whose harvesting depended upon the treatment of the cane at the sugar factory. It is not questioned by either party to the record, and indeed, we think it clearly results from the mortgage law to which we have referred, that the crop which is therein subjected to the mortgage is not simply a growing product, but the harvested crop, which, in the case of growing sugar cane, necessarily includes the result of treating the cane at the sugar house,—that is, a crop of sugar and molasses.

From the text of the law we have quoted, and the exposition just given of its general import, the following conclusions result:

First. That the growing crop was, by operation of law, included in the mortgage to the Caja de Ahorros, even although the mortgage had not, as it did, expressly purported to embrace the fruits growing upon the mortgaged property.

Second. That the growing crop of cane continued to be affected by the mortgage after its harvest or manufacture into sugar up to the time of its removal or warehousing.

Third. That the rights of the mortgage creditor attached to indemnity for insurance upon the mortgaged property, including the crops, provided the loss occurred after the execution of the mortgage.

Under the construction which we have given the policy of insurance, these propositions are decisive in favor of the right of the mortgage creditor, unless it be that the sugar and molasses in question, although it had come from the growing cane, and was, at the time of the fire, in the sugar house as the result of the manufacture from such cane, or was in the process of manufacture, was not yet subject to the rights of the mortgage creditor, because it is to be considered as having been then "warehoused" within the meaning of that word as employed *in paragraph 8 of article 119 of the law [364] of 1880, which we have quoted. But to so hold would be, at one and the same time, to admit and deny the rights of the mortgage creditor to the avails of the crop, and to the indemnity arising from the insurance. This must follow, because it is impossible to conceive of the harvesting of growing sugar cane, without, at the same time, presupposing the existence in the sugar house of sugar and molasses as the result of the harvesting. We construe the warehousing referred to in the provision of the mortgage law in connection with the word "removed," with which it is associated. In other words, we construe it as relating to a distinct act of warehousing, separate from the mere existence of the manufactured product in the sugar house wherein it was made.

As, then, the mortgage, by operation of law, embraced the crop, and as also, by operation of law, the mortgage creditor was entitled to the benefits of the indemnity resulting from the insurance, it follows that the right of the mortgage creditor did not depend upon an assignment of the policy, and the contentions upon that subject are without merit.

The doctrine common to countries governed by the civil law is that a mortgage is indivisible. Code Napoleon, art. 2114; Paul Pont, Privileges et Hypotheques, vol. 1, p. 319, par. 330 *et seq.* And we think it is not to be doubted that the law of Spain, in this respect, was not different. Schmidt, Civil Law of Spain and Mexico, p. 108, art. 853. The mortgage being indivisible, the mortgage creditor had an undoubted

right to assert the entirety of his mortgage rights against any or all of the property affected by the mortgage.

The contention pressed at bar, that the mortgage creditor had no cause of action to recover the insurance money subject to his mortgage because the law gave the power to proceed to enforce the mortgage by what is known in the Spanish law as *via executiva*, we think is without merit. The existence of the summary remedy does not tend to the implication that the creditor might
[365] not, if he elected so to do, proceed *via ordinaria* to obtain judicially a decree recognizing his right of mortgage on the insurance money, and enforcing payment of the amount.

This is illustrated by a provision (art. 161) in the general regulations, put in force in 1893 for the execution of the mortgage law, wherein it is provided that where an indemnity for insurance on property covered by a mortgage becomes due in consequence of the destruction of the property by fire, before the maturity of the mortgage debt, the creditor has a right to compel the deposit of the sum of the insurance to await the period of the maturity of the mortgage obligation. Manifestly, if the mortgage creditor be endowed with this right before his mortgage debt becomes due, the right of such creditor to proceed separately to recover the insurance money after his debt becomes due must obtain. This case does not require us to pass upon, and we therefore do not decide whether, under the Spanish law, if there was a junior encumbrancer having some special right in or to the avails of the insurance money such junior encumbrancer would be entitled to compel the mortgage creditor to exhaust the other property covered by the mortgage before attempting to irrevocably impute or apply the proceeds of the insurance to the *pro tanto* extinction of the mortgage debt.

Fourth. All the questions concerning alleged misrepresentation in obtaining the policy, of misdescription of the property, of a material increase of the risk, of incendiarism, and of the failure to make the due proofs of loss required by the policy, depend for their ultimate determination upon questions of fact, which were concluded adversely to the plaintiff in error by the verdict of the jury. Although they are referred to, as they are not pressed in the brief of the plaintiff in error, we content ourselves with saying that we think the court, as to the matters in question, correctly applied the law to the state of the proof.

Fifth. The fire occurred on February 6, 1885. Suit was brought on April 23, 1902,
[366] and Lucas Amadeo was made a *party plaintiff on May 13, 1903. In other words, even although the cause of action on the policy only arose within a reasonable time after the making of proofs of loss, more than fifteen years elapsed between the arising of the cause of action and the bringing of this suit. Both parties at bar admit that the action on the policy was personal in its nature, and barred by the term of prescription governing actions of that character.

As we have seen, the defendant (plaintiff in error here) specially pleaded and relied upon the prescription of fifteen years. The applicability of that prescription is based upon article 1964 of the Civil Code, which provides: "A mortgage action prescribes after twenty years, and those which are personal and for which no special term of prescription is fixed, after fifteen years."

As both parties concede that there was no special term of prescription fixed by the Civil Code for an action upon an insurance policy, it follows that the right to sue on the policy was barred by the limitation in question, if that limitation applied. The defendants in error—the plaintiffs below—deny its applicability, and insist that the term of prescription was twenty years, and, moreover, insist that, even if the fifteen-year term applied, the action was not barred, because of interruptions of the prescription asserted to result from the proof as to alleged demands and acknowledgments. The trial judge, whilst rejecting the claim of the plaintiffs as to the twenty-year prescription, and maintaining that of the defendant as to the fifteen-year prescription, yet held the action not barred, because of the interruptive effect which the court considered arose from certain demands or acknowledgments, which it was deemed were established by the proof. Before coming to consider the alleged errors on this subject we must determine whether the time of prescription was fifteen years, as asserted by the defendant and held by the trial court, or twenty years, as contended by the plaintiffs.

The loss under the policy occurred in 1885, and the right of action arose, therefore, in that year. The Civil Code was *not [367] then applicable to Porto Rico, not having been extended to that island by royal decree until 1889, and the claim that the twenty-year prescription is the only controlling period is based upon that fact. Whilst it is conceded that, by the terms of the Civil Code, personal actions were barred by fifteen years, the argument is, that by the Code, actions which arose prior to its promulgation were to be controlled by the prior law, which, it is insisted, was twenty years. The provision of the Code relied upon to maintain this proposition is article 1939, which reads as follows:

"Article 1939. Prescription which began

to run before the publication of this Code shall be governed by the prior laws; but if, after this Code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if, according to said prior laws, a longer period of time may be required."

As the fifteen years fixed by the Code for the bringing of personal actions had not elapsed between the promulgation of the Code and the bringing of this action, it follows that the controversy was not within the terms of the proviso, and therefore the limitation of the cause of action is to be determined, not by the Code provision fixing fifteen years, but by the prior law. What was the term of prescription of personal actions under the prior law is, therefore, the question.

In the absence of express legislation concerning Porto Rico, what was the prior law applicable to that island concerning the limitations of personal actions must be fixed by ascertaining the period of prescription for personal actions generally prevailing under the Spanish law. Schmidt, Civil Law of Spain and Mexico, p. 35. Whilst the general Spanish law prior to the promulgation of the Civil Code is to be derived from a review of the successive Spanish codes, nevertheless, the Spanish law prevailing prior to the Code is primarily to be found in the code known as the Novisima Recopilación.

By law 5, title 8, book 2, of the Novisima Recopilación, it appears that the term of
[368] prescription of personal actions *was twenty years. 1 White, New Recopilación, p. 96. And from an edition of the Spanish codes, with concordance and notes, published at Madrid in 1850, under the text of the Novisima Recopilación in question (vol. 9, p. 458), it appears that the limitation of twenty years as to personal actions as expressed in the text of the Recopilación, prevailed as early as 1348, in the code known as the Ordenamiento de Alcalá.

Moreover, the supreme court of Spain has held, in repeated decisions, that the provision found in the Novisima Recopilación, above alluded to, was the general law of Spain on the subject, in force prior to the adoption of the Civil Code, and that by that law the limitation of personal actions was twenty years. References to a Spanish publication in which many such decisions are reported are given in the margin. †

It follows that the court below erred in applying the fifteen-year period of prescription, and that as twenty years had not elapsed from the time the cause of action arose to the bringing of the suit on the policy, the right to sue was not barred by limitation.

But it is insisted that, as the trial judge erred, either in admitting evidence or in the legal effect which he gave to the evidence admitted, concerning acts which were held adequate to interrupt the course of the fifteen-year prescription, there should be a reversal, despite the fact that it is now decided that a longer period of prescription controlled, concerning which the acts of interruption were wholly irrelevant, and *there- [369]
fore not in any way prejudicial. We cannot yield our assent to the proposition. The contention that there should be a reversal because the defendant might have introduced evidence at the trial in support of certain defenses set up in its answer other than prescription, if it had not relied upon the certainty of securing a reversal by this court of any judgment which might be obtained against it, because of what was deemed to be the erroneous rulings as to the interruption of the prescription, is without merit. What term of prescription was applicable to the action was a disputed question at the trial; and we cannot admit that the defendant, by neglecting to make full defense, and by speculating on the chances of a verdict in its favor, could secure the right to a reversal of a verdict and judgment against it because of an error of law which, in a legal sense, occasioned no possible prejudice. And equally without merit is the contention that there would be prejudice if there be not a reversal, because in this court, relying upon the sufficiency of the errors assigned relating to the action of the court concerning the proof of interruption of the fifteen-year prescription, there was a neglect to assign other substantial errors which it is asserted the trial court committed as to the admissibility of certain evidence and the striking out of various answers of a witness who had given testimony under a commission. As we are at liberty, however, despite the absence of an assignment of error on the subject, to con-

†Decisions of the supreme court of Spain sitting at Madrid, reported in the Jurisprudencia Civil, holding the period of prescription of twenty years applicable to personal actions: Sentence of January 21, 1863, vol. 8, p. 54, No. 20; sentence of March 17, 1865, vol. 11, p. 326, No. 92; sentence of April 8, 1865, vol. 11, p. 469, No. 139; sentence of June 4, 1886, vol. 60, p. 24, No. 7*a*; and sentence of October 3, 1892, vol. 72, p. 142, No. 40 of the last-mentioned sentence. See also sentence of March 24, 1892, vol. 71, p. 307 (after the enactment of the Code); sentence of March 9, 1865, vol. 14, p. 264, No. 75; sentence of May 12, 1874, vol. 30, p. 56, No. 181; sentence of April 1, 1884, vol. 54, p. 548, No. 137; sentence of March 12, 1888, vol. 61, p. 404, No. 89; and sentence of April 19, 1901, vol. 91, p. 556, No. 105.

sider a plain error arising on the record, we have given our attention to the subjects referred to, and content ourselves with saying that we think they are devoid of merit.

It remains only to consider the error alleged to have been committed by the trial court in allowing Lucas Amadeo to be made a party plaintiff.

The elementary rule is that amendments are within the sound discretion of the trial court, and are not susceptible of review on error, except for a clear abuse. *Gormley* v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453.

The objection made at the trial to the [370] amendment was that *it substituted a new party and an entirely new cause of action. That there was no clear abuse in this case we think results from article 156 of the Law of Civil Procedure for Cuba and Porto Rico, War Department translation of 1899, providing as follows:

"Causes of action against several persons, or by several persons against one, arising from the same source of title, or based upon the same cause of action, may be joined and brought in one action."

The claims of both parties depended upon the contract of insurance. There was no inherent antagonism between the two claims, since the amendment making Lucas Amadeo a party expressly alleged that his rights in and to the policy were subordinate to those of Miller, special master. We consider the provision of the Code of Procedure above quoted as analogous to the provision in the codes of a number of the states of the Union, by which an action is required to be brought in the name of the real parties in interest, and it is allowable to join as parties-plaintiff those having an interest in the recovery sought. *Fireman's Fund Ins. Co.* v. *Oregon R. & Nav. Co.* 45 Or. 53, 67 L. R. A. 161, 76 Pac. 1075; *Fairbanks* v. *San Francisco & N. P. R. Co.* 115 Cal. 579, 47 Pac. 450; *Home Ins. Co.* v. *Gilman*, 112 Ind. 7, 13 N. E. 118; *Winne* v. *Niagara F. Ins. Co.* 91 N. Y. 185, 192; *Pratt* v. *Radford*, 52 Wis. 114, 8 N. W. 606.

The contention in the argument that the permitting of Lucas Amadeo to be joined as plaintiff was, in legal effect, a consolidation of pending causes, which could not be made after answer filed, relying on article 157 of the Code of Civil Procedure, was not made below, since the ground of objection made at the trial was that the amendment substituted a new party and an entirely new cause of action, not that it was merely too late to permit the amendment.

But it is further contended that, as the bill of exception states that no evidence was offered proving or tending to prove any transfer by the Credito Mercantil of the policy sued on to Lucas Amadeo, therefore there was no proof whatever *tending to es- [371] tablish title in Lucas Amadeo to the policy, and hence there must be a reversal. On the state of the record, however, this objection is not available. The amended declaration making Amadeo a party, and alleging a transfer to him by the Credito Mercantil, was not traversed. It is argued, however, that no express traverse was necessary, because the plea of the general issue filed to the declaration before the allowance of the amendment must be applied to the amendment, and, therefore, the amended declaration should be regarded as having been traversed. Conceding, for the sake of the argument, the rule ordinarily to be as stated, and further conceding that that rule obtained under the procedure in Porto Rico, we do not think that it is here applicable. We say this because the record establishes that the case was tried upon the hypothesis that the transfer to Amadeo by the Credito Mercantil was not disputed, but, on the contrary, was an admitted fact in the case. Thus, when the court came to charge the jury, it enumerated specifically various issues of fact which they were to determine, and among those issues was not embraced any controversy whatever upon the fact of the transfer by the Credito Mercantil to Lucas Amadeo, as alleged in the amendment to the declaration, and no exception was taken to the action of the court in this particular. Moreover, although various instructions were asked to be given to the jury on behalf of the defendant, no request was made which in any way intimated that the defendant disputed the fact that Lucas Amadeo had acquired the interest, if any, of the Credito Mercantil in the policy in question, as alleged in the amended declaration. Indeed, we think the record affirmatively establishes that the case was tried below upon the assumption by all the parties that if there was a right to recover on the part of Miller, special master, and Lucas Amadeo had properly been joined as a party plaintiff, a joint recovery was not improper.

Judgment affirmed.

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*JOHN D. JACK, *Plff. in Err.*, [372]

v.

STATE OF KANSAS.

(See S. C. Reporter's ed. 372-382.)

Constitutional law—due process of law—privilege of witnesses—sufficiency of

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NOTE.—*On privilege of witnesses*—see notes to Cooper v. State, 4 L.R.A. 766; Rice v. Rice, 11 L.R.A. 591; *Re* Buskett, 14 L.R.A. 407; United States v. James, 26 L.R.A. 418; Levy v. Superior Court, 29 L.R.A. 811; and Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

Immunity.—The danger that the testimony given in an examination under Kan. Laws 1897, chap. 265, § 10, might incriminate the witness as a violator of the Federal anti-trust law, and of the possible use, in a Federal prosecution for a violation of such statute, of the testimony given in the state proceeding, is so unsubstantial and remote as not to make an imprisonment for refusal to testify a deprivation of liberty without due process of law, where the statute is construed by the state courts to render material only such questions as relate to transactions within the state, and grants full immunity from prosecution in the state courts.

[No. 54.]

Argued and submitted Nov. 8, 1905. Decided Nov. 27, 1905.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment affirming a judgment of the District Court of Shawnee County, in that state, imprisoning a person for his refusal to testify in an examination under the Kansas antitrust act. *Affirmed.*

See same case below, 69 Kan. 387, 76 Pac. 911.

Statement by Mr. Justice **Peckham:**

The plaintiff in error seeks to review the judgment of the supreme court of the state of Kansas, affirming a judgment against him of imprisonment for contempt, entered by direction of the district court of Shawnee county, in that state. The plaintiff in error had been duly subpœnaed as a witness to appear before the above mentioned district court, and was examined before that court under and by virtue of the provisions of § 10 of chapter 265 of the Laws of Kansas of 1897. Gen. Stat. 1901, § 7873. The statute is known as the Kansas anti-trust act. Section 10 is reproduced in the margin.†

[373] *The proceeding was commenced in September, 1903, by the attorney general and county attorney of Shawnee county, and those officers presented to the court their verified application, informing it of the existence of combinations of persons engaged in the operation of coal mines in Osage county to fix the price of coal at the mines, and the price to be charged to purchasers; that the members of the combination met at a place in Shawnee county monthly to fix the minimum price to be charged for coal, and that they would not sell coal for less than the minimum price so fixed, and that the agreements thus entered into were by them carried out and executed. The plaintiff in error was engaged in operating a coal mine in Osage county, and was named in the application as one who had a knowledge concerning the existence of the combination, and a subpœna was thereupon asked for to be served upon him. The district judge granted the application. The subpœna was duly served, and the plaintiff in error appeared pursuant thereto before the district judge and answered some questions that were propounded him by the attorney general or county attorney. Other questions were put to him in relation to his knowledge of the meetings, and as to the existence of any agreement between *the operators of the [374] coal mines of Osage county, and with regard to the fixing of the price of coal to be sold to residents and citizens of Kansas. The plaintiff in error refused to answer these questions, and assigned reasons for such refusal at some length; but the chief ground now relied on in this court as forming a Federal question is that the statute violated the 5th and 14th Amendments of the Federal Constitution; that the statute did not furnish a broad enough indemnity, and the judgment of imprisonment deprived him of his liberty without due process of law.

The court held that the excuses given for declining to answer were insufficient, and thereupon instructed and directed the witness to answer the questions propounded to him, but he still refused to do so. Whereupon the court found him guilty of a direct contempt of court in refusing to answer the questions, and ordered that

†Section 10, being § 7873, Gen. Stat. 1901, reads:

"The several district courts of this state and the judges thereof, shall have jurisdiction, and it shall be their duty, upon good cause shown, and upon written application of the county attorney or the attorney general, to cause to be issued by the clerk of said court subpœnas for such witnesses as may be named in the application of a county attorney or the attorney general, and to cause the same to be served by the sheriff of the county where such subpœna is issued; and such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpœna, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who falls or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpœnaed shall be taken down by the reporter of said court, and shall be transcribed and placed in the hands of the county attorney or the general attorney, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpœnaed as provided for in this section shall be compelled to attend from any county in the state."

he be committed to the jail of Shawnee county until he should answer them, but not beyond a period of thirty days.

The plaintiff in error then appealed from the judgment rendered against him to the supreme court, where it was affirmed in May, 1904. To review that judgment of affirmance the plaintiff in error has brought the case here by writ of error.

Messrs. **W. H. Rossington** and **Charles Blood Smith** submitted the cause for plaintiff in error. *Messrs. J. T. Pringle* and *R. B. Giluly* were with them on the brief.

Mr. **Edwin A. Austin** argued the cause, and, with *Messrs. C. C. Coleman* and *Otis E. Hungate*, filed a brief for defendant in error.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The supreme court of Kansas has held in this case that the statute under which the plaintiff in error was sentenced to be imprisoned for a contempt of court was a valid statute, and did not violate either the Constitution of the state or of the Federal government.

One portion of the statute in question has already been passed upon by this court and decided to be a valid provision as construed by the state court. *Smiley* v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289. The decision in that case has no application to the section involved herein.

It is contended on the part of the plaintiff in error that the court below denied to him the protection of § 10 of the Bill of Rights of the Constitution of Kansas, and also denied to him the benefit of the provision of the 5th Amendment to the Constitution of the United States, that no person should be compelled, in any criminal case, to be a witness against himself, and also that he has been deprived of the benefit of the 14th Amendment. We are bound by the decision of the supreme court of Kansas that the statute in question violated no provision of the Constitution of that state, and that it was a valid statute so far as that instrument was concerned. This doctrine is familiar, and a few of the many cases upon the subject are cited in *Smiley* v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

It has been so frequently held as not to warrant the citation of many authorities, [380] that the first ten amendments to the *Federal Constitution operate on the national government only, and were not intended to, and did not, limit the powers of the states in respect to their own people. *Spies* v. *Illinois* (*Ex parte Spies*) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Brown* v. *New Jersey*, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77. That portion of the 5th Amendment, therefore, already cited, has no application in a proceeding like this, in a state court, under a state statute.

The plaintiff in error, however, contends that the denial of his claim of right to refuse to answer the questions was in violation of the 14th Amendment to the Constitution of the United States, and deprived him of his liberty without due process of law. This, in reality, is the sole question in the case. He contends that the immunity granted by the state statute, while enforcing the giving of testimony which may incriminate the party interrogated, as a violator of that statute, is not (and could not be) broad enough to provide immunity from prosecution under the Federal antitrust statute, and that compelling him to answer questions under such circumstances, which might incriminate him as a violator of the Federal antitrust statute, and upon his refusal condemning him to imprisonment, deprived him of his liberty without due process of law, within the meaning of the 14th Amendment, and the statute is therefore void. The state statute could not, of course, prevent a prosecution of the same party under the United States statute, and it could not prevent the testimony given by the party in the state proceeding from being used against the same person in a Federal court for a violation of the Federal statute, if it could be imagined that such prosecution would be instituted under such circumstances. Is this fact fatal to the proceeding? We think not. Assuming for this purpose that if the statute failed to give sufficient immunity from prosecution or punishment, it would violate the 14th Amendment, and that an imprisonment by virtue of the statute would be depriving the witness of his liberty without due process of law, we come to an examination of the extent of the immunity in this case.

*The question has been before this court [381] in cases somewhat similar to this, although they arose under Federal statutes. In *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, the immunity provided for by § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661) was held not to be broad enough to enable the prosecution to insist upon an answer from the witness. In the subsequent case of *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819,

5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, the statute there involved was held to afford complete immunity to the witness, and he was therefore obliged to answer the questions that were put to him, although they might tend to incriminate him. In that case it was contended on the part of the witness that the statute did not grant him immunity against prosecutions in the state courts, although it granted him full immunity from prosecution by the Federal government. This contention was held to be without merit. While it was asserted that the law of Congress was supreme, and that judges and courts in every state were bound thereby, and that therefore the statute granting immunity would probably operate in the state as well as in the Federal courts, yet still, and aside from that view, it was said that while there might be a bare possibility that a witness might be subjected to the criminal laws of some other sovereignty, it was not a real and probable danger, but was so improbable that it needed not to be taken into account.

The supreme court of Kansas has held in this case that in the proceeding under the section in question the witness can only be asked material questions relating to information regarding any alleged violation of the statute relating to transactions within the state, and that it would not be material, and consequently not permissible, to ask a witness in relation to matters of interstate commerce, which might constitute a violation of the Federal antitrust act. Therefore, the opinion continued, if, in the course of an examination properly made, in regard to transactions within the state, information should incidentally be given which might possibly be used in a prosecution under the Federal act, such possible prosecution did not operate as a reason for permitting the witness to refuse
[382] to *answer; that it could not be presumed that under such circumstances any Federal prosecution would ever take place, and that it was, within the reasoning of *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, a danger so unsubstantial and remote that it was not necessary (as it was impossible) for the statute to provide against it. We regard this as a sound view. We do not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the government for such purpose. We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough. The principles underlying the provision itself have been thoroughly treated in the above-cited cases, and it would be out of place to here renew their discussion.

We are of opinion that no Federal right of the plaintiff in error has been violated, and *the judgment of the Supreme Court of Kansas must, therefore, be affirmed.*

Mr. Justice **Brewer** and Mr. Justice **McKenna** dissented.

MARY McCUNE, by Daniel Donahue, Her Guardian *ad litem*, *Appt.*,

v.

N. FRED ESSIG and Emma C. Essig, His Wife.

(See S. C. Reporter's ed. 382–390.)

1. **Removal of causes—cases arising under Federal laws.**—A question depending for solution upon the laws of the United States, and therefore justifying removal from a state to a Federal circuit court, is involved in a suit by the daughter of a deceased homestead settler to establish her title under the operation of the state laws, as against his widow, to whom, in accordance with U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, pp. 1390, 1394, the patent has issued.

2. **Public lands—patent to widow of homestead settler—relation.**—The doctrine of relation cannot successfully be invoked to confer any right or interest in the land under the operation of the state laws upon the daughter of a deceased homestead settler, as against his widow, to whom, in accordance with the provisions of U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, pp. 1390, 1394, the patent has issued.

[No. 61.]

Submitted November 9, 1905. Decided November 27, 1905.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Washington, Eastern Division, sustaining a demurrer to the complaint in a suit in equity to establish title to real property, which had been removed from the Superior Court in and for Lincoln County, in that state. *Affirmed.*

See same case below, 122 Fed. 588.

The facts are stated in the opinion.

NOTE.—*On removal of causes where the Federal Constitution, statute, or treaty comes in question*—see notes to Little York Gold Washing & Water Co. v. Keyes, 24 L. ed. U. S. 656; Ferguson v. Ross, 3 L.R.A. 322; Austin v. Gagan, 5 L.R.A. 476; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

Mr. **W. E. Cullen** submitted the cause for appellant:

It has not been the policy of this court to determine questions involving the beneficial or equitable title to real estate, although the title had been acquired from the United States.

Blackburn v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

The allegation that the construction of the United States laws which are referred to in the petition is involved in the determination of this case is a mere conclusion. There is no fact alleged which shows that any particular part or portion of these laws must be construed in the determination of this case. It is clearly manifest that they were complied with, and the patent issued to the only person to whom it could have been issued. The essential facts necessary to change the jurisdiction are not contained in the petition.

Little York Gold-Washing & Water Co. v. *Keyes*, 96 U. S. 199, 24 L. ed. 656.

It is admitted by all parties, and is a fact beyond doubt, that the widow took the legal title under and by virtue of the patent. The patent operated as a release to her of all the interest of the United States in the land. Whether she took the beneficial interest as well as the legal title depends upon the effect to be given the acts of the legislature of the state, and not upon the acts of Congress.

Romie v. *Casanova*, 91 U. S. 379, 23 L. ed. 374; *McStay* v. *Friedman*, 92 U. S. 723, 23 L. ed. 767; *Hoadley* v. *San Francisco*, 94 U. S. 4, 24 L. ed. 34; *Blue Bird Min. Co.* v. *Largey*, 49 Fed. 289; *Blackburn* v. *Portland Gold Min. Co. supra; Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

After any part of the public domain has been entered by a homesteader, and notice of such entry has been properly filed in the proper land office, such land, so entered, becomes segregated from the public domain, and such settler has a vested right therein against everybody and the government as well; and, when the patent for such land issues, it relates back and takes effect as of the time of such entry.

Shepley v. *Cowan*, 91 U. S. 330, 337, 23 L. ed. 424, 427; *Sturr* v. *Beck*, 133 U. S. 541, 550, 33 L. ed. 761, 765, 10 Sup. Ct. Rep. 350; *Northern P. R. Co.* v. *McCormick*, 89 Fed. 659; *Witherspoon* v. *Duncan*, 4 Wall. 210, 218, 18 L. ed. 339, 343; *Bardon* v. *Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 361, 33 L. ed. 363, 366, 10 Sup. Ct. Rep. 112; *United States* v. *Turner*, 54 Fed. 228; *Burlington, K. & S. W. R. Co.* v. *Johnson*, 38 Kan. 142, 16 Pac. 125; *Gibson* v. *Chouteau*, 13 Wall. 92, 101, 20 L. ed. 534, 537.

That question having been settled by this court, it no longer presents a Federal question.

Kansas v. *Bradley*, 26 Fed. 289; *Blue Bird Min. Co.* v. *Largey, supra.*

When William McCune entered this land he had not the legal title, but he had an immediate equitable interest, and the exclusive right of possession until forfeited by failure to carry out the terms of his entry.

United States v. *Turner, supra.*

Assuming the jurisdiction of this court to exist, then it is submitted that it will be bound by the rule laid down by the supreme court of the state of Washington in the cases of *Forker* v. *Henry*, 21 Wash. 235, 57 Pac. 811, and *Ahern* v. *Ahern*, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023, as determinative of a settled rule of property in the state of Washington, that, when the title is initiated during the community, and perfected after dissolution, the property is community.

Lowndes v. *Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

The states have the power to regulate the tenure of real property and the rules of its transfer and descent.

United States v. *Fox*, 94 U. S. 315, 24 L. ed. 192; *Arndt* v. *Griggs*, 134 U. S. 321, 33 L. ed. 920, 10 Sup. Ct. Rep. 557; *Hutchinson Invest. Co.* v. *Caldwell*, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504.

Mr. **George Turner** submitted the cause for appellees. *Messrs. F. H. Graves* and *W. G. Graves* were with him on the brief:

Prior to a patent, or, at least, prior to a full compliance with the conditions which entitle him to a patent, the settler has no more than a right of possession, and a right to be preferred in the purchase of the lands. As against the United States, the owner of the lands, he acquires no vested right until he has fully complied with the requirements of the act; and Congress may at any time vest title in another.

Shiver v. *United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *Campbell* v. *Wade*, 132 U. S. 34, 33 L. ed. 240, 10 Sup. Ct. Rep. 9; *Wagstaff* v. *Collins*, 38 C. C. A. 19, 97 Fed. 3; *Frisbie* v. *Whitney*, 9 Wall. 187, 19 L. ed. 668; *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424; *Gonzales* v. *French*, 164 U. S. 338, 345, 41 L. ed. 458, 460, 17 Sup. Ct. Rep. 102.

No doubt this right is, in a sense, a property right; but it is held at the will of Congress. It may be forfeited for noncompliance with existing laws, or taken away

by changes in those laws. It becomes subject to state regulation only in so far as Congress permits.

Anderson v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Hall* v. *Russell*, 101 U. S. 503, 513, 514, 25 L. ed. 829, 833.

When a settler upon public lands under the homestead laws dies before he has become the purchaser of the lands, *i. e.*, before he has done those things which entitle him to the lands, his right to purchase, being purely a personal right, dies with him. Those whom Congress recognizes as entitled to complete the performance of the conditions do so, not as successors in interest from the deceased settler, but as grantees, or, rather, donees, of the United States.

Hall v. *Russell*, 101 U. S. 503, 25 L. ed. 829; *Maynard* v. *Hill*, 125 U. S. 190, 215, 31 L. ed. 654, 661, 8 Sup. Ct. Rep. 723; *Cutting* v. *Cutting*, 6 Sawy. 396, 6 Fed. 259; *Stubblefield* v. *Menzies*, 8 Sawy. 41, 11 Fed. 270; *United States* v. *Tichenor*, 8 Sawy. 142, 12 Fed. 421; *Hershberger* v. *Blewett*, 55 Fed. 177; *Cooper* v. *Wilder*, 111 Cal. 195, 52 Am. St. Rep. 163, 43 Pac. 591; *Wittenbrock* v. *Wheadon*, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; *Towner* v. *Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; *Rogers* v. *Clemmans*, 26 Kan. 522; *Dawson* v. *Mayall*, 45 Minn. 408, 48 N. W. 12; *Gjerstadengen* v. *Van Duzen*, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; *Chapman* v. *Price*, 32 Kan. 446, 4 Pac. 807.

The doctrine of relation is no more relevant to this case than is the doctrine of predestination.

Gibson v. *Chouteau*, 13 Wall. 92, 101, 20 L. ed. 534, 537.

Jurisdiction of the Federal courts over this cause is asserted upon the ground that it is one arising under the Constitution or laws of the United States. A case may be said to so arise whenever its correct decision depends upon the construction of either (*Cohen* v. *Virginia*, 6 Wheat. 379, 5 L. ed. 285), or when the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction.

Osborn v. *Bank of United States*, 9 Wheat. 822, 6 L. ed. 224.

The appellant denies the jurisdiction of the Federal courts upon the ground that title has passed from the United States, and the only controversy is as to the beneficial interests in that title. This is begging the whole question. The appellant may assert that, but the appellees deny it; and the only manner in which it can be determined who is right is by construing a law of the United States.

Anderson v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Bernier* v. *Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; *Hutchinson Invest. Co.* v. *Caldwell*, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504.

Mr. Justice **McKenna** delivered the opinion of the court:

Suit in equity to establish title in appellant to an undivided one half of northeast quarter of section 6, township 25 north, range 38 east, Washington meridian 2, and for accounting of rents and profits, and for partition between appellant and appellees.

It was originally brought in the superior court in and for Lincoln county in the state of Washington. A demurrer was filed to the amended complaint, and a petition to remove the suit to the circuit court for the district of Washington, eastern division, on the ground that the suit involved the construction of §§ 2291 and 2292 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1390-1394), and of all statutes of the United States relating to homesteads. The suit was removed. In the circuit court a motion was made to remand, which was denied. The demurrer was sustained, and appellant, electing to stand upon her bill, it was decreed that she had no right, title, or interest in the land. 118 Fed. 273. The decree was affirmed by the circuit court of appeals. 122 Fed. 588.

The facts as exhibited by the bill of complaint are that appellant is the daughter of William McCune, deceased, and his wife, Sarah McCune, now Sarah Donahue, and the stepdaughter of Daniel Donahue, who appears as her guardian *ad litem*. William McCune and his wife, Sarah, settled on the land in controversy, it being a part of the public domain, and subject to settlement under the homestead laws. On the 4th of April, 1884, McCune filed a claim to the land as a homestead in the proper land district. In the same year he died intestate, *leaving surviving as his [387] only heirs appellant and his wife, Sarah. They continued to reside on the land until December 17, 1889, upon which day the mother of appellant made the required proof of full compliance with the homestead laws, and on the 6th of March, 1891, a patent was issued to her. In the year 1892 she, having become Mrs. Donahue, sold and conveyed the land to appellees, who went into possession of it and have been in possession of it ever since. The

value of the land is $6,400. The patent recites:

"Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Spokane Falls, Washington, it appears that, pursuant to the act of Congress approved 20th May, 1862 [12 Stat. at L. 392, chap. 75, U. S. Comp. Stat. 1901, p. 1388], 'to secure homesteads to actual settlers on the public domain,' and the acts supplemental thereto the claim of Sarah Donahue, formerly the widow of William McCune, deceased, has been established and duly consummated, in conformity to law, for the south half of the northeast quarter and the lots numbered one and two of section six, in township twenty-five north of range thirty-eight of Willamette meridian in Washington, containing one hundred and sixty-three and eighty-four hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

"Now know ye, that there is, therefore, granted by the United States unto the said Sarah Donahue the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said Sarah Donahue and to her heirs and assigns forever."

The action of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground; to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the state. Sections 4488, 4489,
[388] 4490, and *4491 of the statutes of Washington provide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise, or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. 1 Ballinger's Anno. Codes & Statutes. Relying on these provisions the argument of appellant is, and we give it in the words of her counsel:

"When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession, until forfeited by failure to carry out the terms of his entry. *United States* v. *Turner*, 54 Fed. 228.

"The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent."

But this is begging the question. What interest arose in McCune by his entry, who could, upon his death, fulfil the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. *Bernier* v. *Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244. The motion to remand was rightly overruled. On the merits we think the ruling of the lower courts was also right. *Hutchinson Invest. Co.* v. *Caldwell*, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504. *Hoadley* v. *San Francisco*, 94 U. S. 4, 24 L. ed. 34, and other cases relied on by appellant, are not in point.

Chapter 5, title 32, of the Revised Statutes, provides who may enter public lands as a homestead, and the conditions to be observed as to entry and settlement. By §§ 2291 and 2292 it is provided as follows:

"Sec. 2291. No certificate, however, shall be given or patent *issued therefor until the
[389] expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry, or, if he be dead, his widow, or, in case of her death, his heirs or devisee, or, in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated except as provided in section twenty-two hundred and eighty-eight (U. S. Comp. Stat. 1901, p. 1385), that he, she, or they will bear true allegiance to the government of the United States, then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law."

"Sec. 2292. In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children." U. S. Comp. Stat. 1901, pp. 1390, 1394.

It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter, and what he shall do to complete title to the right thus acquired. He may reside upon and culti-

vate the land, and by doing so is entitled to a patent. If he die, his widow is given the right of residenee and eultivation, and "shall be entitled to a patent, as in other cases." He can make no devolution of the land against her. The statute whieh gives him a right, gives her a right. She is as much a benefieiary of the statute as he. The words of the statute are elear, and express who in turn shall be its benefieiaries. The contention of appellant reverses the order of the statute, and gives the ehildren an interest paramount to that of the widow through the laws of the state.

The law of the state is not competent to do this. As was observed by Cireuit Judge Gilbert: "The law of the state of Washington governs the deseent of lands lying within the state, but the question here [390]is whether there had been any *descent of land." And, against applieation of the state law, the learned judge eited *Wilcox* v. *Jackson*, 13 Pet. 517, 10 L. ed. 273, and *Bernier* v. *Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244. In the former it was said that whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subjeet to state legislation. In *Bernier* v. *Bernier* it was said that the objeet of §§ 2291 and 2292 was "to provide the method of eompleting the homestead elaim and obtaining a patent therefor, and not to establish a line of deseent or rules of distribution of the deeeased entryman's estate." See *Hall* v. *Russell*, 101 U. S. 503, 25 L. ed. 829. And hence it was decided that Mrs. Donahue took the title free from any interest or right in the appellant under the laws of the state.

Against the effeet of the patent conveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted "that the title to the real estate in the ease at bar passed and vested aeeording to the laws of the United States by patent." But it is contended that, a beneficial interest having been ereated by the state law in McCune when the title passed out of the United States by the patent, it "instantly dropped baek in time to the inception or initiation of the equitable right of William McCune, and that the laws of the state intercepted and prevented the widow from having a eomplete title without first eomplying with the probate laws of the state." This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which § 2291 of the Revised Statutes does not impose. It may be that appellant's eontention has support in some expressions in the state deeisions. If, however, they may be eonstrued as going to the extent eontended for, we are unable to aeeept them as eontrolling.

Decree affirmed.

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*WILLIAM M. ESTES, *Appt.*, [391]

v.

RICHARD A. TIMMONS.

(See S. C. Reporter's ed. 391-396.)

Public lands—conclusiveness of decisions of Land Department—perjury as ground for equitable relief.—Perjury on a hearing before the Land Department of a contest over an entry under the homestead laws is not ground for equitable relief against the decision of the Department.

[No. 74.]

Submitted November 10, 1905. Decided November 27, 1905.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a deeree of the District Court of Pottawatomie County, in that territory, sustaining a demurrer to a bill in equity to establish a trust in land settled under the homestead laws. *Affirmed.*

See same ease below, 12 Okla. 537, 73 Pac. 303.

The facts are stated in the opinion.

Mr. **S. D. Luckett** submitted the cause for appellant:

The Secretary of the Interior is the guardian of the people of the United States over the public lands. The obligations of his oath of offiee oblige him to see that the law is carried out, and that none of the public domain is wasted, or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

Knight v. *United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The United States is so far interested in keeping the title to a tract of public land within the jurisdiction of the Land Department until the question as to who is entitled to a patent has been properly de-

NOTE.—*On the effect and conclusiveness of decisions of the Land Department*—see notes to Hartman v. Warren, 22 C. C. A. 38: and Carson City Gold & Silver Min. Co. v. North Star Min. Co. 28 C. C. A. 344.

termined that suit will be brought in the name of the United States to vacate a patent improvidently issued before the Department has fully determined this question.

Germania Iron Co. v. *United States,* 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; *Williams* v. *United States,* 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457.

Cases of this kind have even gone to the extent of recognizing the right of a party whose claim to a tract of public land had not been fully determined by the Land Department to go into the courts himself to maintain his claim as against the party to whom patent had issued.

Duluth & I. Range R. Co. v. *Roy,* 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549.

Courts of justice have power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the register and receiver, confirmed by the commissioner, in a case where they have been imposed upon.

Garland v. *Wynn,* 20 How. 6, 15 L. ed. 801.

This court has sustained the lower courts where they have examined the entire proceeding in the Land Department, including the testimony taken in a contest case, to determine whether a patent issued and involved in the suit had been obtained rightfully or not.

Barnard v. *Ashley,* 18 How. 43, 15 L. ed. 285; *Lytle* v. *Arkansas,* 22 How. 193, 16 L. ed. 306; *Lindsey* v. *Hawes,* 2 Black, 554, 17 L. ed. 265; *Carr* v. *Fife,* 156 U. S. 494, 39 L. ed. 508, 15 Sup. Ct. Rep. 427; *Johnson* v. *Howsley,* 13 Wall. 72, 20 L. ed. 485.

This court recognizes the obtaining of a decision by the officials of the Land Department by means of imposition upon them through false swearing as sufficient ground for reviewing their action.

Lytle v. *Arkansas, Lindsey* v. *Hawes,* and *Carr* v. *Fife, supra.*

Where fraud or imposition has been practised on the party interested, or on the officers of the law, or where these have clearly mistaken the law of the case as applicable to the facts,—courts of equity may give relief.

Baldwin v. *Stark,* 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473.

Mr. **J. H. Everest** submitted the cause for appellee:

To charge the holder of legal title to land under a patent as trustee of another, the claimant must show himself entitled to it, and its refusal to him in consequence of errors in the rulings of the Land Department, under the law applicable to the facts found. It is not sufficient to show that there may have been error in adjudging the title to the patentee.

Bohall v. *Dilla,* 114 U. S. 47–51, 29 L. ed. 61–63, 5 Sup. Ct. Rep. 782; *Sparks* v. *Pierce,* 115 U. S. 408–413, 29 L. ed. 428, 429, 6 Sup. Ct. Rep. 102.

In an action to declare a resulting trust where the plaintiff claims the land under the homestead laws, an essential averment of the petition, and one without which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated, and improved the land for such a period of time and to such an extent that, upon final proof, he would be entitled to the patent thereto.

Baldwin v. *Keith,* 13 Okla. 624, 75 Pac. 1124.

The appellant, Estes, being merely an unsuccessful contestant for a preference right, cannot question the judgment of the Land Department in a suit in equity to declare a trust.

Emblen v. *Lincoln Land Co.* 184 U. S. 661–663, 46 L. ed. 736, 737, 22 Sup. Ct. Rep. 523; *Graham* v. *Great Falls Water Power & Townsite Co.* 30 Mont. 393, 76 Pac. 808.

This being a suit in equity, the plaintiff, to maintain it, must offer to do equity. Nowhere in the petition does the appellant offer to pay the appellee, Timmons, the moneys expended by him in obtaining title to the tract of land, such as the purchase price, fees, and commissions paid the government, etc.; nor does he make any general offer to do equity which in general terms might satisfy this requirement of a bill in equity.

Thornton v. *Peery,* 7 Okla. 441, 54 Pac. 649; *McQuiddy* v. *Ware,* 20 Wall. 14, 22 L. ed. 311.

The petition of the plaintiff in the court below stated no cause of action for the reason that he seeks to overturn a decision of the Secretary of the Interior, and said petition does not exhibit or set out in any way the decision complained of.

Myers v. *Berry,* 3 Okla. 612, 41 Pac. 581; *Thornton* v. *Peery, supra.*

The frauds for which a bill in chancery will be sustained to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction or special tribunal, are frauds extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in the former suit.

United States v. *Throckmorton,* 98 U. S. 61–67, 25 L. ed. 93–95; *Vance* v. *Burbank,* 101 U. S. 514–521, 25 L. ed. 929–931; *United States* v. *Minor,* 114 U. S. 233–244, 29 L. ed. 110–114, 5 Sup. Ct. Rep. 836; *State* v. *Bachelder,* 5 Minn. 223, 80 Am. Dec. 410, Gil. 178.

Mr. Justice **McKenna** delivered the opinion of the court:

Bill in equity to declare appellee trustee of appellant of the south half of the southeast quarter of section 18, T. 10 N., R. 4 E., in the county of Pottawatomie, Oklahoma. Appellee holds patent of the United States. The charge is that he obtained the patent by imposition and fraud practised upon the Land Department. The trial court sustained a demurrer to the bill, and entered a judgment dismissing it. The judgment was affirmed by the supreme court of the territory. 12 Okla. 537, 73 Pac. 303.

The essential averments of the bill are that the land is a part of Sac and Fox reservation in the territory of Oklahoma, which was thrown open to settlement and homestead entry under the homestead laws of the United States, September 22, 1891, under the proclamation of the President of the United States, issued September 18, 1891. 27 Stat. at L. 989. The appellant was qualified to make settlement and entry of said land, and immediately after 12 o'cloek noon of September 22, and before any other qualified person, settled upon the land. Immediately thereafter he commenced to erect a dwelling house and established his residence thereon, and cultivated and improved the same in compliance with the homestead laws. On the 25th September he made a homestead entry thereon at the land office at Oklahoma City. Appellee filed an affidavit contesting the entry, in which he falsely and fraudulently alleged that he made settlement on the land immediately after 12 o'clock noon of September 22, 1891, and prior to appellant. The contest came on for hearing on the 5th of July, 1892, and after hearing, the register and receiver of the local land office held that appellee was the prior settler, and appellant's entry was canceled, and appellee was allowed to enter the land, May 21, 1894. On the 26th of September, 1894, appellant filed an affidavit of contest against appellee
[393] and his entry, *alleging that appellee was not qualified to make entry, for the reason that he entered upon and occupied the land and other parts of the reservation prior to noon of the 22d day of September, 1891, and after September 18, 1891. The contest was heard and the land officers found adversely to the contention. This ruling was affirmed successively by the Commissioner of the General Land Office and the Secretary of the Interior, and patent issued to the appellee. The appellant alleges that, upon the hearing and trial before the register and receiver, appellee "wilfully, intentionally, and fraudulently, intending to deceive and mislead and misinform said register and receiver, procured and introduced the testimony of witnesses,—W. L. Hartman, Clarence Hartman, Sam Cole, David L. Timmons, John Eaton, and H. W. Darrow,—who, at the instigation and procurement of the said defendant (appellee), testified before said register and receiver, in substance and effect, that the said defendant did not enter upon or occupy any of said lands so opened to settlement as aforesaid before 12 o'clock noon of September 22, A. D. 1891, and subsequent to September 18, A. D. 1891, and to the effect that they were with said defendant during said period and all of the time; which said testimony was false, and known by said defendant to be false when he procured and introduced the same." The appellant also alleges that the Commissioner and Secretary of the Interior were deceived and misled as to the facts in the case by said false and fraudulent testimony.

An amendment to the bill, filed by permission of the trial court, alleges that after testimony was taken in the contest, and before any decision had been rendered by the register and receiver, appellant filed a motion to reopen the hearing in said contest, and that he be allowed to introduce further testimony. The motion was overruled, and a motion was then made for a new trial. Both motions were supported by affidavits, and it is alleged that the register and receiver were influenced to overrule the motions, and were deceived by the false and fraudulent testimony of appellee and his witnesses, and that *said officers miscon-[394] strued and misapplied the law, in that the rules and practice of the Land Department require in all cases where fraud or perjury has been committed in any hearing the same shall be reopened or a new trial granted, when such fact is shown to the office or department where pending, regardless of technicalities. A like allegation is made in regard to the ruling of the Commissioner of the General Land Office and the Secretary of the Interior.

One of the affidavits attached to the motions was that of John Eaton, a witness in the contest proceedings for appellee, who testified to the settlement of the latter upon the land on the 22d day of September, 1891, after the opening of the reservation. Eaton states in his affidavit that he made his deposition by inducement of appellee and while he, Eaton, was intoxicated; and, coming to reflect upon the injury he had done, he voluntarily reveals his perjury. He also states that he was not in Oklahoma on the 22d of September, but was in Kentucky, arriving there about the 15th or 16th of September. The affidavits of his brother and nephew corroborate his statement. There is an affidavit of one of the attorneys for appellant that he had been informed before

the hearing of the contest by appellant that one George Stratton knew and had sworn in an affidavit, supporting appellant's affidavit of contest, that he was with appellee on the land in controversy on the 22d day of September, 1891, and was told by appellee that he had been on the reservation before it was opened. Stratton was written to, the affidavit states, to appear at the hearing, but did not appear. The affiant tried to see Stratton, but was prevented by inclement weather, but read his affidavit to him through the telephone, between the town of Wewoka and his residence. He replied that the affidavit was true. He, however, refused to come to town on account of the weather, and the notary refused to go to Stratton's for the same reason. It was stated that Stratton could not be communicated with earlier. No date is given of the communi-
[395] cation with Stratton. The affivadit *is dated March 4, 1899. The officers of the Land Department held the showing insufficient.

The contention of the appellant is that the Land Department was imposed upon, and that this imposition constitutes a ground of review of its decision by the courts. *Garland* v. *Wynn*, 20 How. 6, 15 L. ed. 801; *Barnard* v. *Ashley*, 18 How. 43, 15 L. ed. 285; *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306; *Lindsey* v. *Hawes*, 2 Black, 554, 17 L. ed. 265; *Carr* v. *Fife*, 156 U. S. 494, 39 L. ed. 508, 15 Sup. Ct. Rep. 427; *De Cambra* v. *Rogers*, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519, are relied on to support the contention.

Appellant, distinguishing between fraud and imposition practised by a party upon the Land Department, makes the latter a ground of jurisdiction in the courts. His case demands this, as no fraud was practised upon him to prevent him from fully presenting his case. He admits that a finding of facts upon contradictory testimony is conclusive, not only in the Land Department, but upon the courts. It is, however, in effect, contended that if perjury can or shall be imputed to the witnesses, the character of the decision changes and becomes reviewable; and this not in an *ex parte* proceeding, but in a contested proceeding, where everything was open and took place upon notice. No case justifies this extreme view. It is certainly not called for by the facts of the case at bar. The land was thrown open to entry on the 22d day of September, 1891. Appellant made an entry and appellee contested it. The contest came on for hearing July, 1892, and decision rendered in 1894. Appellee then made entry and appellant instituted a contest. After some preliminary steps, and by consent of the parties, the case was set for hearing June 10, 1898. There was a continuance until September 12, and another until the 29th, both at the instance of appellant. The case was closed October 28. Motion to reopen the case was made January 27, 1899. Five witnesses besides Eaton and appellee testified to the latter's qualification to enter the land. At the hearing, October 12, 1898, the divorced wife of Eaton testified on behalf of appellant that she knew of the opening of the Sac and Fox reservation for settlement, and at that time *she and Eaton were on the way [396] to Kentucky, having started in July, 1891. The attorney for the appellant, in the affidavits referred to, excused himself for not having moved for a continuance of the hearing after this testimony was given, on the ground that he could not give the names and residence of the witnesses by whom Eaton's presence in Kentucky could be proven, as required by rule 24, for the reason that the witness bad informed him she did not know any person who would be likely to know the date other than the brother and relatives of Eaton, and they would not testify without his consent. He gave as another reason that he was fearful if he disclosed the fact that he was seeking evidence in Kentucky Eaton would flee the country; and, as appellee had sought to confuse and conceal the identity of Eaton, the flight of the latter would make the evidence of no utility to appellant. In view of this statement of the proceedings, how can it be said imposition was practised upon the Land Department? A great deal of the testimony was taken in the presence of the register and receiver. They, as officers, given by law the duty and function of judgment, passed upon the weight of the evidence, its contradictions, and the imputations to which it and the witnesses who gave it were subject. They exercised a like judgment upon the new testimony which was submitted on the motions to reopen and for new trial, upon the diligence in procuring it, and its value upon the issue between the parties. They considered it and decided against it. They exercised the judgment which the law invested them with power to make. Their function would be useless if it did not extend that far, and every decision they should make could be subjected to review by the courts by a charge of perjury against a witness. Against such power of review the decisions are clear. *Vance* v. *Burbank*, 101 U. S. 514, 25 L. ed. 929; *United States* v. *Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; *Lee* v. *Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

Decree affirmed.

[397] *GREENLIEF W. SIMPSON, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 397-400.)

1. **Contracts—effect of prior negotiations on written agreement.**—The written undertaking of the United States to take the fresh beef needed for army posts or camps in the interior of Cuba cannot be extended to cover the entire island whenever the supply of refrigerator beef should be insufficient, because of a prior conversation between the contractor and Commissary General of Subsistence, in which that officer stated that such was the purpose and intent of the Department.

2. **Contracts—construction — agreement to furnish beef to interior army posts in Cuba.**—The camp at Los Quemados of the main body of United States troops in the vicinity of Havana, situated about 6 or 8 miles from that city, and about 2½ miles from the beach of Marianao, and connected with both points by rail, is not "situated in the interior of the island" within the meaning of an agreement on the part of the United States to take the fresh beef needed at posts or camps so situated, made pursuant to advertisements for proposals, in which the phrases "posts remote from the seacoast" and "posts and camps in the interior of the island" were used as synonymous.

[No. 31.]

Argued and submitted October 27, 30, 1905.
Decided November 27, 1905.

APPEAL from the Court of Claims to review a judgment dismissing a petition for a recovery from the United States for refusal to take fresh beef for army posts in Cuba. *Affirmed.*

The facts are stated in the opinion.

Mr. **A. A. Hoehling, Jr.,** argued the cause, and, with *Mr. John S. Blair,* filed a brief for appellant.

Assistant Attorney General **Pradt** and *Mr.* **Philip M. Ashford** submitted the cause for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This case arises upon a contract between the Commissary General of Subsistence and the claimant, by which it was agreed that the claimant should "deliver to the commissaries of the United States troops stationed at such posts and camps as are situated in the interior of the island of Cuba, at such prescribed hours on such days as, under the direction of their commanding officers, they shall designate, such quantities of fresh beef . . . fit for immediate use . . . as from time to time they may require." The contract was to "be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the Commissary *General of Subsistence, U. S. Army, may di- [398] rect." The claims made are two,—one for a refusal to take beef needed for troops at Los Quemados, during certain parts of the contract time, and another for a refusal to take it at Havana and Matanzas. The court of claims found the facts and dismissed the petition. The reasons for the judgment were not given, but manifestly were that, on the facts stated, the claimant had no claim, as matter of law.

The claim in respect of the ports of Havana and Matanzas is based on a talk with the Commissary General before the contract was made, in which that officer stated that it was the purpose and intent of the Department to cover the entire beef supply for the island of Cuba by two contracts: one with Swift & Co., for refrigerated beef, slaughtered in the United States and delivered at points on the seacoast, the other with the claimant, for fresh beef; and that when Swift & Co. could not furnish beef, the claimant's contract covered the entire island, both interior and seacoast. It is enough to say that the claim based on this conversation flies in the face of the contract, which confines the undertaking of the United States to beef for camps in the interior. The conversation is inadmissible, and if admitted would not be definite enough to change the plain meaning of the written words. *Brawley* v. *United States,* 96 U. S. 168, 173, 24 L. ed. 622, 624; *Simpson* v. *United States,* 172 U. S. 372, 379, 43 L. ed. 482, 484, 19 Sup. Ct. Rep. 212.

The claim in respect of Los Quemados raises two questions, or at least two were argued; one, whether the words "such quantities . . . as from time to time they may require," mean such quantities as the commissaries may make requisition for, or such quantities as they may need; the other, whether the camp at Los Quemados was "situated in the interior of the island," within the true intent of the contract. Our opinion upon the latter will dispose of the case.

Los Quemados was the camp of the main body of troops in the vicinity of Havana, and about 6 or 8 miles from that city. It was about 2½ miles from the beach of *Marianao, and connected with both points [399] by rail. There was a refrigerator plant

NOTE.—*As to admissibility of parol evidence of previous negotiations to affect a written contract*—see note to Union Mut. L. Ins. Co. v. Mowry, 24 L. ed. U. S. 674.

On merger of previous negotiations in contract—see notes to Diven v. Johnson, 3 L.R.A. 308; and Riedinger v. Diamond Match Co. 60 C. C. A. 6.

there which had been erected by Swift & Co., so that, if the claimant regarded his contract as the supplement to that of Swift & Co., there was notice on the face of the earth that this point was supposed to be within their territory. The original advertisement for proposals, referred to by the claimant when he made his offer, spoke of "posts remote from the seacoast;" a later one, also referred to, read "posts and camps in the interior of the island." Obviously the two phrases were used as meaning the same thing, and they may be considered in interpreting the word "interior" in the contract. *Bradley* v. *Washington, A. & G. Steam Packet Co.* 13 Pet. 89, 101, 10 L. ed. 72, 78; *Stoops* v. *Smith*, 100 Mass. 63, 65, 66, 1 Am. Rep. 85, 97 Am. Dec. 76; *Prouty* v. *Union Hardware Co.* 176 Mass. 155, 158, 57 N. E. 352; *Bank of New Zealand* v. *Simpson* [1900] A. C. 182; *Bruce* v. *Moon*, 57 S. C. 60, 68, 69, 35 S. E. 415; 4 Wigmore, Ev. § 2465. When performance of the contract began in January, 1899, beef was not ordered of the claimant for this camp. On the 26th he protested, but not on the ground that Los Quemados was situated in the interior of the island. His complaint was that he was to furnish all the fresh beef except that furnished under Swift & Co.'s contract. The reply from the acting Commissary General, and the local chief commissary, was that his contract embraced camps in the interior, "and not seacoast points," thus showing how the contract was construed at that time. He does not appear to have suggested a different view, although he seems to have kept on trying to get what orders he could. During January and February beef was purchased from third parties. On February 21 he was notified that commissaries throughout the island had been instructed to call on him to furnish fresh beef under his contract whenever Swift & Co. could not do so under theirs, and he furnished beef for Los Quemados for the first thirteen days of March, and was paid for it. But it will be observed that this action again was not on the ground that Los Quemados was a camp in the interior.

[400] *While insufficient to modify the contract in the sense of the claim first discussed, it was based on the willingness which the claimant had shown to furnish beef to that greater extent. Pursuant to the notice it would seem that he furnished beef to various points upon the coast.

On March 13 the call upon the claimant was stopped, and he again protested. On May 4 the Secretary of War decided that the camp at Quemados was an interior post, but called the attention of the Commissary Department to the clause in the contract providing that it should be in force from January 5 to June 30, 1899, or such less time for any post as the Commissary of Subsistence might direct. Accordingly the Commissary General notified the claimant that "the suspension of the delivery of fresh beef under your contract . . . is hereby made to cover the life of the contract in so far as it relates to the post of Quemados." The claimant, of course, relies upon this construction of his contract so far as it favors him, while he repudiates the attempt to terminate his rights under the last quoted clause. But this interpretation was after the event, and was not accepted or acted upon otherwise than to give the notice just mentioned. As we have shown, the contemporary construction by the men on the spot was different, and seems to have been accepted by the claimant. Taking the instrument in connection with the facts that for camping purposes Quemados was Havana, and that, as between the parties, interior meant remote from the seacoast, we are of opinion that the United States did not promise to take beef from the claimant at that point.

Judgment affirmed.

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*BERYL F. CARROLL, Auditor of State of [401] the State of Iowa, *Appt.*,

v.

GREENWICH INSURANCE COMPANY OF NEW YORK *et al.*

(See S. C. Reporter's ed. 401–414.)

Constitutional law—validity of state legislation to insure competition between insurance companies.—Insurance companies doing business in Iowa cannot claim to be deprived of their rights under U. S. Const. 14th Amend. by Iowa Code 1897, § 1754, making it unlawful for them or their officers, agents, or employees to make or enter into any combination or agreement relating to the rates to be charged, the amount of commissions to be allowed agents, or the manner of transacting their business within the state, in the absence of any judicial construction of such statute as having any other than the single object to insure competition.

[No. 50.]

Argued November 7, 8, 1905. Decided November 27, 1905.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa to review a decree enjoining the enforcement, as against fire insurance com-

NOTE.—*On illegal trusts under modern anti-trust laws*—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

panies doing business in that state, of legislation to insure competition. *Reversed.*

See same case below, 125 Fed. 121.

The facts are stated in the opinion.

Mr. **Charles W. Mullan** argued the cause and filed a brief for appellant:

The Iowa statute does not deprive any person of liberty or property, and does not restrict or abridge the liberty of contract; nor does any provision of such statute in any manner violate or infringe any provision of the 14th Amendment to the Federal Constitution.

Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Craft* v. *McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *People ex rel. Peabody* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Richardson* v. *Buhl*, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *India Bagging Asso.* v. *Kock*, 14 La. Ann. 164; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 339, 48 L. ed. 679, 701, 24 Sup. Ct. Rep. 436; *People* v. *Sheldon*, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *State ex rel. Crow* v. *Firemen's Fund Ins. Co.* 152 Mo. 45, 45 L.R.A. 363, 52 S. W. 595; *State ex rel. Monnett* v. *Buckeye Pipe Line Co.* 61 Ohio St. 520, 56 N. E. 464; *Stanton* v. *Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Watson* v. *Harlem & N. Y. Nav. Co.* 52 How. Pr. 348; *Anderson* v. *Jett*, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670; *Nester* v. *Continental Brewing Co.* 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; *Texas Standard Oil Co.* v. *Adoue*, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; *John D. Park & Sons Co.* v. *National Wholesale Druggists' Asso.* 50 N. Y. Supp. 1064; *People* v. *Milk Exchange*, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; *Emery* v. *Ohio Candle Co.* 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; *Chapin* v. *Brown Bros.* 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; *DeWitt Wire-Cloth Co.* v. *New Jersey Wire-Cloth Co.* 16 Daly, 529, 14 N. Y. Supp. 277; *United States* v. *E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed 1007, 17 Sup. Ct. Rep. 540; *United States* v. *Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 228, 44 L. ed. 143, 20 Sup. Ct. Rep. 96; *Barron* v. *Baltimore*, 7 Pet. 247, 8 L. ed. 674; *Fox* v. *Ohio*, 5 How. 434, 12 L. ed. 224; *Withers* v. *Buckley*, 20 How. 90, 15 L. ed. 819; *Twitchell* v. *Pennsylvania*, 7 Wall. 326, 19 L. ed. 224; *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 176, 20 L. ed. 560; *Spies* v. *Illinois* (*Ex parte Spies*) 123 U. S. 166, 31 L. ed. 86, 8 Sup. Ct. Rep. 21; *West River Bridge Co.* v. *Dix*, 6 How. 531, 12 L. ed. 545; *State* v. *Phipps*, 50 Kan. 609, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

Mr. **Charles A. Clark** also argued the cause and filed a brief for appellant:

A statute prescribing regulations for actions on insurance policies different from those on other contracts is valid.

Christie v. *Life Indemnity & Invest. Co.* 82 Iowa, 360, 48 N. W. 94.

A method of assessing railway companies different from the method of assessing other taxpayers is valid.

Central Iowa R. Co. v. *Wright County*, 67 Iowa, 199, 25 N. W. 128.

The same is true as to express and telegraph companies.

United States Exp. Co. v. *Ellyson*, 28 Iowa, 370.

A statute establishing the liability of railroad companies to employees for negligence of coemployees is valid.

McAunich v. *Mississippi & M. R. Co.* 20 Iowa, 338; *Deppe* v. *Chicago, R. I. & P. R. Co.* 36 Iowa, 52.

State banks may be assessed for taxation differently from national banks.

Primghar State Bank v. *Rerick*, 96 Iowa, 238, 64 N. W. 801.

The classification in the statute assailed is not such as to be open to the objection of such want of uniformity as to deny the equal protection of the law.

Field v. *Barber Asphalt Paving Co.* 194 U. S. 621, 622, 48 L. ed. 1153, 1154, 24 Sup. Ct. Rep. 784; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Haycs* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Messrs. **John G. Johnson** and **James C. Davis** argued the cause, and, with *Mr. George H. Carr*, filed a brief for appellees:

The legislature of a state may not, under the guise of protecting public interests, arbitrarily interfere with private business, or

impose unusual and unnecessary restrictions upon lawful occupations.

Lawton v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; *State ex rel. Zillmer* v. *Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

Under the guise of police regulation, the rights of persons and property cannot be invaded by legislative action; and, when such action takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is an appropriate remedy for the preservation of the safety and welfare of society.

Ritchie v. *People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Bessette* v. *People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 219; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People* v. *Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

Reasonable contracts in restraint of trade are not void or against public policy. This is especially true where the subject of the contract is not a prime necessity or staple of commerce.

Oregon Steam Nav. Co. v. *Winsor*, 20 Wall. 69, 22 L. ed. 319; *Fowle* v. *Park*, 131 U. S. 97, 33 L. ed. 74, 9 Sup. Ct. Rep. 658; *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 89, 35 L. ed. 101, 11 Sup. Ct. Rep. 490; *Northern Securities Co.* v. *United States*, 193 U. S. 361, 48 L. ed. 710, 24 Sup. Ct. Rep. 436; *Smiley* v. *Kansas*, 196 U. S. 454, 49 L. ed. 550, 25 Sup. Ct. Rep. 289; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353, 9 N. E. 629; *Herriman* v. *Menzies*, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730; *Manchester & L. R. Co.* v. *Concord R. Corp.* 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 385.

Cases in which legislation has been held to be in contravention of the 14th Amendment of the Constitution of the United States are, (a) where the classification has been one of arbitrary selection; (b) where the liberty of contract has been invaded arbitrarily and without just cause.

Cooley, Const. Lim. 5th ed. §§ 484–486, 6th ed. pp. 481–483; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Lochner* v. *New York, supra; State* v. *Haun*, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 341; *Frorer* v. *People*, 141 Ill. 171, 16 L.R.A. 495, 31 N. E. 397; *State* v. *Goodwill*, 33 W. Va. 179, 6 L.R.A. 623, 25 Am. St. Rep. 863, 10 S. E. 285; *State* v. *Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Godcharles* v. *Wigeman*, 113 Pa. 431, 6 Atl. 354; *Stratton Claimants* v. *Morris Claimants* (*Dibrell* v. *Lanier*) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; *State ex rel. Zillmer* v. *Kreutzberg, supra; Republic Iron & Steel Co.* v. *State*, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1006; *Vanzant* v. *Waddel*, 2 Yerg. 260; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie* v. *People, supra; Harding* v. *People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Eden* v. *People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Chicago* v. *Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Bailey* v. *People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Johnson* v. *St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Sutton* v. *State*, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; *State* v. *Garbroski*, 111 Iowa, 498, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *State* v. *Jackman*, 69 N. H. 318, 42 L.R.A. 438, 41 Atl. 347; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 641; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *St. Louis, I. M. & S. R. Co.* v. *Williams*, 49 Ark. 492, 5 S. W. 883; *San Antonio & A. P. R. Co.* v. *Wilson*, 4 Tex. App. Civ. Cas. (Willson) § 323, 19 S. W. 910; *Wallace* v. *Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *New York L. Ins. Co.* v. *Smith*, (Tex. Civ. App.) 41 S. W. 680; *Street* v. *Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 155, 98 Am. St. Rep. 325, 66 N. E. 895; *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill brought by a number of fire insurance companies, incorporated in states other than Iowa, to enjoin the auditor of that state from enforcing §§ 1754, 1755, and 1756 of the Iowa Code, 1897. The ground of the bill is that these sections are invalid under the state Constitution and the 14th Amendment of the Constitution of the United States. There is a reference also to article 1, § 10, and an oblique suggestion that the law impairs the obligation of contracts.

The defendant demurred, and the circuit court issued an injunction as prayed, which was made perpetual by final decree. 125 Fed. 121. Thereupon the defendant appealed to this court.

By § 1754 "it shall be unlawful for two or more fire insurance companies doing business in this state, or for the officers, agents, or employees of such companies, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amount of commissions to be allowed agents for procuring the same, or the manner of transacting the fire insurance business within this state; and any such company, officer, agent, or employee violat-
[408] ing this provision *shall be guilty of a misdemeanor," and a fine is imposed for each offense. By § 1755 it is made the duty of the auditor of state to summon for examination, under oath, any officer, agent, or employee suspected of violating § 1754, and if he determines that the company is guilty, or if the officer or agent fails to appear, to revoke the authority of the company to do business in the state for one year. By § 1756 an appeal is given from the decision of the auditor to the district court, the case to be tried *de novo*, as equitable causes are tried. By § 1757 the statements made upon the examination before the auditor or county court shall not be used in any criminal prosecution against the person making them.

The bill sets forth the necessity for every insurance company to gather all the experience available into one mass, and to analyze and classify it scientifically in order to ascertain the true value of risks, and that it will add greatly to the expense if each company is required to employ a separate person to do the work. It charges, upon information and belief, that if the plaintiffs attempt to combine their experience and to employ the same person to analyze it, the auditor will summon them and revoke their authority to do business in the state. It further alleges that the plaintiffs desire not only to do what has been stated for their guidance in establishing rates, but to agree what classes of risks are noninsurable, how various risks shall be classified, and as to other matters relating to the manner of doing business. It repeats the charge, upon information and belief, that if the plaintiffs proceed in this manner the auditor will order an examination and revoke their licenses, and prays for an injunction against enforcing in any manner the above-mentioned sections of the Iowa Code. The circuit court considered that the statute was not invalid under the Constitution of Iowa, but held that the prohibitions of agreements as to the amount of commissions to be allowed, or as to the manner of transacting the fire insurance business in the state, were contrary to the 14th Amendment. While waiving a discussion of the clause against combinations *as to rates, it seem-[409] ingly regarded the provisions of § 1754 as inseparable, and issued a general injunction forbidding the enforcement against the plaintiffs of §§ 1754, 1755, and 1756.

We assume, for purposes of decision, that the bill means that the auditor threatens and intends to enforce the act in case the plaintiffs do what they desire to do, and that if § 1754 is contrary to the Constitution of the United States, a proper case for an injunction is made out. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 839, 840, 6 L. ed. 204, 228. See *Cleveland* v. *Cleveland City R. Co.* 194 U. S. 517, 531, 48 L. ed. 1102, 1106, 24 Sup. Ct. Rep. 756; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 378, 46 L. ed. 592, 600, 22 Sup. Ct. Rep. 410. We assume further that the position of the plaintiffs is not affected by the fact that they are foreign corporations. The act is in general terms, and hits all insurance companies. If it is invalid as to some, it is invalid as to all. *United States* v. *Ju Toy*, 198 U. S. 253, 262, 263, 49 L. ed. 1040, 1043, 1044, 25 Sup. Ct. Rep. 644. That the requirements of the act might have been made conditions to foreign companies' doing business in the state (*Fidelity Mut. Life Asso.* v. *Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518) is immaterial, since as we understand the statute, the legislature did not attempt to reach the result in that way. A company lawfully doing business in the state is no more bound by a general unconstitutional enactment than a citizen of the state. *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

We pass to the question upon which the circuit court decided the case; namely, the constitutionality of § 1754, the only section which we find it necessary to consider. Whatever may be thought of the policy of such attempts, it cannot be denied in this court, unless some of its decisions are to be overruled, that statutes prohibiting combinations between possible rivals in trade may be constitutional. The decisions concern not only statutes of the United States (*Northern Securities Co.* v. *United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276), but also state laws of similar import (*Smiley* v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379).

[410] *In view of these cases further discussion is unnecessary; but we will add a few words. While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the 5th Amendment it would be hard to say that a state law in like terms was void under the 14th. It is true that, by the provision in the body of the instrument, Congress has power to regulate commerce, and that the act of Congress referred to in the cases cited was passed in pursuance of that power. But even if the 5th Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the 5th Amendment protects fundamental personal rights. It is only on the ground that the right to combine at will is a fundamental personal right that it can be held to be protected by the 14th Amendment, from any abridgment by the states. *Cincinnati Street R. Co.* v. *Snell*, 193 U. S. 30, 36, 48 L. ed. 604, 607, 24 Sup. Ct. Rep. 319. Many state laws which limit the freedom of contract have been sustained by this court, and therefore an objection to this law on the general ground that it limits that freedom cannot be upheld. There is no greater sanctity in the right to combine than in the right to make other contracts. Indeed, Mr. Dicey, in his recent work on Law and Public Opinion in England during the Nineteenth Century, indicates that it is out of the very right to make what contracts one chooses, so strenuously advocated by Bentham, that combinations have arisen which restrict the very freedom that Bentham sought to attain, and which even might menace the authority of the state. If, then, the statute before us is to be overthrown, more special reasons must be assigned.

At the argument before us more special reasons were assigned. It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. With regard to this it should be observed, as is noticed by the appellees, that a general statute of Iowa prohibits all contracts or combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of [411] *the same produced or sold in the state (Code of 1897, § 5060), and that this section covers fire insurance (*Beechley* v. *Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428). Therefore the act in question does little if anything more than apply and work out the policy of the general law in a particular case. Again, if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis* v. *Parker*, 187 U. S. 606, 610, 611, 47 L. ed. 323, 328, 23 Sup. Ct. Rep. 168. And if this is true, then, in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what legislatures have approved.

If the legislature of the state of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mut. Life Asso.* v. *Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662. See also *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Otis* v. *Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Home L. Ins. Co.* v. *Fisher*, 188 U. S. 726, 727, 47 L. ed. 667, 668, 23 Sup. Ct. Rep. 380.

But it is said that, however it may be as to some regulations of fire insurance, these, or at least the last two of them, forbidding agreements as to agents' commissions and the manner of transacting business, are not to be justified. In order to make this out the scope of the provisions was exaggerated both in the argument and in the bill. The bill seems to assume that the statute forbids insurance companies to obtain and use each other's experience, or to employ the same person to work up the results. It does not. It simply forbids an agreement between [412] *the companies relating to the rates which may be based upon those results. No doubt an agreement between the companies readily would be inferred if they were found all to charge the same rates; but an agreement between the companies is the only thing aimed at, and if they avoid that they escape the law. So it was suggested in argument that they could not employ the same adjuster in case of loss. We do not perceive anything to hinder their doing so, although it may be that they would have to be careful about the terms of his authority. The object of the law, we assume, until the Iowa court shall decide otherwise, is single,—to keep up competition,—and the general language is to be restricted by the specific provisions and to the particular end. Limited as we

understand it to be limited, the statute goes no further than others which have been sustained, and does not contravene the Constitution of the United States.

The argument before us very properly was rested on the 14th Amendment. Therefore it is unnecessary to discuss the other objections suggested in the bill.

Although we have conceded that the bill makes a case for an injunction if its premises are true, it cannot be understood to charge that the auditor will go further than to enforce the act as properly construed. The allegations upon information and belief, which we have stated, probably mean no more than that the plaintiffs reasonably suppose that the auditor will do his duty. They are pressed to the verge when they are taken to set forth a threat to do that. They certainly do not show that he threatens to do more.

Decree reversed.

Mr. Justice **Harlan**, concurring:

It is clear from the averments of the bill that the insurance companies had not, prior to the institution of this suit, made any combination or agreement, among themselves, relating to the rates to be charged for insurance, or to the amount of commis-
[413] sions *to be allowed agents for procuring insurance, or to the manner of transacting fire insurance business within the state. They expressed a desire to make such a combination or agreement, but were apprehensive that by doing so they would come into conflict with the state authorities. The auditor had done nothing under the statute, and will have nothing to do in execution of its provisions unless the insurance companies enter into the forbidden combination or agreement. Nevertheless, the plaintiffs came into court, avowed that they had not as yet violated the statute, but asked to be informed whether, in the event they concluded to do so, their officers, agents, or employees could be legally summoned before the state auditor for examination, as prescribed in § 1755. In other words, in advance of anything being done in violation of the statute, or of any steps being taken by the auditor in execution of its provisions, the opinion of the court was asked and obtained as to its constitutionality. This is a very convenient—and, in my judgment, a mischievous—mode of obtaining the opinion of a court upon an abstract question of the constitutionality of a statute which has not been and may never be violated, and under which no case may ever arise calling for judicial interference. It is as if the plaintiffs had addressed a personal communication to the court, asking to be informed as to what they might safely do. It seems to me that the suit has been prematurely brought. If the plaintiffs should make such a combination as is forbidden by the statute, the time to seek judicial interference in their behalf would be when the state auditor proceeds, or in some definite way indicates his purpose to proceed, under § 1755. I think the decree below should be reversed and the bill ordered to be dismissed, upon the ground that no facts existed, at the time the suit was brought, to justify a judicial tribunal in delivering a judgment as to the constitutionality of the state statute.

As, however, the court considered the case upon the merits, it is appropriate to say that I concur with the court in holding that the section of the statute which is assailed is not invalid. *The business of fire insur-[414] ance is of such a peculiar character, so intimately connected with the prosperity of the whole community, and so vital to the security of property owners, that it is competent for the state to forbid combinations and agreements among fire insurance companies doing business within its limits, in reference to rates, agents' commissions, and the manner of transacting their business. If, in the judgment of the state, the people who desire insurance upon their property are put at a disadvantage when confronted by a combination or agreement among insurance companies, I do not perceive any sound reason why, preserving the individual right of contracting, it may not forbid such combinations and agreements, and thereby enable the insured and insurer to meet on terms of equality. Surely, the state could enact such a regulation with reference to companies organized under its own laws. If that be so, it cannot be that such a regulation may not be made applicable to foreign insurance companies doing business in the state only by its consent.

UNITED STATES, *Appt.*,
v.
UTAH, NEVADA, & CALIFORNIA STAGE COMPANY. (No. 51.)

UTAH, NEVADA, & CALIFORNIA STAGE COMPANY, *Appt.*,
v.
UNITED STATES. (No. 52.)

(See S. C. Reporter's ed. 414–425.)

1. Postoffice—mail contract—extra service.—An increase in the service required on a mail route, as the result of the establishment of a new distributing station in the city of New York, amounting to more than 300,000 miles of additional transfer service, and involving an additional expenditure of

nearly $10,000 for ferry tolls, cannot be required by the Postmaster General without extra compensation, under the authority reserved to him in the contract to call for new, additional, mail messenger, or transfer service without additional compensation.

2. **Postoffice—mail contract—effect of mistake in advertisement for proposals.**—The positive statement in the government's advertisement for proposals for services on a mail route that the number of elevated stations to be served was two, whereas in fact there were four to be served, entitles the contractor to additional compensation for the extra service thereby necessitated, although the advertisement required bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes.

3. **Postoffice — mail contract — delivery of mail at elevated stations.**—The carriage of the mails up and down the steps at elevated railroad stations is called for by a contract for performing the covered regulation wagon, mail messenger, transfer, and mail station service on a mail route, in which the contractor agreed to take the mails from and deliver them to the postoffices, mail stations, and cars.

[Nos. 51, 52.]

Submitted November 8, 1905. Decided November 27, 1905.

APPEAL and Cross Appeal from the Court of Claims from a judgment awarding a portion of the extra compensation demanded for services performed under a contract for carrying the mails. *Affirmed.*

See same case below, 39 Ct. Cl. 420.

Statement by Mr. Justice **Day:**

This is an appeal and cross appeal from a judgment of the court of claims upon a demand for extra compensation in the performance of a contract made on December 21, 1892, between the United States, represented by the Postmaster General, and the Utah, Nevada, & California Stage Company, for the rendition of certain covered regulation wagon, mail messenger, transfer, and station service on mail route number 207,003, in the city of New York, for a term from July 1, 1893, to June 30, 1897. The advertisement contained certain instructions to bidders, a part of which is as follows:

"The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term, whether between postoffices and railroad stations, between postoffices and steamboat landings, between postoffices and mail stations, or between the several railroad stations, steamboat landings, and mail stations now established or that may hereafter be established, whether caused by the establishment of new, or by change of site of existing, postoffices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary by any other reason.

"The statements of probable additional service that may be necessary on the routes under this advertisement are given so that bidders may be as fully advised as possible of the amount likely to be required. It will not, however, limit the *liability of the[416] contractors to perform all service that may become necessary without additional pay.

"Bidders must inform themselves of the distances, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds, whereby expense may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based on such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed or ferries discontinued, cannot be considered."

The stage company, having submitted a proposal under this advertisement, was awarded the contract, and the same was duly entered into. Among other things it was stipulated:

"To take the mail from and deliver it into the postoffices, mail stations, and cars at such points and at such hours, under the directions of the postmaster at New York, N. Y., approved by the Postmaster General, as will secure despatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

"To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail station service that the Postmaster General may order at the city of New York, N. Y., during the contract term, without additional compensation, whether caused by change of location of postoffice, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service."

After the contract was entered into, Congress having made an appropriation for the purpose, a new distribution station was established at Forty-fourth street and Lexington avenue, in the city of New York, known as the Industrial building station. At the time of the advertisement for proposals, *which resulted in the contract, to[417]

wit, on September 15, 1892, the service therein referred to involved the carrying of the mails for approximately 973,674.22 miles per annum. In the advertisement bidders were notified that the probable annual increase in such service would amount to 6,718.40 miles. Between the time of the advertisement and the time when complainant entered upon the performance of his contract, additional service was required which increased the amount of annual mileage to 1,012,604.54 miles. On August 22, 1893, an order was made by the Second Assistant Postmaster General, requiring additional mail service to supply the mail station at Forty-fourth street and Lexington avenue, as per certain statements attached to the order, and a further order was made on October 23, 1893, for additional mail station service. Under the arrangement ordered by the Department, all first-class matter (letters) previously collected in the district of Station H (removed into the Industrial building from 156 East Fourth street) continued to be received and handled there; massed matter made up by the states for the East, North, and West, which had previously been sent to the general postoffice for distribution, was sent to the Industrial branch to be distributed. South and West mail was taken there during the period within suit and assorted, and all of the second-class bulky matter of publishers above Fourteenth street, which had formerly been received at the general postoffice and Station O, was delivered at the Industrial building; also, all third and fourth class matter, mailed in uptown stations, which had previously come to the general postoffice, was sent to the Industrial building, relieving the general postoffice from handling that matter. The result of the orders aforesaid was that claimant was compelled to increase the number of wagon trips from October 25, 1893, to February 6, 1895, over and above what would have been the normal increase, and increased the distance to be traveled by the wagons, over and above the normal increase, 311,939 miles for the period from October 5, 1893, to February 6, 1895.

[418] *The Industrial building was rented in March, 1893, for postal purposes, in order to relieve the general postoffice, which had become inadequate to accommodate the increased volume of business. Station H, on May 1, 1893, was moved from 156 East Fifty-fourth street into the Industrial building. In connection with Station H, there were inaugurated in the premises the district departments, variously known as district stations.

By establishing the distribution station in the Industrial building, and issuing the orders above set forth, there was no diminution in the number and character of the runs to and from the general postoffice, nor was the mileage at said general postoffice thereby diminished. To perform this extra service to and from the Industrial building the claimant was required to purchase from 80 to 100 additional horses, and from 32 to 33 additional wagons; to put on from 45 to 46 new runs, and to employ from 33 to 50 additional men,—drivers, hostlers, etc. The orders resulted in such increased speed in carrying the mails from the Industrial building to some of the railroad stations that in obeying them it was necessary to violate the city ordinances as to the rate of speed; it largely increased the wear and tear on the wagons; it injured and shortened the period of usefulness of the horses, some of them dying from overexertion in hot weather by reason of the fast driving, made necessary by the short time allowed to make the various trips.

The increase of runs to the railroad stations outside of the city of New York, made necessary by the establishment of the extra service from the Industrial building, increased the necessary expenditure by the claimant, in the matter of ferry tolls, in the sum of $9,950.22.

At no time prior to the making of said bid, or prior to entering into said contract, was any intimation or information given by the defendants' officers to claimant that they contemplated or intended the establishment of a service at the Industrial building.

*A postal station was established in the [419] Industrial building, and the contractor was required to transport the mails between it and the various railroad stations and some postal stations. This postal station was constituted as follows:

"Station H was moved May 1, 1893, from its location at No. 156 East Fifty-fourth street into the above-named premises.

"Thereafter, on September 1, 1893 (service began October 4, 1893), there was inaugurated in the same premises and in connection with Station H the distribution department, which was variously known as 'Distribution station,' 'Industrial station,' and 'Station H (distribution department),' and the two together were sometimes known as 'Industrial branch station.'

"Before and after the removal of Station H, as above stated, it was in all respects a branch postoffice, at which there were collections and deliveries of mail by carriers, distribution of mail matter for despatch, registration of letters, sale of stamps, and the issuing of money orders.

"Both that part of the industrial branch which had been known as Station H, and that part which was referred to as 'Dis-

tribution station,' etc., were situated on the same floor of the Industrial building, and were at all times connected by a passageway. The former was in charge of a superintendent of station, and the latter was, until January 5, 1895, under the direction of an assistant of the superintendent of mails of the general postoffice. Station H continued the collection and delivery of mail by carriers, the sale of stamps, the registration of matter, and sale of money orders, while the distribution department had charge of the distribution of second, third, and fourth class matter. The collectors for Station H proper carried their collections of mail directly into and deposited them in the distribution department, and the distribution for despatch and the assortment for city delivery were made there.

"After the equipment of Industrial branch station, second-class mail matter mailed by publishers and originating north of Fourteenth street was mailed at that station.

[420] *"This mail matter had previously been mailed at the general postoffice and at Station O, at which points the distribution had theretofore been made and despatch made to the several railroad stations, as specifically stated in the advertisement. Thereafter no further such mailing of second-class matter was made at Station O, and all despatches of said mailed matter for the West and New England states and to and from Grand Central station were made from the Industrial branch station, a distance of approximately 6 blocks, instead of from the general postoffice, 3½ miles distant, and from Station O, 1¾ miles distant, as theretofore.

"The congested state of the general postoffice on account of lack of adequate space, for the remedy of which Station O had been established some years before, was well known for some time prior to the advertisement and proposal for this service."

The advertisement of September 15, 1892, containing provision for covered regulation wagon, mail messenger, transfer, and station service, which was made a part of the contract, undertook to give a schedule of service probably required in the city as the same existed and was in operation on August 15, 1892, as stated in the advertisement, "so that bidders might be as fully advised as possible of the amount of service likely to be required." The advertisement inadvertently stated the service between the Manhattan Elevated Railroad station and the general postoffice and certain branch stations at one half of the number of transfers actually required, consequently the stage company was required to perform, and did perform, double the number of trips specified.

In the performance of the contract certain foot service was required, which, it is contended, was not included in the contract, which necessitated 479,875 trips going up and down steps in making delivery of mail to messengers on elevated trains, the service requiring the employment of additional men at each station.

From the findings of fact the court of claims held the complainant *entitled to re- [421] cover the sum of $68,483 as compensation for the additional service under the orders of the Department, made necessary by the establishment of the extra service in connection with the Industrial building, the sum including $9,950.22 expenses incurred by the stage company in the matter of ferry tolls; also $14,538 because of the double service required between the Manhattan Elevated Railroad and the general postoffice and certain branch postoffices, growing out of the mistake in the advertisement in stating the number of trips required at one half the actual number. It disallowed the claim for extra compensation on account of the "foot service" required in delivering the mail upstairs at the elevated railway stations. 39 Ct. Cl. 440.

Assistant Attorney General **Pradt** and *Mr.* **Joseph Stewart** for the United States.

Messrs. **A. A. Hoehling, Jr.,** and **J. H. McGowan** for the Utah, Nevada, & California Stage Company.

Mr. Justice **Day** delivered the opinion of the court:

It is the contention of the government that, under the authority of the Postmaster General to require new or additional mail messenger or transfer service, without additional compensation, the contractor might be required to perform the additional service made necessary by the establishment of the Industrial building branch under the authority of the act of Congress of March 3, 1893 (27 Stat. at L. 732, chap. 213), authorizing the renting of the building to be used for general postoffice purposes in the city of New York. The findings of fact establish that this Industrial building branch was more than 3 miles distant from the general postoffice, and was intended to and did transact nearly all of the business north of Fourteenth street. This necessitated the carrying of the mails, not only from the *general [422] postoffice to the railroad stations, but to and from the branch station established at the Industrial building. In order to perform this service under the directions of the Department, complainant was required to furnish 80 additional horses, more than 30 additional wagons, and from 33 to 50 addi-

tional men, requiring an additional distance to be traveled in wagons, over and above the normal increase, of 311,939 miles for the period from October 5, 1893, to February 6, 1895, and to pay an increased sum for ferrying the wagons across the North and East rivers of $9,950.22. Can such enormous increase of the service required and the expense entailed be exacted of a contractor who had agreed to perform new or additional service of the kind specified without additional compensation? There can be no doubt that the purpose of placing this stipulation in the contract was to require the performance, without additional compensation, of new or additional service which might arise from improved methods in the transaction of the business of the Postoffice Department and in the increased demand for service resulting from the growth and developments of towns and cities. The contract gave to the Postmaster General very considerable discretion in calling for additional service which might result from these causes, without compensation. This was well illustrated in the case of *Slavens* v. *United States*, 196 U. S. 229, 49 L. ed. 457, 25 Sup. Ct. Rep. 229, in which it was held that while the Postmaster General might not order, under such a contract, service of a different character not within the contractual arrangement, he might order, without additional compensation, a change in the service which required the mail to be taken to and from street cars, met at crossings instead of landings and stations. In that case it happened the burden upon the contractor was not increased. But in the present case we find more service required, amounting to additional mileage of hundreds of thousands of miles, and the payment of a large additional sum of money for ferrying wagons to deliver the mails. There must be some limit to the service which can be required without additional compensation, under *the authority [423] vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals, a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the government and individuals. The phrase "new or additional service" is not one of exact meaning, defining the precise extent of the obligation incurred, and permits the court to give it a reasonable construction with a view to doing justice between the parties. In giving a proper construction, the court is required to examine the entire contract, to consider the relation of the parties, and the circumstances under which it was signed. *Chicago, R. I. & P. R. Co.* v. *Denver & R. G. R. Co.* 143 U. S. 596, 609, 36 L. ed. 277, 281, 12 Sup. Ct. Rep. 479. It was said by Mr. Justice White, in *O'Brien* v. *Miller*, 168 U. S. 287, 297, 42 L. ed. 469, 473, 18 Sup. Ct. Rep. 140, 144:

"The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *Boardman* v. *Reed*, 6 Pet. 328, 8 L. ed. 415; *Chesapeake & O. Canal Co.* v. *Hill*, 15 Wall. 94, 21 L. ed. 64."

And, upon the same subject, Mr. Justice Bradley, in the case of *Chesapeake & O. Canal Co.* v. *Hill*, 15 Wall. 94, 99, 21 L. ed. 64, 67, said:

"We should look carefully to the substance of the original agreement, . . . as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements."

We cannot believe it possible that the parties to this contract contemplated the establishment of a new postal department *in [424] the city of New York not then authorized by any act of Congress, which should so greatly increase the service, requiring more than 300,000 miles of additional transfer service and nearly $10,000 of additional expense for ferrying during the time covered in the suit. The government, in its advertisement, had stated the probable additional annual mileage at 6,718.40 miles. This may be presumed to have been a fair and impartial estimate, made for the benefit of those with whom the government was about to contract, notwithstanding they were warned that it was not conclusive. There is nothing in the record to show that it was not a reasonable estimate in the light of the facts then known. In this case, after the contract was entered into, this enormous new service, clearly not intended by either of the parties to be rendered, was required. In this instance we think the limit of reasonable requirement under the new and additional service clause was exceeded, and the service required cannot be held to be with-

in the terms of the contract. We find no error in the court of claims reaching this conclusion.

2. The second question involved is as to the right of the contractor to recover because the government's advertisement for proposals, instead of stating the number of elevated stations to be served at four, which was, in fact, the number, gave the number of stations at two, thus doubling the number of trips necessary. It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the government, in its advertisement, had positively stated the number of stations at two. The contractor had a right to presume that the government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the government agents, and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for government service, that the general statement that the
[425] contractor must investigate *for himself, and of nonresponsibility for mistakes, would require an independent investigation of a fact which the government had left in no doubt. We think the court of claims correctly allowed this item.

3. As to the compensation for the so-called "foot service," for carrying the mails up and down the steps at the elevated railroad stations, the delivery of the mail at the foot of the steps would not have been sufficient, and the contractor agreed to deliver the mail into the postoffices, mail stations, and cars. The statement of facts shows that the preceding contractor had delivered the mail on the platform of the stations, at the door of the cars. We think the contract was not exclusively for wagon service, but, reasonably construed, required the delivery of the mail into the elevated stations in such wise as to be placed in the cars, and consequently required it to be carried upstairs without extra allowance of pay. We find no error in disallowing this claim for extra compensation.

The judgment of the Court of Claims is affirmed.

MARY MABEL ROGERS, *Appt.*,

v.

HENRY H. PECK and Wilson S. Lovell.

(See S. C. Reporter's ed. 425–437.)

1. Habeas corpus—Federal interference with state administration of criminal law.—The Federal courts will not interfere by habeas corpus with a state in the administration of its criminal law unless fundamental rights specially secured by the Federal Constitution are invaded.

2. Constitutional law—due process of law—solitary confinement after original date fixed for execution of death sentence.—Solitary confinement by the state authorities pending the execution of a death sentence after the original day fixed for the execution of that sentence has passed, even if unwarranted, is not a denial of the due process of law guaranteed by the 14th Amendment to the Federal Constitution.

3. Constitutional law—due process of law in execution of death sentence.—No denial of the due process of law guaranteed by U. S. Const. 14th Amend. will result from the execution of a death sentence because of the failure of the highest state court, on denying a motion for a new trial, to fix a day for execution, where the governor of the state had, by a reprieve, already definitely fixed the time for execution at a day which had not arrived when the court made its decision.

4. Constitutional law—due process of law in providing for appellate review in criminal cases.—The due process of law guaranteed by U. S. Const. 14th Amend. does not require that the highest state court for the review of a conviction of capital crimes be held in any particular county of that state, whatever may be the requirement of the state Constitution in that respect.

5. Habeas corpus—state interference pending final judgment.—A reprieve by the governor of a state, postponing, until a fixed date, the execution of a death sentence, evidently granted to permit the prisoner to appeal to the Supreme Court of the United States from the order of a district court denying habeas corpus, is not a proceeding against the prisoner within the meaning of U. S. Rev. Stat. § 766, as amended by the act of March 3, 1893 (27 Stat. at L. 751, chap. 226, U. S. Comp. Stat. 1901, p. 597), nullifying any proceeding against a person in prison or confined or restrained of his liberty, in any state court, or by authority of any state, pending the proceedings or appeal in habeas corpus cases in the Federal courts.

[No. 368.]

Argued November 6, 1905. Decided November 27, 1905.

APPEAL from the District Court of the United States for the District of Vermont to review an order denying a petition for a writ of habeas corpus. *Affirmed.*

See same case below, 138 Fed. 961.

The facts are stated in the opinion.

NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to what constitutes due process of law—

Messrs. **Tracy L. Jeffords** and **T. W. Moloney** argued the cause, and, with *Mr. F. M. Butler*, filed a brief for appellant:

Solitary confinement with the sentence of death is held to constitute, in and of itself, a separate and severe punishment in addition to being in custody until execution by hanging.

Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

Whenever a citizen is denied a right guaranteed by the Federal Constitution, or is subjected to a penalty forbidden by it, the Federal courts have jurisdiction, and may grant relief.

Ex parte Royall, 117 U. S. 241, 29 L. ed. 869, 6 Sup. Ct. Rep. 734.

Law in its regular course of administration through courts of justice is due process of law.

Hurtado v. *California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

A Federal court has jurisdiction to discharge from the custody of state officials any person restrained of his liberty in violation of the Constitution, and may exercise its discretion in the light of the circumstances.

Minnesota v. *Brundage*, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; *Markuson* v. *Boucher*, 175 U. S. 184, 44 L. ed. 125, 20 Sup. Ct. Rep. 76.

The Constitution applies to any person. In *Leeper* v. *Texas* the court seems to have limited this provision to "particular persons or classes of persons." By the use of these expressions it can hardly be possible that the Supreme Court intended to amend or limit the express words "any person" to a particular person or class of persons. It surely was intended to apply to any person, rich or poor, white or black, young or old, male or female.

139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

The reason of the rule that the court usually refuses to review the decisions of state courts on habeas corpus, and compels resort to writ of error, as stated in the leading case of *Baker* v. *Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323, incidentally touches this case. This is a case of "peculiar urgency;" error is being committed, since the judgment of the inferior court has been superseded or vacated by the supreme court. It is an attempt of the state, by its officers, to execute a sentence vacated by the court. There is no action of the court in this regard to which error can be assigned.

Tinsley v. *Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; *Newport Light Co.* v. *Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429; *Pepke* v. *Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34.

This is one of the cases of so exceptional a nature that this writ is the only course.

Re Neagle (*Cunningham* v. *Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Re Loney* (*Thomas* v. *Loney*) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584.

Courts illegally constituted, whose judgment and sentence are void, do not furnish the citizen with due legal process. An indictment in a state court, obtained by unlawful discrimination, is void.

Rogers v. *Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257.

Even a sane person cannot waive anything in a capital cause.

People v. *Barberi*, 149 N. Y. 256, 52 Am. St. Rep. 717, 43 N. E. 635.

The exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the very result of a decision is to deny the rights.

Rogers v. *Alabama*, *supra*.

Mr. **Clarke C. Fitts** argued the cause and filed a brief for appellees:

Appellant's mere averment that she is detained in violation of the Constitution and laws of the United States, and is restrained in violation of the Constitution of the United States, is merely an averment of a conclusion of law, and not of fact; and is not sufficient to give the court jurisdiction.

Sawyer v. *Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Craemer* v. *Washington*, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1; *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304.

The granting of a reprieve under the Constitution of Vermont is an executive function. It is favor to the prisoner.

Re Cross, 146 U. S. 277, 36 L. ed. 972, 13 Sup. Ct. Rep. 109.

The Federal Constitution neither grants, nor forbids, to the governor of a state, the right to stay the execution of a sentence.

Storti v. *Massachusetts*, 183 U. S. 141, 46 L. ed. 122, 22 Sup. Ct. Rep. 72.

In *Lambert* v. *Barrett*, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 135, this court held that the question whether there was authority to issue a reprieve or death war-

see Kuntz v. Sumption, 2 L.R.A. 655, and note: *Re* Gannon, 5 L.R.A. 359, and note; Ulman v. Baltimore, 11 L.R.A. 224, and note; and Gilman v. Tucker, 13 L.R.A. 304, and note. And see notes to People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

rant was for the state court alone to determine.

The authority of the governor to fix a certain date for the execution to take place is an incident to the power to grant reprieves.

Clifford v. *Heller*, 63 N. J. L. 105, 57 L.R.A. 312, 42 Atl. 155.

The repricve is not a new sentence, and the execution under it is not by way of a new sentence, but by reason of the expiration of a temporary suspension of the original sentence.

Ex parte Fleming, 60 Miss. 910.

The failure of the state supreme court to appoint a time for executing the sentence is a matter of state procedure.

Lambert v. *Barrett*, *supra*; *Brown* v. *New Jersey*, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Baldwin* v. *Kansas*, 129 U. S. 57, 32 L. ed. 642, 9 Sup. Ct. Rep. 193.

Any question relating to procedure in the state court cannot be raised by habeas corpus. A writ of error is the proper remedy to review judgments and practice of state courts.

Re Frederich, 149 U. S. 70–78, 37 L. ed. 653–657, 13 Sup. Ct. Rep. 793; *Markuson* v. *Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *Re Sehneider*, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; *Re Duncan* (*Duncan* v. *McCall*) 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573.

The appellant complains that her rights under the Constitution of the United States have been infringed because she has been denied the right of appeal for a correction of errors of the trial court. She says there is no supreme court of the state of Vermont to which she has the right to appeal for a correction of the errors which she alleges occurred on her trial in county court. This question, as the appellant makes it, raises only the question of the Constitution of the state of Vermont and the alleged collision of the state statute with the state Constitution. It is not a Federal question.

Baldwin v. *Kansas*, *Brown* v. *New Jersey*, and *Lambert* v. *Barrett*, *supra*; *Porter* v. *Foley*, 24 How. 415, 16 L. ed. 740.

A state may provide one judicial system for one county and another for an adjoining county so long as it does not abridge the privileges and immunities of citizens of the United States, nor deprive any person of his rights without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws in the same county.

Missouri v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 33, 25 L. ed. 993.

This court has nothing to do with the wrongs which may have been inflicted by an individual upon the appellant. It is only to inquire into what the state has done.

Murphy v. *Massachusetts*, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; *People ex rel. Trezza* v. *Brush*, 128 N. Y. 536, 28 N. E. 533.

This court has repeatedly frowned upon attempts to use the writ of habeas corpus in place of a writ of error.

Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; *Pepke* v. *Cronan*, 155 U. S. 100, 101, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *Davis* v. *Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *Minnesota* v. *Brundage*, 180 U. S. 499, 505, 45 L. ed. 639, 642, 21 Sup. Ct. Rep. 455.

Under the writ of habeas corpus, the court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact and pronounce them erroneous.

Re Frederich, *supra*; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Curtis*, 106 U. S. 371, 27 L. ed. 232, 1 Sup. Ct. Rep. 381; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Stevens* v. *Fuller*, 136 U. S. 468, 34 L. ed. 461, 10 Sup. Ct. Rep. 911.

Mr. Justice **Day** delivered the opinion of the court:

The appellant, Mary Mabel Rogers, having been convicted and sentenced in the county court of Bennington, in the state of Vermont, of the crime of murder in the first degree, filed her petition on June 19, 1905, for a writ of habeas corpus against the sheriff and superintendent of the state prison, in the district court of the United States for the district of Vermont. The petition, having been heard, was denied on June 22, 1905. From that order an appeal was taken to this court.

The conviction of appellant was had at the December term, 1903, of the Bennington county court, and she was sentenced to be confined at hard labor in the state prison at Windsor until the 3d day of November, 1904, and on and after that day to be kept in solitary confinement until February 3, 1905, on which day she should suffer the penalty of death by hanging. On the first day of February, 1905, the Governor of the state of Vermont reprieved the execution of sentence until June 2, 1905. On April 29, 1905, the appellant presented a petition for a new trial to two judges of the supreme court of Vermont. On May 5, 1905, the judges made an order allowing the petition for new trial

to be filed, and fixed May 10 for the hear-
[427] ing *thereof. After hearing before the supreme court, sitting at Montpelier, Washington county, on May 30 an order was made dismissing the petition, and refusing the new trial. *Rogers* v. *State*, 77 Vt. 454, 61 Atl. 489. On June 1, 1905, the execution of sentence was further reprieved by the Governor until June 23, 1905. Thereupon appellant filed her petition in the Federal court for the writ of habeas corpus, which was dismissed, as heretofore stated. On the date of the dismissal of her petition (June 22, 1905), the Governor further reprieved the execution of the sentence until December 8, 1905. The appeal to this court was allowed on June 22, 1905. The petitioner (appellant) averred that, by the various proceedings in the state courts and her incarceration in the prison in solitary confinement, she has been restrained of her liberty and is about to be executed without due process of law, guaranteed for her protection by the 14th Amendment to the Constitution of the United States.

For the reversal of the judgment and order of the district court of the United States, discharging the writ and remanding her to the custody of the Vermont authorities, appellant relies upon the following specifications of error:

"First. Because the petitioner was and is deprived of her liberty by the state, and subjected to the punishment of solitary confinement without any statute authorizing such punishment, and without any sentence of any court directing such punishment, and therefore without due process of law.

[432] *"Second. Because the supreme court of Vermont, having taken jurisdiction of the petition for a new trial, and having failed to comply with the requirements of law in respect of ordering a stay of execution and fixing the time for the execution of the petitioner, has failed to fix a day for the execution, and the Governor of Vermont has no right or authority to fix such a day, and the petitioner is being held to be executed in accordance with a precept not authorized by law, and which is not in and of itself due process of law.

"Third. Because the state of Vermont, having failed to maintain an appellate court in the County of Bennington, as required by its Constitution, has deprived the relator of the opportunity to be heard by a court of competent jurisdiction, and thus deprived her of due process of law.

"Fourth. Because the Governor of Vermont, having issued his order requiring execution of the petitioner on December 8, while proceedings were pending in the courts of the United States for her relief on habeas corpus, said order of the Governor is to be deemed null and void, and the petitioner should be released from custody thereunder."

We shall notice these several assignments in the order named.

As to solitary confinement of the prisoner, it is not contended that she was not properly sentenced in this respect by the court of original jurisdiction. The statute of the state of Vermont (Vt. Stat. § 2007) provides:

"When execution is not to take place until after six months from date of sentence, the court at the same time shall sentence the respondent to hard labor in the state prison or house of correction until three months before the time fixed in the sentence of death for execution thereof, and shall also sentence him to solitary confinement in the state prison or house of correction from the expiration of the sentence to hard labor until the time of execution."

The court, in sentencing the appellant to be hanged on the first Friday of February, 1905, in pursuance of this statute, imposed a sentence of three months at hard labor until within *three months of the time fixed [433] for the execution, and three months of solitary confinement next before the day of execution.

The complaint in this behalf is not of a sentence alleged to have been imposed in violation of law but because of the manner in which the appellant has been kept in confinement in prison after the original day fixed for the execution of the sentence. She alleges that she is suffering solitary confinement without due process of law, within the meaning of the 14th Amendment. If she is held in such confinement by the state authorities,—which the record does not disclose, the confinement shown being close rather than solitary,—we are of the opinion that no case within the Federal protection is made. *Re Medley*, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384, is cited and relied upon by counsel. That case presented an entirely different question. It was there held that a sentence under a state law passed after the commission of felonious homicide, affixing the punishment of solitary confinement for a period of six months in addition to the death penalty, was an *ex post facto* law within the meaning of § 10, article 1, of the Federal Constitution, and therefore void. In *Rooney* v. *North Dakota*, 196 U. S. 319, 49 L. ed. 494, 25 Sup. Ct. Rep. 264, it was held that a statute which substituted close confinement in the penitentiary for a period before execution longer than had theretofore been authorized for confinement in jail was not an *ex post facto* law. In the present case no sentence or law is being violated, and,

assuming the appellant to be held in solitary confinement, there is nothing to prevent her having relief at the hands of the state authorities, and nothing to show that the appellant is being deprived of her liberty in violation of any right secured to her by the Federal Constitution.

The extent of the right of the Federal courts to interfere by the writ of habeas corpus with the proceedings of courts and other authorities of a state is carefully defined by statute. When a prisoner is in jail he may be released upon habeas corpus when held in violation of his constitutional rights. Rev. Stat. § 753, U. S. Comp. Stat. 1901, p. 592. In the case before us,
[434] assuming for this purpose *that the appellant has been properly convicted and sentenced of one of the gravest offenses known to the law, she is properly restrained of her liberty while in custody, for the purpose of making the sentence effectual. If her custodian is improperly restricting her freedom more than is necessary or legal under state law, there is no reason to suppose that the state authorities will not afford the necessary relief. And certainly there is nothing in this branch of the case to justify Federal interference with the local authority intrusted with the keeping of the prisoner.

The reluctance with which this court will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *Allen* v. *Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Hodgson* v. *Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; *Brown* v. *New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Re Frederich*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793.

As to the second assignment of error,—arising from the failure of the supreme court of Vermont to grant a stay, and fix a time for execution of the sentence when it entertained and denied the petition for a new trial,—at the time of the ruling in this behalf the prisoner had been reprieved until June 2. The decision was made before that day had arrived (May 30th). It is difficult to perceive any good reason for requiring the court to fix a time for sentence which was already definitely set by the reprieve of the Governor. It was the opinion of the supreme court of Vermont that it was not required to do so, and this decision cannot be reversed by Federal authority. It has been so frequently ruled by this court, that it is scarcely necessary to cite cases, that the Federal courts will not, by writs of habeas corpus, undertake to reverse the proceedings of the state courts, while acting within their jurisdiction, under statutes which do not conflict with the Federal Constitution. *Re* **Shibuya Jugiro* (*Shibuya Jugiro* v. *Brush*) [435] 140 U. S. 291, 35 L. ed. 510, 11 Sup. Ct. Rep. 770; *Re Wood* (*Wood* v. *Brush*) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; *Andrews* v. *Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389.

Whether, when the Governor had issued a reprieve which carried the date of execution beyond the time of decision in the supreme court, such action rendered unnecessary the fixing of a new day for execution, was purely a question of state practice, not controlled by the Federal Constitution or laws, and upon which the state court had final jurisdiction. *Lambert* v. *Barrett*, 159 U. S. 660, 40 L. ed. 296, 16 Sup. Ct. Rep. 135.

As to the third assignment, that the state of Vermont had failed to maintain an appellate court in the county of Bennington, as required by its Constitution, and thereby deprived the appellant of an opportunity to be heard in review by a court of competent jurisdiction, the state has the right to determine for itself the courts in which crime may be prosecuted, and the appellate tribunals, if any, to which such causes may be carried for review. *McKane* v. *Durston*, 153 U. S. 684, 687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913. Due process of law, guaranteed by the 14th Amendment, does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; *Wilson* v. *North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

The appellant had the right, by the laws of the state, to have a jury trial before a competent court. Upon exceptions, duly and seasonably taken for errors of law alleged to have occurred upon the trial, the appellant had a right to review in the supreme court (Vt. Stat. § 1961); whether this court should be held in each county, or at the state capital for all the counties, is entirely a question of state procedure, presenting no Federal question for review here.

The fourth assignment of error calls for the consideration of § 766, Rev. Stat. of the United States, as amended. 27 Stat. at L. 751, chap. 226, U. S. Comp. Stat. 1901, p. 597. This section provides in substance that any proceeding against a person imprisoned

[436] or confined or restrained *of his liberty, in any state court, or by authority of any state, pending the proceedings or appeal in habeas corpus cases in the Federal courts, and until final judgment therein, and after final judgment of discharge, shall be null and void. The contention for the appellant in this behalf is that the order further staying execution of the sentence by the Governor of Vermont, made on June 22, 1905, granting a reprieve until December 8 of the same year, was made pending the habeas corpus proceedings in the Federal courts, and is therefore void. The order of reprieve was made on June 22, the day upon which the writ was dismissed and appeal allowed to this court, just after the petitioner was remanded to the custody of the state authorities, and very shortly before the appeal here was allowed. The power of the Governor of Vermont to grant reprieves in cases of murder is ample. Vt. Const. Amend. art. 8, chap. 2, § 11. And such power is neither granted nor withheld by the Federal Constitution. *Storti* v. *Massachusetts*, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72.

It is perfectly apparent that it was exercised in the present instance for the very purpose of permitting the prisoner to appeal to this court, and not to render ineffectual or in anywise interfere with the jurisdiction and orders of the Federal courts. Statutes should be given a reasonable construction with a view to make effectual the legislative intent in their enactment. The object of this statute is apparent. It requires the state courts and authorities to make no order, and entertain no proceeding, which shall interfere with the full examination and final judgment in a habeas corpus proceeding in the Federal courts (*Re Shibuya Jugiro* [*Shibuya Jugiro* v. *Brush*] 140 U. S. 291, 35 L. ed. 510, 11 Sup. Ct. Rep. 770), and in no wise to interfere with the judgment if it shall result in a restoration of the petitioner's freedom when wrongfully imprisoned or restrained. The proceedings annulled are "against the person so imprisoned," etc. The statute aims to entirely prevent action which shall interfere with the perfect freedom of the Federal courts to inquire into the case and make such orders and render such judgment as they shall see fit.

[437] *The reprieve granted has had the effect doubtless intended by the chief executive of the state, to allow the cause to be heard upon appeal in this court. To denominate such an order a proceeding against the prisoner would do violence to the terms of the statute and defeat, not carry out, its purpose.

We are unable to find that the appellant has sustained any violation of rights secured by the Federal Constitution by the proceedings of the executive or judicial departments of the state of Vermont. *The final order is affirmed*, mandate to issue at once.

STATE OF SOUTH CAROLINA, *Appt.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 437–472.)

1. **Internal revenue—tax on dealers in intoxicating liquors—application to state agents.**— The dispensing and selling agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors, are fairly within the scope of U. S. Rev. Stat. §§ 3232, 3244, 3140 (U. S. Comp. Stat. 1901, pp. 2091, 2097, 2040), under which an excise tax is to be collected from all sellers of intoxicating liquors.

2. **Constitutional law—Federal license tax on state dispensers of intoxicating liquors.**— The United States may, under the Federal Constitution, exact the license taxes prescribed by the internal revenue laws for dealers in intoxicating liquors from the dispensing and selling agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling such liquors.

[No. 10.]

Argued April 11, 1905. Decided December 4, 1905.

APPEAL from the Court of Claims to review a judgment denying the right of the state of South Carolina to recover the amounts exacted under the Federal internal revenue laws from the state dispensers of intoxicating liquors. *Affirmed.*

See same case below, 39 Ct. Cl. 257.

Statement by Mr. Justice **Brewer:**

By several statutes, the state of South Carolina established dispensaries for the wholesale and retail sale of liquor, and prohibited sale by other than the dispensers. The United States demanded the license taxes prescribed by the internal revenue act for dealers in intoxicating liquors, and the dispensers filed the statutory applications for such licenses. The state, sometimes in cash and sometimes by warrant on its treasury, paid the taxes. No protest was made in reference to these payments prior to April 14, 1901. On that day a formal protest by the state dispensary commissioner was filed with the United States collector of internal revenue at Columbia, South Carolina. No appeal or application for the repayment of the sums paid by the various dispensers was made by them or by the state of South Caro-

lina to the Commissioner of Internal Revenue, as authorized by §§ 3226, 3227, and 3228, Rev. Stat., U. S. Comp. Stat. 1901, pp. 2088, 2089.

The dispensers had no interest in the [439] sales, and received no *profit therefrom. The entire profits were appropriated by the state, one half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the state treasury. In the year 1901 the profits arising from these sales amounted to $545,248.12. While the laws of South Carolina prohibited the sale of liquor by individuals other than the dispensers, of 373 special license stamps issued in that state by the United States internal revenue collector, only 112 were to dispensers, while 260 were to private individuals. Three separate actions were commenced in the court of claims by the state of South Carolina to recover the amounts paid for these license taxes. These actions were consolidated. Upon a hearing, findings of fact were made and a judgment entered for the United States. 39 Ct. Cl. 257. Whereupon the state appealed to this court.

Mr. **Jackson H. Ralston** argued the cause, and, with *Mr. Frederick L. Siddons*, filed a brief for appellant.

Mr. Franklin H. Mackey also filed a brief for appellant:

The word "person," as contained in U. S. Rev. Stat. § 3140, U. S. Comp. Stat. 1901, p. 2040, does not, and was not intended by Congress to, mean a state.

The Alabama Certificates, 12 Ops. Atty. Gen. 176; *Taxation of State Railroads and Manufactures*, 12 Ops. Atty. Gen. 277; *The Detroit House of Correction*, 12 Ops. Atty. Gen. 376; *Internal Revenue Laws and Municipal Corporations*, 13 Ops. Atty. Gen. 67; *Tax on Dividends Accruing to a State*, 13 Ops. Atty. Gen. 439; *State* v. *Atkins*, 35 Ga. 315; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Van Brocklin* v. *Tennessee* (*Van Brocklin* v *Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

The Constitution contains no grant of power to Congress, express or implied, to tax a state or its means and instrumentalities of government; and the exercise by Congress of a power not expressly or impliedly granted by the Constitution to it is impliedly forbidden.

Cooley, Const. Lim. *480; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 432, 4 L. ed. 579, 583; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *The Collector* v. *Day* (*Buffington* v. *Day*) 11 Wall. 113, 20 L. ed. 122; *Warren* v. *Paul*, 22 Ind. 276; *State ex rel. Lakey* v. *Garton*, 32 Ind. 1, 2 Am. Rep. 315; *Jones* v. *Keep*, 19 Wis. 390; *Sayles* v. *Davis*, 22 Wis. 225; *Union Bank* v. *Hill*, 3 Coldw. 325; *Fifield* v. *Close*, 15 Mich. 505; *Smith* v. *Short*, 40 Ala. 385; *Freedman* v. *Sigel*, 10 Blatchf. 327, Fed. Cas. No. 5,080.

By no subterfuge of language, or indirection of phraseology, can the limitation upon the taxing power be evaded. It is the substance, and not the shadow, that is to be regarded.

Brown v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481; *Dobbins* v. *Erie County*, 16 Pet. 435, 10 L. ed. 1022; *Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Northern C. R. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88; *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Fairbank* v. *United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597.

The power to tax includes the power to destroy; therefore the police power, like the judicial power, of a state, may be destroyed by Congress under the guise of taxation if the right to tax it exists at all.

Fifield v. *Close*, 15 Mich. 505.

Solicitor General **Hoyt** argued the cause and filed a brief for appellee:

There are many state authorities for the proposition that a state is a corporation, and that the word "person" in a statute may include a state on its corporate and municipal side, as distinguished from its sovereign character.

Martin v. *State*, 24 Tex. 61; *Indiana* v. *Woram*, 6 Hill, 33, 40 Am. Dec. 378; *Lancaster County* v. *Trimble*, 34 Neb. 752, 52 N. W. 711; *State* v. *Herold*, 9 Kan. 194; *Honduras* v. *Soto*, 112 N. Y. 310, 2 L.R.A. 642, 8 Am. St. Rep. 744, 19 N. E. 845. See also *Salt Lake City* v. *Hollister*, 118 U. S. 256, 30 L. ed. 176, 30 Sup. Ct. Rep. 1055.

There has been no actual burden on the state or its property. Its customers have paid the tax and this principle is evident when considered in connection with the fact that these taxes were charged in as expenses of the business, and were so passed by the state's accounting officers. The tax may also be viewed as taking the form of an occupation tax and license, but it falls none the less within the indirect class, and is as truly an excise as the charge per gallon on whisky or per hundred on cigars.

Pacific Ins. Co. v. *Soule*, 7 Wall. 433, 19 L. ed. 95; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 19 L. ed. 482; *Scholey* v. *Rew*, 23 Wall. 331, 23 L. ed. 99; *Nicol* v. *Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Patton* v. *Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct.

Rep. 493; *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

The Federal excise is levied pursuant to express constitutional grant of power. It is superior to the reserved police power of the states, which cannot control the powers created, or prohibitions imposed, by the Constitution.

This power of taxation is especially broad, absolute, and untrammeled; it is in no wise affected by the fact that states, under their like sovereign power, do or may tax the same object, activities, or rights; it includes liquor excises and license fees.

M'Culloch v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *License Tax Case*, 5 Wall. 462, 18 L. ed. 497; *Pacific Ins. Co.* v. *Soule*, *supra*; *Austin* v. *Boston*, 7 Wall. 694, 19 L. ed. 224; *Veazie Bank* v. *Fenno*, and *Knowlton* v. *Moore*, *supra*; *McCray* v. *United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769.

It is well settled that state laws of police and public welfare become inoperative so far as they interfere with the Federal power over interstate commerce.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 465, 507, 31 L. ed. 700, 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 473, 474, 24 L. ed. 527, 530, 531.

Before the passage of the so-called Wilson act, it was thoroughly established that it was not within the power of a state to forbid the importation of liquors from foreign countries or other states, nor their sale in original packages, nor to subject the sale to discriminatory taxes or regulations.

Walling v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Re Rahrer* (*Wilkerson* v. *Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *American Exp. Co.* v. *Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

Under the Wilson act, however, Congress consented, to a certain degree, that the states should regulate the introduction of liquors into their confines by providing that intoxicating liquors, when transported from one state to another, should lose their character as interstate commerce, and be subject to the operation of state laws, upon completion by delivery and before sale in the original packages; and this act was passed upon in the cases of *Re Rahrer* (*Wilkerson* v. *Rahrer*) and *Rhodes* v. *Iowa*, *supra*, which held that the act was a valid exercise of the power to regulate commerce.

In *Vance* v. *W. A. Vandercook Co.* *supra*, a case coming from South Carolina, the Wilson act was again before the court, and it was held that since the passage of the act, while the right existed to receive intoxicating liquors sent from another state without regard to the state laws to the contrary, there was no right to their sale in the original packages in defiance of state law.

A state may, by contract, restrict the exercise of its powers beyond the right of revocation, where exclusive grants have been made, or exemptions from taxation have been conferred.

Proprietors of Bridges v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *The Binghamton Bridge* (*Chenango Bridge Co.* v. *Binghamton Bridge Co.*) 3 Wall. 51, 18 L. ed. 137; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *Humphrey* v. *Pegues*, 16 Wall. 244, 248, 249, 21 L. ed. 326, 327; *Farrington* v. *Tennessee*, 95 U. S. 679, 689, 24 L. ed. 558, 561; *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362, 368, 26 L. ed. 1128, 1130.

State statutes dealing with undesirable immigrants are unconstitutional whenever they conflict by their necessary operation and effect with the paramount authority of Congress.

Henderson v. *New York* (*Henderson* v *Wickham*) 92 U. S. 259, 271, 23 L. ed. 543 548. See also *Chy Lung* v. *Freeman*, 92 U S. 275, 23 L. ed. 550.

The police power is, from its nature, it capable of exact definition or limitation.

Slaughter-House Cases, 16 Wall. 36, 6 21 L. ed. 394, 404; *Stone* v. *Mississippi*, 10 U. S. 814, 818, 25 L. ed. 1079, 1080; *Eldridge* v. *Trezevant*, 160 U. S. 452, 40 L. ed 490, 16 Sup. Ct. Rep. 345.

But all definitions of the power must be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

New Orleans Gaslight Co. v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547, 549, 19 L. ed. 482, 487, 488, a Federal statute enacted under the power to coin money and the power to lay and collect taxes was attacked upon the ground that it was a tax upon a state instrumentality exercised by the state under its police power; but the court held that, since the Constitution granted the power expressly, any appropriate legislation was superior to the

state police power, and that the particular legislation was entirely constitutional.

If the state delegates authority to her citizens to sell liquor, and exacts a license tax, the Federal excise must be paid before that authority or privilege may be exercised.

Merchants' Nat. Bank v. *United States*, 101 U. S. 1, 25 L. ed. 979.

Since the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

McCray v. *United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769.

The word "dealer" is not confined to one who sells his own property only.

United States v. *Allen*, 38 Fed. 736.

Mr. Justice **Brewer** delivered the opinion of the court:

The important question in this case is whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business, and are simply the agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. It is true a further question is made whether the act of Congress is broad enough to include such persons. But upon this we have little doubt. Section 3232, Rev. Stat., U. S. Comp. Stat. 1901, p. 2091, provides:

"No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3244 (U. S. Comp. Stat. 1901, p. 2097) contains these words of description:

"Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

"Person" is also defined:

[448] *"Sec. 3140 (U. S. Comp. Stat. 1901, p. 2040). . . . Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Now, the dispensers were persons who sold liquors. They applied for and received the licenses. True, they were acting simply as agents of the state; but if the fact that the state was the principal creates no exemption from Federal taxation, then the statute reaches them because they were the actual sellers.

We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this republic a dual system of government,—national and state,—each operating within the same territory and upon the same persons, and yet working without collision, because their functions are different. There are certain matters over which the national government has absolute control, and no action of the state can interfere therewith, and there are others in which the state is supreme, and in respect to them the national government is powerless. To preserve the even balance between these two governments, and hold each in its separate sphere, is the peculiar duty of all courts; pre-eminently of this,—a duty oftentimes of great delicacy and difficulty.

Two propositions in our constitutional jurisprudence are no longer debatable. One is that the national government is one of enumerated powers; and the other, that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, *while the pow- [449] ers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Scott* v. *Sandford*, 19 How. 393, 426, 15 L. ed. 691, 709:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them; putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, 6 L. ed. 23, 68, well declared:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith* v. *Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 809, 8 Sup. Ct. Rep. 564, 569:

[450] *"The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

And by Mr. Justice Gray in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654, 42 L. ed. 890, 892, 18 Sup. Ct. Rep. 456, 459:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162, 22 L. ed. 627; *Ex parte Wilson*, 114 U. S. 417, 422, 29 L. ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd* v. *United States*, 116 U. S. 616, 624, 625, 29 L. ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274, 23 L. ed. 346, 347."

To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.

By the 1st clause of § 8 of article 1 of the Constitution, Congress is given the "power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

By this clause the grant is limited in two ways: The revenue must be collected for public purposes, and all duties, imposts, and excises must be uniform throughout the United States.

The 4th, 5th, and 6th clauses of § 9 of article 1 are:

"4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"5. No tax or duty shall be laid on articles exported from any state.

"6. No preference shall be given by any regulation of commerce *or revenue to the [451] ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."

Article 5 of the amendments provides that no one shall be deprived of "life, liberty, or property without due process of law."

These are all the constitutional provisions that bear directly upon the subject. It will be seen that the only qualifications of the absolute, untrammeled power to lay and collect excises are that they shall be for public purposes, and that they shall be uniform throughout the United States. All other limitations named in the Constitution relate to taxes, duties, and imposts. If, therefore, we confine our inquiry to the express provisions of the Constitution, there is disclosed no limitation on the power of the general government to collect license taxes.

But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. As said by Mr. Justice Miller in *Ex Parte Yarbrough*, 110 U. S. 651, 658, 28 L. ed. 274, 276, 4 Sup. Ct. Rep. 152, 155:

"The proposition that it has no such power is supported by the old argument, often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."

Among those matters which are implied,

though not expressed, is that the nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it follows from
[452] the 2d clause of artiele *6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the national government of all the powers conferred upon it.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

In other words, the two governments—national and state—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the nation is concerned, was affirmed at an early day in the great case of *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, in which it was held that the state had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from. No answer has ever been made to the argument of Mr. Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481; *New York ex rel. Bank of Commerce* v. *Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Bank Tax Case* (*New York ex rel. Bank of Commonwealth* v. *Tax & A. Comrs.*) 2 Wall. 200, 17 L. ed. 793; *The Banks* v. *New York* (*People ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*) 7 Wall. 16, 19 L. ed. 57.

The limitations on the powers of the states to tax national banks are founded upon the doctrines laid down in that case. So also the immunity of national property from state taxation. It is true that in most of the enabling acts for the admission of new states there is express provision that the property of the nation shall be free from state taxation; but, as shown by Mr. Justice Gray, delivering the opinion of the court in *Van Brocklin* v. *Tennessee* (*Van Brocklin* v. *Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, this provision is merely declaratory and unnecessary to establish the exemption of national property from state taxation. See also *Dobbins* v. *Erie County*, 16 Pet. 435, 10 L. ed. 1022, as to taxation by a state of an officer of the United States for his office or its emoluments.

*The converse of this proposition has also [453] been declared by the decisions of this court. In *Texas* v. *White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, Mr. Chief Justice Chase, speaking for the court, declared:

"Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."

In *The Collector* v. *Day* (*Buffington* v. *Day*) 11 Wall. 113, 20 L. ed. 122, it was held that it was not competent for Congress to impose a tax upon the salary of a judicial officer of a state. In the opinion of the court, delivered by Mr. Justice Nelson, it was said (p. 127, L. ed. p. 126):

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

See also *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429–584, 39 L. ed. 759–820, 15 Sup. Ct. Rep. 673.

Upon this proposition counsel for appellant rely. There being no constitutional limit as to the amount of a license tax, and the power to tax being the power to destroy, if Congress can enforce such a tax against a state, it may destroy this effort of the state, in the exercise of its police power, to control the sale of liquor. It cannot be doubted that the regulation of the sale of liquor comes within the scope of the *police power, and equally true that the po- [454] lice power is, in its fullest and broadest sense, reserved to the states; that the mode of exercising that power is left to their discretion, and is not subject to national supervision. But, if Congress may tax the agents of the state charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over this police power, and thus may embarrass and even thwart the

attempt of the state to carry on this mode of regulation.

We are not insensible to the force of this argument, and appreciate the difficulties which it presents; but let us see to what it leads. Each state is subject only to the limitations prescribed by the Constitution, and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the United States shall guarantee to every state in this Union a republican form of government." Art. 4, § 4. That expresses the full limit of national control over the internal affairs of a state.

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The profits from the business in the year 1901, as appears from the findings of fact were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed "public utilities," including not merely therein the supply of gas and water, but also the entire railroad system. Would the state, by taking into possession these public utilities, lose its republican form of government?

We may go even a step further. There are some insisting that the state shall become the owner of all property and the manager of all business. Of course, this is
[455] an extreme view, *but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government. If it be said that the states can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the national government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 431, 4 L. ed. 607, for a complete answer:

"But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and
*most valuable interests? In the legislature [456]
of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, we are to find in the Constitution itself the full protection to the nation, and not to rest its sufficiency on either the generosity or the neglect of any state.

There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the state from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the national government, with only the limitations of uniformity and the public benefit. The exemption of the state's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the state in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that

modern notions as to the extent to which the functions of a state may be carried had then no hold. Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the states, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people depended on
[457] the preservation of the rights *of the states, they had no thought that those states would extend their functions beyond their then recognized scope, or so as to imperil the life of the nation. As well said by Chief Justice Nott, delivering the opinion of the court of claims in this case (39 Ct. Cl. 284):

"Moreover, at the time of the adoption of the Constitution, there probably was not one person in the country who seriously contemplated the possibility of government, whether state or national, ever descending from its primitive plane of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention, there were men who trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments."

Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the national government, meant that that power should be complete, and never thought that the states, by extending their functions, could practically destroy it.

If we look upon the Constitution in the light of the common law, we are led to the same conclusion. All the avenues of trade were open to the individual. The government did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the *business, and not to [458]
exclude him therefrom. The government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a state would attempt to monopolize any business heretofore carried on by individuals.

Further, it may be noticed that the tax is not imposed on any property belonging to the state, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and *Snyder* v. *Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803. In the former case a succession tax of the state of New York was sustained, although the property charged therewith was bequeathed by will to the United States, the court holding that the latter acquired no property until after the state charges for transmission had been paid, saying (p. 629, L. ed. p. 288, Sup. Ct. Rep. p. 1075):

"This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

In *Snyder* v. *Bettman*, the succession tax required by the laws of Congress was sustained, although the bequest was to the city of Springfield, Ohio. This is almost a converse to the *Perkins Case*. It was held that while the power to regulate inheritances and testamentary dispositions was one belonging to the state, and therefore subject to such conditions as the state might see fit to impose (as held in the *Perkins Case*), yet the power to impose a succession tax was vested in Congress, that it could be exercised upon a bequest made to a municipality or a state, and was not to be considered as a tax upon the property bequeathed, the court saying (p. 254, L. ed. p. 1037, Sup. Ct. Rep. p. 805):

"Having determined, then, that Congress has the power to tax successions, that the states have the same power, and that such power extends to bequests to the United States, it would *seem to follow logically that [459]
Congress has the same power to tax the transmission of property by legacy to states,

or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or agencies of the other; since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

So here, the charge is not upon the property of the state, but upon the means by which that property is acquired, and before it is acquired.

It is also worthy of remark that the cases in which the invalidity of a Federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the state, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the state, in the discharge of its ordinary functions as a government.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, 19 L. ed. 482, in which a national tax of 10 per cent on the amount of notes of any person, state bank, or banking association, used for circulation, was sustained, the court thus stated the limits of the power of national taxation over state agencies (p. 547, L. ed. p. 487):

"It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day* (*Buffington* v. *Day*) 11 Wall. 113, 20 L. ed. 122, in the argument in favor of the exemption of the salary of a state judge from national taxation is this language (p. 125, L. ed. p. 126):

"It would seem to follow, as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired,—should not be
[460] liable to be crippled, much less *defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power and the exercise of it, we risk nothing in saying that no one of the states, under the form of government guaranteed by the Constitution, could long preserve its existence."

In *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597, an attempt was made to collect a tax on money due from a railroad company to the city of Baltimore. It was held that the city was a portion of the state, in the exercise of a limited portion of the powers of the state, and the court said (p. 327, L. ed. p. 599):

"The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government."

And again (p. 332, L. ed. p. 601):

"We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not, in that action, be an auxiliary or servant of the state, but of the individual creating the trust. There is nothing of a governmental character in such a position."

*In *Ambrosini* v. *United States*, 187 U. S.
[461] 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, in which the Federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8, L. ed. p. 52, Sup. Ct. Rep. p. 3):

"The question is whether the bonds were taken in the exercise of a function strictly belonging to the state and city in their ordinary governmental capacity, and we are of the opinion that they were, and that they were exempted as no more taxable than the licenses."

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying on of an ordinary private business.

In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations, and those which relate to what may be considered their private business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. The supreme court of Massachusetts, speaking by Mr. Justice Gray (afterwards an associate justice of this court), in *Oliver* v. *Worcester*, 102 Mass. 489, 499, 500, 3 Am. Rep. 485, observed:

"The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.

"To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike,
[462] . . . . the performance *of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. . . . But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument."

In *Lloyd* v. *New York*, 5 N. Y. 369, 374, 55 Am. Dec. 347, the court said:

"The corporation of the city of New York possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty; the other private, and, to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government; and while in the exercise of the latter, is a corporate, legal individual."

See also *Maxmilian* v. *New York*, 62 N. Y. 160, 164, 20 Am. Rep. 468; *Brown* v. *Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Mead* v. *New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Petersburg* v. *Applegarth*, 28 Gratt. 321, 343, 26 Am. Rep. 357; *Eastman* v. *Meredith*, 36 N. H. 285, 72 Am. Dec. 302; *Western Sav. Fund Soc.* v. *Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730. In this case it was held that a city supplying gas to the inhabitants acts as a private corporation, and is subject to the same liabilities and disabilities. In the opinion the court declared (p. 183, Am. Dec. p. 735):

"Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the
*public good. The whole investment is the [463]
private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

See further a subsequent case between the same parties, in the same volume (pp. 185, 189); *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669; 1 Dill. Mun. Corp. 4th ed. § 66.

Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing exeises granted to the national government by an implied inability to impede or embarrass a state in the discharge of its functions. It is reasonable to hold that, while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a state engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation.

For these reasons we think that the license taxes charged by the Federal government upon persons selling liquor are not invalidated by the fact that they are the

agents of the state, which has itself engaged in that business.

The judgment of the Court of Claims is affirmed.

[464] *Mr. Justice **White**, with whom concur Mr. Justice **Peckham** and Mr. Justice **McKenna**, dissenting:

The delicacy of the question, the suggestion that, apart from constitutional limitations, the ruling made is, from an economic point of view, a just one, and the long and painstaking consideration which the court has given the case, cause me to be reluctant to announce a dissent. This, however, is overborne by the conviction that it is my duty to dissent and state my reasons. And this because the decision now made, as it is by me understood, overrules many cases, departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the government of the United States, establishes a doctrine which, in its potentiality, strips the states of their lawful authority. It does more than this, since the theory upon which the case is decided also endows the states with a like power to devest the government of the United States of its lawful attributes. In other words, by the ruling and the reasoning sustaining it, the ancient landmarks are obliterated, and the distinct powers belonging to both the national and state governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other.

The case is this: South Carolina has adopted a law by which no liquor is allowed to be brought into the state for sale or to be sold therein, except such liquor as may be bought by a board of officers appointed by state authority, which liquor is sold by state agents, appointed for that purpose under regulations prescribed by the statute. The question is whether these agents of the state, for the act of selling liquor belonging to the state, as agents of the state, under the authority of the state, can be subjected to a license for carrying on the liquor business, levied by the internal revenue laws of the United States.

That the state, under its police authority, had the right to absolutely prohibit the sale of liquor, or to subject it to such regulations as it deemed proper, is elementary.

[465] So far-reaching *is that authority that a state may direct the destruction of liquor held contrary to law, without paying the value thereof, and without thereby violating the constitutional safeguards as to the taking of property. *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. True, by the operation of the commerce clause of the Constitution, the absolute authority of the state does not extend to prohibiting the sale in original packages of liquor brought in from other states. *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. But that limitation no longer applies, since Congress has, by express legislation, permitted the power of the states to attach to all liquor shipped into one state from another, at once on its arrival, before sale in the original packages, as fully as if it had been manufactured within the state. And the validity of the statute referred to has been upheld by the court in reiterated rulings. *Re Rahrer* (*Wilkerson* v. *Rahrer*) 140 U. S. 562, 35 L. ed. 576, 11 Sup. Ct. Rep. 865; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *American Exp. Co.* v. *Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Adams Exp. Co.* v. *Iowa*, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552. Indeed, one of these cases—the *W. A. Vandercook Co.'s Case*—involved the question whether the act of South Carolina, providing for the purchase and sale of liquor belonging to the state, as above stated, was repugnant to the Constitution of the United States, and the validity of the act in this particular was upheld by the court because of the police power of the state, and because of the provisions of the act of Congress limiting the effect of the interstate commerce clause as to liquor, as already mentioned.

It is not necessary to trace the want of authority of the United States to impose a license exaction on the agents of the state to an express provision of the Constitution, since the court has constantly held that the absence of authority in the government of the United States to tax or burden the agencies or instrumentalities of a state government, and the like want of authority on the part of the states to tax the agencies or instrumentalities of the national government, results from the dual system of government which the Constitution created, *and [466] that the continuance in force of such a prohibition is absolutely essential to the preservation of both governments.

It would be superfluous to review in detail the many cases decided on the subject, but, in the endeavor to bring the settled doctrine clearly to the mind, I refer to the most salient of the cases.

In *M'Culloch* v. *Maryland* (1819) 4 Wheat. 316, 4 L. ed. 579, and *Osborn* v. *Bank of United States* (1824) 9 Wheat. 738, 6 L. ed. 204, it was held that a state could not

impose a tax on the operations of the Bank of the United States or any of its branches. In *Weston* v. *Charleston* (1829) 2 Pet. 449, 7 L. ed. 481, *New York ex rel. Bank of Commerce* v. *Tax Comrs.* (1862) 2 Black, 620, 17 L. ed. 451, *Bank Tax Case* (*New York ex rel. Bank of Commonwealth* v. *Tax & A. Comrs.*) (1865) 2 Wall. 200, 17 L. ed. 793, and *The Banks* v. *New York* (*People ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*) (1869) 7 Wall. 16, 19 L. ed. 57,—it was decided that a state was without power to tax stock or bonds issued by the United States for loans made to it, when held by an individual or by a corporation. In *Dobbins* v. *Erie County* (1842) 16 Pet. 435, 10 L. ed. 1022, it was decided that a state might not tax the compensation of an officer of the United States. And, in *Van Brocklin* v. *Tennessee* (*Van Brocklin* v. *Anderson*) (1886) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, and cases cited on pages 167 *et seq.*, L. ed. page 850, Sup. Ct. Rep. p. 679, it was held that a state might not impose a tax on any property of the United States, including real estate of which the United States had become the owner as the result of a sale to enforce the payment of direct taxes previously levied by the United States.

Conversely, the adjudications concerning the want of power in the United States to tax the states are of a like scope. In *The Collector* v. *Day* (*Buffington* v. *Day*) (1870) 11 Wall. 113, 127, 20 L. ed. 122, 126, it was decided that Congress could not impose a tax upon the salary of a judicial officer of a state. In *United States* v. *Baltimore & O. R. Co.* (1872) 17 Wall. 322, 21 L. ed. 597, it was held that the United States might not impose a tax upon the property and revenues of a municipal corporation. Two members of the court dissented (p. 334, L. ed. p. 601), on the ground that the private property owned by a municipal corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gains, and profits, was "taxable [467] just the same as *property owned by an individual or any other corporation." In *Van Brocklin* v. *Tennessee* (*Van Brocklin* v. *Anderson*) (1886) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, where, as we have seen, it was held that the state of Tennessee could not tax real property within its borders while held by the United States as proprietor, in reviewing the ruling made in *United States* v. *Baltimore & O. R. Co.*, the court said (p. 178, L. ed. p. 854, Sup. Ct. Rep. p. 685):

"This court, in *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597, held that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its powers of government, and therefore its revenues, like those of the state itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income belonging to it in its municipal character must be so held. The reasons for exempting all the property and income of a state, or of a municipal corporation, which is a political division of the state, from Federal taxation, equally require the exemption of all the property and income of the national government from state taxation."

In *Mercantile Nat. Bank* v. *New York* (1887) 121 U. S. 138, 162, 30 L. ed. 895, 904, 7 Sup. Ct. Rep. 826, it was decided that the United States might not tax bonds issued by a state or one of its municipal bodies, under its authority, and held by private corporations. In *Pollock* v. *Farmers' Loan & T. Co.*—the income tax case—(1895) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, although much difference of opinion was manifested in the court as to some of the questions involved, as to one, that is, the lack of authority in the United States to include in the amount of income subject to taxation by the United States money derived from interest on municipal bonds, *the court was [468] unanimous. The opinion, in reviewing the subject, and citing approvingly *The Collector* v. *Day*, *United States* v. *Baltimore & O. R. Co.*, the *Van Brocklin Case* and the *Mercantile Nat. Bank Case*, said (p. 584, L. ed. p. 820, Sup. Ct. Rep. p. 690):

"As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state."

And, lastly, in *Ambrosini* v. *United States* (1902) 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, it was held that Congress could not impose a stamp tax upon a bond which the state law required to be given as a prerequisite to the right to sell liquor.

Is the ruling now made reconcilable with the cases just referred to? In other words, is it consistent with the theory of the Con-

stitution as interpreted from the beginning? In order to give the reasons which convince me that it is not, let me review the contentions which are relied upon to support the ruling.

1. It is urged that, as the state of South Carolina derives revenue from the sale, by the agents of the state, of the liquor belonging to the state, therefore the United States has also the right to derive a revenue from that source. If, by this contention, it is intended to suggest that the South Carolina law was not passed in the exercise of the police power of that state, and must be treated as a revenue law from the mere fact that some revenue results from the operation of the law, the unsoundness of the proposition is demonstrated by the previous cases. In *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, that identical proposition was urged, and was decided to be without merit; and the same doctrine was reiterated in the cases of *American Exp. Co.* v. *Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Adams Exp. Co.* v. *Iowa*, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185, and *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552. If the contention be that wherever, by the exertion of state power upon persons or things, [469] a revenue is produced, *there must be a corresponding right on the part of the government of the United States to reap revenue by burdening the like person or thing, even although in so doing a state agency or instrumentality is taxed, the unsoundness of the proposition and its conflict with the previous cases becomes yet more apparent. One of the foundations upon which the doctrine rests, denying the power of the governments, state or national, to burden the instrumentalities or agencies of each other, is that, if such burdening be permitted, it might result in crippling the revenues of the government upon whose agency or instrumentality the tax was placed. Was this not the ground upon which the earlier cases were placed, and was it not specifically declared to be the foundation of the ruling made in the income tax case, —*Pollock* v. *Farmers' Loan & T. Co.* (1894) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673? The contention that because one government may have derived income from the exertion of its authority, therefore the other government has a right to do likewise, even if the agencies of the other government be thereby taxed, reduces itself to this: That the power to burden arises from the very condition which prevents the power from existing. If pushed to its logical conclusion, the far-reaching result of the proposition that wherever revenue is derived from an act by one government, therefore the other may burden the agent or instrumentality of the other, may be readily illustrated. Take the national government. If, in the exercise of its ample authority to establish national banks, a tax is imposed on such banks and a revenue derived, do the states thereby become entitled, without the consent of Congress, to tax banks? Take the Postoffice Department. If, by the carrying of the mails, revenue is derived by the government of the United States, are the states, from that fact, entitled to tax the instrumentalities employed by the Postoffice Department? Take the ocean transport service of the United States. If, under given circumstances, a charge is made for transportation, and hence a revenue is earned, may the states cripple that service by taxation? It is no answer to the demonstration *which results from these illustra- [470] tions to say that the cases concern purely governmental functions of the United States, and, therefore, the states cannot tax the exercise of such functions. May I ask are these functions on the part of the United States any more governmental than is the power of the government of South Carolina to absolutely control at will the liquor traffic in that state?

2. It is implied that necessity demands the recognition of the right of the government of the United States to tax the state agencies in question because the principle, by which alone such power on the part of the United States can be denied, will inevitably result in giving the states authority to destroy the government of the United States by adopting peculiar methods of dealing with various classes of persons or property. Thus, it is said, the state governments may acquire all farms within their borders, and thus deprive the United States of its power to impose a direct tax on land. That a state may import property from foreign countries, and be exempt from import duty, and undersell those who pay duty, and render the collection of any import tax from others by the United States impossible. But these extreme illustrations amount simply to saying that it is possible for the imagination to foreshadow conditions which, did they arise, would impair the government created by the Constitution, and, because such conjectures may be indulged in, the limitations created by the Constitution for the purpose of preserving both the state and national governments are to be disregarded. In other words, that the government created by the Constitution must now be destroyed, because it is possible to suggest conditions which, if they arise, would, in the future, produce a like result. But the weakness of the illustrations as applied to

this case is apparent. They have no relation to this case, since it is not denied that, as to liquor, the state has absolute power, and may prohibit the sale of all liquor, and thus prevent the United States from deriving revenue from that source. Again, there-
[471] fore, when the true relation *of the argument to the case in hand is seen, it reduces itself to a complete contradiction, *viz.*, a state may, by prohibition, prevent the United States from reaping revenue from the liquor traffic, but any other state regulation by which such result is accomplished may be prevented by the United States, because thereby the state has done indirectly only that which the state had the lawful power directly to do.

3. It is urged that the liquor in this case was owned by South Carolina, and in selling it the state was merely acting as a proprietor, and therefore the tax on the state agents is lawful. But here again the argument overlooks the absolute power possessed by the state concerning the liquor traffic, and the consequent right of the state, in the exercise of its governmental functions, to adopt such methods and instrumentalities as might be deemed best for the control of the traffic. Besides, the proposition is directly repugnant to the previous decisions of this court. Can anything be plainer than that the contention is directly antagonistic to the ruling made in *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597, which ruling was expressly approved in the subsequent cases, especially in the income tax case? Was not the United States the proprietor of the land in Tennessee, which it was held, in the *Van Brocklin Case*, the state of Tennessee had no power to tax? Conceding, for the sake of argument only, that the doctrine announced in the previous cases should be qualified, certainly such qualification would be wholly unreasonable if it did not propose to take in view the absolute and paramount nature of the governmental function under which the property or agency which it was proposed to tax was held or exercised. Reference is made to cases in state courts concerning the liability of municipal corporations to suits for negligence. I cannot see their appositeness to the issue here involved. Besides, the doctrine expounded in the line of cases referred to, if doctrine can be deduced from the confusion and contradiction which exists among the cases, has never received the approval of this court. On the contrary, the rulings of this court point the other way.
[472] *Barnes* v. *District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Workman* v. *New York*, 179 U. S. 552, 574, 45 L. ed. 314, 325, 21 Sup. Ct. Rep. 212. But grant that the rule applied by some state courts, in order to determine when a municipal corporation may be sued for a negligent act, has relation to this case,—my mind sees no possibility of holding that the state of South Carolina, when, by the law in question, it provided for the purchase and sale of liquor by its own agents, was not exercising purely governmental function, in view of the absolute power of that state over that subject, and, moreover, in view of the act of Congress making such power complete and efficacious, even as to original packages of liquor before sale.

4. It is not, of course, by me denied that however varying may be the conditions to which the Constitution is applied, that instrument means to-day what it did at the time of its adoption; but I cannot give my assent to the doctrine that a limitation, which it has been decided over and over again arises from the very nature of the Constitution, is not to be enforced in a given condition to which the Constitution applies, because it does not appear that the framers could have contemplated that such conditions might be evolved in the course of the development of our constitutional institutions. To me it seems that no proposition could be more absolutely destructive of constitutional government.

Being of opinion that the state of South Carolina had complete and absolute power over the liquor traffic, and could exert, in dealing with that subject, such methods and instrumentalities as were deemed best, and that the United States was without authority to tax the agencies which the state called into being for the purpose of dealing with the liquor traffic, I, therefore, dissent, and am authorized to say that Mr. Justice **Peckham** and Mr. Justice **McKenna** concur.

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*ARTHUR M. MANIGAULT, *Appt.*, [473
v.
ALFRED A. SPRINGS *et al.*

(See S. C. Reporter's ed. 473–487.)

1. **Commerce—state obstruction of navigable waters.**—In the absence of legislation by Congress, a state may improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade.

2. **Waters—power of legislature to authorize dam across navigable stream.**—The provision of a state Constitution that

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NOTE.—*On the right to obstruct or destroy rights of navigation*—see note to Hutton v. Webb, 59 L.R.A. 33.

As to liability for damming back water of stream—see note to Avery v. Vermont Electric Co. 59 L.R.A. 817.

On state control of navigable waters—see

all navigable waters shall forever remain public highways does not prevent the legislature, in the exercise of its police power to subserve the drainage of lowlands, from authorizing the construction of a dam across a navigable stream.

8. Contracts—impairment of obligation by exercise of police power.—The obligations of an agreement to remove an existing dam from a navigable stream, and to allow the stream to remain open and unobstructed, are not unconstitutionally impaired by a state statute subsequently enacted in the exercise of the police power to subserve the drainage of lowlands, authorizing the construction of a dam across the stream by the very persons making such agreement.

4. Constitutional law—due process of law—flooding lands as taking private property without compensation.—The flooding of lands consequent upon the private erection of a dam under the authority of legislation enacted in the exercise of the police power to subserve the drainage of lowlands does not amount to a taking which requires compensation to be made to the owner in order to afford the due process of law guaranteed by U. S. Const., 14th Amend., when such flooding can be prevented by raising the height of the dikes around the lands.

5. Constitutional law—due process of law—taking private property without compensation—interference with navigation.—The interruption of access to lands, and the impairment of the rights of navigation, consequent upon the private construction of a dam across a navigable stream, under the authority of legislation enacted in the exercise of the police power to subserve the drainage of lowlands, is not a "taking" which requires compensation to be made to the owner of the lands in order to afford the due process of law guaranteed by the 14th Amendment to the Federal Constitution.

6. Injunction — pending payment of damages—financial irresponsibility.—Equity will not—at least, in the absence of any allegation of financial irresponsibility—enjoin until the damages are paid the private erection of a dam across a navigable stream, at the instance of one who claims that his lands will be flooded as a result of its construction unless prevented by raising the dikes around his lands, and that his access thereto will be interrupted and his rights of navigation impaired, where the legislation authorizing the construction of the dam to subserve the drainage of lowlands makes provision for compensation to any landowner claiming that his land is damaged by reason of its erection.

7. Statutes—local or special legislation.—A navigable stream is not a highway in the sense that that word is used in the provision of S. C. Const. art. 3, § 34, forbidding the enactment of local or special laws "to lay out, open, alter, or work roads or highways."

8. Statutes—formalities essential to the introduction of private bills—validity of statute as affected by noncompliance.—Noncompliance with the formalities prescribed by the general laws of the state for the introduction of private bills in the legislature does not nullify an act passed in disregard of such noncompliance.

[No. 46.]

Submitted November 2, 1905. Decided December 4, 1905.

APPEAL from the Circuit Court of the United States for the District of South Carolina to review a decree sustaining a demurrer to, and dismissing, a bill to enjoin the damming or otherwise obstructing of a stream in that state. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was a bill in equity filed March 4, 1903, by Manigault, *to enjoin the damming [474] or otherwise obstructing Kinloch creek, in the county of Georgetown, South Carolina. A demurrer to the bill was sustained, and the bill subsequently dismissed. See 123 Fed. 707.

It seems that, in 1898, the plaintiff and the two defendants, Springs and Lachicotte, together with one Ford, were adjoining riparian owners on the Santee river, at the mouth of Kinloch creek. The creek furnished access as a highway to all the proprietors on its banks. At that time the defendants constructed a dam across the creek for their own purposes. Objection was made to this by plaintiff and by Ford as an interference with their rights of passage and irrigation. Plaintiff also complained that the effect was to compel him to raise the dikes around his lands. As a result of long negotiations, a compromise was effected and a contract entered into in August, 1898, between defendants under the name of S. M. Ward & Company, of the first part, and plaintiff and Ford, of the second part, whereby it was agreed that the obstructions should continue until December 31 of that year, when they should be removed, so as to give the parties complaining a clear passage through the creek.

notes to Gibson v. United States, 41 L. ed. U. S. 997; Swanson v. Mississippi & R. River Boom Co. 7 L.R.A. 673; Eisenbach v. Hatfield, 12 L.R.A. 632; and Mills v. United States, 12 L.R.A. 673.

On consequential damages in eminent domain proceedings—see notes to D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; A. Backus Jr. & Sons v. Fort Street Union Depot Co 42 L. ed. U. S. 853; and High Bridge Lumber Co. v. United States, 16 C. C. A. 468.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

This removal was effected and matters allowed to remain as they were until 1903, when the general assembly of the state passed an act reciting the necessity of draining the lowlands on the Santee river, whereby their taxable value would be greatly enhanced. Authority was given to the defendants by name to erect and maintain a dam across Kinloch creek, with a proviso that they should be liable for all such damages as might be established in any court of competent jurisdiction by any landowner claiming that his land had been damaged by reason of the erection of the dam.

Mr. **Henry A. M. Smith** submitted the cause for appellant:

The statute is not in the exercise of the police power of the state and for the benefit of the state as a whole, not being a statute passed for the protection of the public health, the public safety, or the public morals.

Jacobson v. *Massachusetts,* 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 358; *Re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; *Lawton* v. *Steele,* 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Mugler* v. *Kansas,* 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273.

The common law with regard to riparian proprietors is the law of South Carolina.

McCullough v. *Wall,* 4 Rich. L. 68, 53 Am. Dec. 715; *Shands* v. *Triplet,* 5 Rich. Eq. 78.

As a riparian proprietor the complainant is entitled, not only to the free use of the stream as a highway, but he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be.

Yates v. *Milwaukee,* 10 Wall. 497, 19 L. d. 984; *Weber* v. *State Harbor,* 18 Wall. 57, 21 L. ed. 798; *Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 682, 27 L. ed. 1074, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; *Illinois C. R. Co.* v. *Illinois,* 146 U. S. 445, 36 L. ed. 1040, 13 Sup. Ct. Rep. 110.

This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.

Yates v. *Milwaukee, Weber* v. *State Harbor, Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* and *Illinois C. R. Co.* v. *Illinois, supra.*

The rule is well settled that the taking, by statute, of the private property of a person or corporation, is not due process of law.

Yates v. *Milwaukee,* 10 Wall. 504, 19 L. ed. 986; *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Missouri P. R. Co.* v. *Nebraska,* 164 U. S. 417, 41 L. ed. 495, 17 Sup. Ct. Rep. 130; *Holden* v. *Hardy,* 169 U. S. 383, 42 L. ed. 788, 18 Sup. Ct. Rep. 383; *Muhlker* v. *New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 523.

Mr. **Theodore G. Barker** submitted the cause for appellees:

In all cases where private property is taken by the state for public use the action is on the property, and the power, if it exists in the state, must be above the contract. It does not act on the contract, but takes from under it vested rights. And this power, when exercised by a state, does not, in the sense of the Federal Constitution, impair the obligation of the contract.

Charles River Bridge v. *Warren Bridge,* 11 Pet. 420, 9 L. ed. 773.

This was said of a grant or contract between the state herself and her grantee, creating vested rights in the latter. If even such a contract was not impaired by the subsequent exercise of the rightful authority of government devesting such vested rights, *a fortiori* would a contract between private persons not be impaired by a law passed in the exercise by the state of her legitimate authority. Such a law must, still more than in a case of the state's own grant, be above the contract, and must be held not to act on the contract at all.

The general provisions of a state constitution are not, and cannot become, as against the state, annexed to the land and properties of a private individual so as to become part of his property; the right to such provisions is not given to him by the Constitution and laws at the time of the acquisition of his land, and such supposed right and privilege are not, by force of such supposed annexation to his property, protected to the owner by a contract obligation binding the state and restricting her in the exercise of her sovereignty.

Jackson ex dem. Hart v. *Lamphire,* 3 Pet. 280, 7 L. ed. 679.

The authority of the state government, for the purposes of public improvements, over navigable streams wholly within the limits of the state, is to be respected as es-

sential to the welfare of the community and to the rights of the states; and the surrender by the state of such authority, or of any power of the like character, can never be implied or presumed, but must be so clearly expressed as to admit of no doubt.

Charles River Bridge v. *Warren Bridge, supra; Bird* v. *Smith,* 8 Watts, 434, 34 Am. Dec. 484; *Atkinson* v. *Philadelphia & T. R. Co.* Fed. Cas. No. 615.

Questions whether the statute passed by the state of South Carolina, approved March 3, 1903, for stopping Kinloch creek by a dam, violated the Constitution and laws of that state, are not matters of which the courts of the United States will entertain jurisdiction.

Willson v. *Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *McCain* v. *Des Moines,* 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *Atkinson* v. *Philadelphia & T. R. Co., Charles River Bridge* v. *Warren Bridge,* and *Jackson ex dem. Hart* v. *Lamphire, supra; Medberry* v. *Ohio,* 24 How. 413, 16 L. ed. 739; *Porter* v. *Foley,* 24 How. 415, 16 L. ed. 740; *Withers* v. *Buckley,* 20 How. 84, 15 L. ed. 816; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435; *Lake Shore & M. S. R. Co.* v. *Ohio,* 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Sinnot* v. *Davenport,* 22 How. 244, 16 L. ed. 248; *Northern Transp. Co.* v. *Chicago,* 99 U. S. 635, 25 L. ed. 336; *Pound* v. *Turck,* 95 U. S. 459, 24 L. ed. 525; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Miller* v. *New York,* 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Escanaba & L. M. Transp. Co.* v. *Chicago,* 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Leovy* v. *United States,* 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797.

Mr. Justice **Brown** delivered the opinion of the court:

The gravamen of the bill is the alleged impairment by the statute of 1903 of the contract entered into in 1898, by which defendants agreed to remove the dam then existing, and to allow such creek to remain open and unobstructed.

It was also charged that the Constitution of South Carolina, declared that all navigable waters should forever remain public highways, was a privilege annexed to and constituting a part of the value of the lands, and that the damming of the creek, except for the purpose of the public health, welfare, and safety, and without due compensation therefor, was a destruction of the property of the plaintiff, and a deprivation thereof without due process of law.

The specific injury complained of is that the plaintiff is the owner of a rice plantation on the North Santee river, bordering on Minim creek, a tributary of the Santee, and lying in part just opposite the mouth or entrance of Kinloch creek; that, relying on the agreement of the defendants, he had also purchased a millsite on the Santee, which could be used for a rice mill or a sawmill, the chief element of value of which was the water connection by means of a canal with Bluff Back creek, accessible only through Kinloch creek, and the consequent necessity of keeping Kinloch creek open and unobstructed; that Kinloch creek is a water highway, navigable by vessels into the Santee river and thence into the ocean; that the erection and retention of a dam across Kinloch creek would not only interrupt his use of Kinloch creek and Bluff Back creek by preventing access to the public landing on the state road from his plantation on Kinloch creek, but would obstruct the inflow of the tide of the Santee river through Minim creek, causing the water from the river to flow back upon the banks to the plantation opposite the mouth of Kinloch *creek, and would thus[478] compel him to raise and strengthen his banks.

1. The first question considered by the court below was whether Kinloch creek was a navigable water of the United States, as defined in the case of *The Montello (United States* v. *The Montello)* 11 Wall. 411, 20 L. ed. 191, 20 Wall. 430, 22 L. ed. 391, or navigable, as navigable streams are defined by the Constitution and the laws of South Carolina. The court was of opinion, based apparently upon affidavits not sent up with the record, that the creek was not a navigable stream under these definitions.

But the bill alleges that "Kinloch creek is a navigable stream or water highway," and the cause was determined upon demurrer to the bill, which admits the allegation of the bill that the creek was navigable. As an original proposition we have repeatedly held that, in the absence of legislation by Congress, a state has power to improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. This was decided in *Willson* v. *Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412, in a brief but cogent opinion by Mr. Chief Justice Marshall. An act of the state of Delaware gave the defendant the right to build a dam across the Black Bird Marsh creek, the constitutionality of which act was attacked as an abridgment of the rights of those who had been accustomed to use it for the purposes of navigation. "But this abridgment," said the court (p. 251, L. ed.

p. 414), "unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." The act was sustained. See also *Pound* v. *Turck*, 95 U. S. 459, 24 L. ed. 525; *Gilman* v. *Philadelphia*, 3 Wall. 732, 18 L. ed. 101; *Huse* v. *Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313.

We do not think the provision of the Constitution of South Carolina interferes with these common-law powers of the state over its navigable waters. In *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185, it was held that the right of bridging
[479] navigable *streams extended to the state of Illinois, notwithstanding that the ordinance of 1787, for the government of the Northwest territory, contained a clause declaring that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free." The power to span these rivers by bridges was put partly upon the theory that the limitations upon the power of the state whilst in a territorial condition ceased to have any operative force except as voluntarily adopted by her after she became a state of the Union, and partly upon the theory, as said Mr. Justice Field, page 689, L. ed. p. 447, Sup. Ct. Rep. p. 194, that "all highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways."

So also in *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423, a provision in the act admitting California [9 Stat. at L. 453, chap. 50, § 3], that "all the navigable waters within the said state shall be common highways and forever free," was held not to deprive the state of the power possessed by it to authorize the erection of bridges over navigable waters. Said the court, page 211, L. ed. p. 961, Sup. Ct. Rep. p. 426, "the clause, therefore, in the act admitting California, quoted above, upon which the complainant relies, must be considered, according to these decisions, as in no way impairing the power which the state could exercise over the subject if the clause had no existence." To the same effect, *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Hamilton* v. *Vicksburg, S. & P. R. Co.* 119 U. S. 280, 284, 30 L. ed. 393, 395, 7 Sup. Ct. Rep. 206.

In *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357, it was held that the act of September 19, 1890 [26 Stat. at L. 426, chap. 907], conferring upon the Secretary of War the authority to direct the alteration of such bridges so as to render navigation easy and unobstructed, did not deprive the states of authority to bridge such streams.

While all of these cases turned upon the power of the state to authorize the erection of bridges, the same principle applies where the legislature deems it necessary to the public welfare *to make other improvements [480] for the reclamation of swampy and overflowed lands, though certain individual proprietors may thereby be subjected to expense. The question whether Kinloch creek could be obstructed without the permission of the Secretary of War does not arise in this case, and is specially disclaimed by the plaintiff. See *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Leovy* v. *United States*, 177 U. S. 621, 633, 44 L. ed. 914, 919, 20 Sup. Ct. Rep. 797; *Cummings* v. *Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Montgomery* v. *Portland*, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735.

The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31 and the free ingress and egress through the creek thereafter, was impaired by the act of the general assembly of 1903, permitting the defendants by name to construct and maintain the dam in question.

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

While this power is subject to limitations

in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—
[481] a discretion which *courts ordinarily will not interfere with. The leading case upon this point is that of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the legislature to establish a parallel bridge between the same points. In *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079, a charter to a lottery company for twenty-five years was held to be subject to the power of the state to abolish lotteries altogether. Similar cases announcing the same principle are *Boyd* v. *Alabama*, 94 U. S. 645, 24 L. ed. 302; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City, L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 672, 29 L. ed. 516, 524, 6 Sup. Ct. Rep. 252; *Mugler* v. *Kansas*, 123 U. S. 623, 665, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

It only remains to consider, in connection with this branch of the case, whether the act of the general assembly of 1903 was a proper exercise of the police power of the state. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of such lands.

Indeed, this seems to have been within the contemplation of Congress in its act of September 28, 1850 (9 Stat. at L. 519, chap. 84, U. S. Comp. Stat. 1901, p. 1586), to enable the states to reclaim the swamp lands within their limits, the 1st section of which enacts that "to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation . . . shall be,
[482] and the same are hereby, granted *to said state." Section 4 extends this provision to the other states. Although the act has no direct bearing on this case, it recognizes an intent on the part of Congress to allow the states to regulate the disposal of overflowed lands as the legislature shall deem best for the public interests. That the act of the general assembly in question was passed upon this theory is indicated by its recitals, that "by reason of the drainage and protection of said lands from overflow, their taxable value will be greaty enhanced, and, without the dam provided for in this bill, a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are," and that this "is the only feasible and practicable scheme for the drainage of said lands." This was the reason given for the passage of the act of the general assembly of Delaware in the *Black Bird Creek Marsh Co.'s Case* already cited. "Chief Justice Marshall observed (p. 251, L. ed. p. 414): "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." Several subsequent decisions have confirmed the power of the state to deal, in the absence of congressional legislation, with their rivers, for the purposes of their internal improvement, such as *Withers* v. *Buckley*, 20 How. 84, 15 L. ed. 816, wherein the right of Mississippi to change the channels or courses of rivers within the state for the purpose of improvement was sustained, and *Atkinson* v. *Philadelphia & T. R. Co.* (Fed. Cas. No. 615), a decision by Mr. Justice Baldwin of this court.

The whole subject was recently discussed in the case of *Leovy* v. *United States*, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797, wherein was vindicated the right of the state of Louisiana to authorize the construction and maintenance of levees, drains, and other structures necessary and suitable to reclaim swamp and overflowed lands, although there was evidence that the stream there concerned *(Red Pass) was useful
[483] for some minor purposes of interstate commerce. There was testimony that luggers or yawls chiefly used by fishermen to carry oysters to and from their beds sometimes went through this pass, but it was not shown that passengers ever went through it, or that freight destined for any other state was ever carried through it.

In delivering an exhaustive opinion in this case, Mr. Justice Shiras observed (p. 636, L. ed. p. 920, Sup. Ct. Rep. p. 803): "We think that the trial court might well

take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances."

While, as already observed, there is a general allegation in the bill that Kinloch creek was a navigable stream, and was capable of navigation by vessels in the Santee river and thence into the ocean, there is no allegation that it was ever used for that purpose, and the opinion of the court was that it certainly was not a navigable water of the United States, or a public highway under the laws of South Carolina. But, however this may be, we are of opinion that the state had full power, in the absence of legislation by Congress, to authorize the construction of this dam for the avowed purposes of this act.

2. The second assignment of error, that the plaintiff was deprived of his property without compensation, and hence without due process of law, is also unsound.

The only allegation of the bill in that connection is that the construction of the dam was not only a destruction of plaintiff's right of navigation and of his access to his lands through Kinloch creek, but has caused the water to fall back to some extent on the plantation on Minim creek, just opposite the mouth of Kinloch, so as to compel the plaintiff to raise his dikes. We do not think the overflow to the minor extent indicated constitutes a taking of prop-
[484] erty within the meaning of *the law, when the damage can be prevented by raising the banks, or that, if the damage stated did in fact result, that it would justify the interposition of a court of equity.

The question whether the overflow of lands constitutes "a taking" within the constitutional provision has been discussed in several cases in this court. *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Gibson* v. *United States*, 106 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Atwater* v. *Canandaigua*, 124 N. Y. 602, 27 N. E. 385.

A recent case is that of *United States* v. *Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, wherein it was held that where the government had placed dams and other obstructions in the Savannah river in such manner as to hinder its natural flow, and to raise the water so as to overflow plaintiff's lands and to cause a total destruction of their value, the proceeding must be regarded as an actual appropriation of the land, and created an obligation upon the government to make compensation for the land. The case was distinguished from that of *Mills* v. *United States*, 12 L. R. A. 673, 46 Fed. 738, wherein the damage consisted in obliging the plaintiff to raise the levees around his rice fields to prevent the flooding of the fields in high water. "Obviously," said the court, in commenting upon that case, "there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense, as alleged, of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained." A still more recent case is that of *Bedford* v. *United States*, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238, in which it is held that damages to lands by flooding as a result of revetments erected by the United States along the banks of the Mississippi river to prevent erosion of the banks from natural causes are consequential, and do not constitute a taking of the lands flooded within the meaning of the Constitution.

We think the rule to be gathered from these cases is that where there is a practical destruction or material impairment of the value of plaintiff's lands, there is a taking which demands *compensation; but [485]
otherwise where, as in this case, plaintiff is merely put to some extra expense in warding off the consequences of the overflow.

The damage claimed by the plaintiff in the interruption of access to his lands and the impairment of his right to navigate the creek does not demand separate consideration. We have repeatedly held that where the government of the United States has, for the purposes of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation. *Gibson* v. *United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48. We see no reason why the same principle should not apply to cases where the state legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its constitutional right,—in one case in improving the navigation of the river, and in the other, in draining its lowlands, and thereby enhancing their value for agricultural purposes.

It is suggested that the agreement of

1898 created an easement of access to plaintiff's land (*Ladd* v. *Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858; *Hogan* v. *Barry*, 143 Mass. 538, 10 N. E. 253), and that the statute of South Carolina must be construed as overriding private rights of property, and not merely as putting an end to the rights of the public, and as giving to plaintiff a claim for damages for the taking of that easement. But it does not necessarily follow that an injunction should issue. Apparently this covenant did not apply to the millsite, since this was purchased after the covenant was made; but, however this may be, a court of equity is not bound to enjoin a public work authorized by statute, until compensation is paid, where no property is directly appropriated. This is particularly true where the damage is difficult of ascertainment at the time, and a reasonable provision is made by the law for compensation. *Sweet* v. *Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. [486] 445; *Cherokee Nation* v. **Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Beasley* v. *Texas & P. R. Co.* 191 U. S. 492, 48 L. ed. 274, 24 Sup. Ct. Rep. 164; *Haverhill Bridge* v. *Essex County*, 103 Mass. 120, 4 Am. Rep. 518; *Parker* v. *Catholic Bishop*, 146 Ill. 158, 34 N. E. 473. The state cases are numerous on this point.

In view of the incidental character of the damage probably resulting to plaintiff's land from the erection of this dam, and the careful provision of the act that the defendants shall be liable for such damage, we do not think, at least, in the absence of an allegation that the defendants are financially irresponsible, that a court of equity would be authorized to enjoin the erection until the damages, which, if they exist at all, must be very difficult of ascertainment, shall be paid.

3. It is also assigned as error that the act of 1903 is obnoxious to the following provisions of the Constitution of South Carolina, article 3, § 34, that "the general assembly of this state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: . . . II. To lay out, open, alter, or work roads or highways."

As the case comes from a Federal court, the question is properly before us.

Admitting that, for the purposes of transit and travel, a river may be considered a highway,—and that seems to have been adjudged by the supreme court of South Carolina (*Heyward* v. *Chisolm*, 11 Rich. L. 253),— we think that, in connection with the words "to lay out, open, alter, or work roads," the word "highway" is used in its ordinary sense, and as an equivalent to a public road. The power given by this section is evidently inapplicable to water highways, which are neither laid out, opened, altered, or worked in the ordinary sense of these words.

4. It is also urged that the act was passed without the formality required by the Revised Statutes of South Carolina of 1893, in which it is declared that no bill for the granting of any privilege or immunity, or for any other private purpose *whatsoever, [487] shall be introduced or entertained in either house of the general assembly except by petition, to be signed by the persons desiring such privileges, of which sixty days' notice shall be given to all persons interested, and be published in the newspaper having the largest circulation in the county where such privilege is to be enjoyed, once a week for three weeks, etc.

As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended, or disregarded by the legislature which enacted it. This law was doubtless intended as a guide to persons desiring to petition the legislature for special privileges, and it would be a good answer to any petition for the granting of such privileges that the required notice had not been given; but it is not binding upon any subsequent legislature, nor does a noncompliance with it impair or nullify the provisions of an act passed without the requirement of such notice.

There was no error in the action of the court below, and *its judgment is, therefore, affirmed.*

HAROLD PETRI, Carl Bopp, and Victor Poels, Copartners, Doing Business under the Name of Petri & Company, *Plffs. in Err.*,

v.

F. E. CREELMAN LUMBER COMPANY and Frank E. Creelman.

(See S. C. Reporter's ed. 487–501.)

1. Error to circuit court—when jurisdiction is in issue—necessity of cer-

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NOTE.—*On direct review in the Federal Supreme Court of judgments of circuit or district court*—see note to Gwin v. United States, 46 L. ed. U. S. 741, and Roberts v. Lewis, 36 L. ed. U. S. 579.

On repeal of statutes by implication—see notes to State v. Massey, 4 L.R.A. 309; First Nat. Bank v. Weidenbeck, 38 C. C. A. 136; and United States v. 356 Caddies of Tobacco, 20 L. ed. U. S. 235.

tificate.— The question of the jurisdiction of a Federal circuit court is sufficiently certified to sustain a writ of error from the Supreme Court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, irrespective of any irregularity in the bill of exceptions or formal certificate, where the judgment dismissing the action and the prior proceedings clearly exhibit the ground on which the judgment was based, and make apparent on the record the fact that the only matters tried and decided were demurrers to pleas to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court was without jurisdiction.

2. **Courts—jurisdiction of circuit court where one of two defendants resides in another district.**—Jurisdiction of a civil cause in which two or more defendants reside in different districts in the state of Illinois was conferred upon the Federal circuit court for either district, where the requisite diversity of citizenship exists, by the provision of the act of March 2, 1887 (24 Stat. at L. 442, chap. 315, U. S. Comp. Stat. 1901, p. 345), § 4, that "if there are two or more defendants in civil suits, residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside."

3. **Statutes—repeal by implication—special and general legislation.**—The special provision of the act of March 2, 1887 (24 Stat. at L. 442, chap. 315, U. S. Comp. Stat. 1901, p. 345), § 4, giving the Federal circuit court for either district in Illinois jurisdiction, where the requisite diversity of citizenship exists, of a civil cause in which two or more defendants reside in different districts in the state, was not repealed by the general language of the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), respecting the proper district for instituting suits in the circuit or district courts, although the act contains a general clause repealing all laws and parts of laws in conflict with its provisions.

[No. 49.]

Argued and submitted November 7, 1905. Decided December 4, 1905.

IN ERROR to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois to review a judgment dismissing, for want of jurisdiction, a suit by aliens against citizens of Illinois, some of whom reside in a different district from that in which the suit was brought. *Reversed* and remanded for further proceedings.

Statement by Mr. Justice **White**:

Plaintiffs in error, suing as aliens and residents of Antwerp, Belgium, commenced this action in the circuit court of the United States for the northern division of the northern district of Illinois, to recover damages for an alleged libel. Two Illinois corporations and a number of persons were made defendants. The bill as to the corporations alleged citizenship in Illinois, and, as to all the defendants, except the Creelman Lumber Company and F. E. Creelman, one of the individual defendants, the bill alleged that the defendants resided in the district and division where the suit was brought. The Creelman Lumber Company and F. E. Creelman filed pleas to the jurisdiction of the court, based upon the fact that each of them, before and at the time of the commencement of the suit, although citizens of the state of Illinois, were residents of a different district from the one in which the suit was brought,—that is, the southern district of Illinois. To these pleas the plaintiffs demurred, and, on a hearing, a district judge, holding the circuit court, overruled the demurrers, and held the pleas to the jurisdiction good. The plaintiffs electing to stand upon their demurrers to the pleas, the action as to the defendants in question was dismissed for want of jurisdiction. Some time afterwards a bill of exceptions was signed by a circuit judge, in which was recited the action taken by the trial court upon the demurrer to the jurisdictional pleas aforesaid, and the cause was taken to the circuit court of appeals. That court, however, dismissed the writ of error, and on the receipt of its mandate, about a year after the entry of the judgment of dismissal above referred to, there was filed in the trial court *a certificate of [489] the circuit judge, in which was set out the proceedings had in the cause, and it was certified, for the purpose of a writ of error from this court, that the only question involved in such writ of error was one of jurisdiction. It was also certified that the judge who had heard the cause resided in the southern district of Illinois, and was not within the territorial limits of the northern district of Illinois. Cotemporaneous with the filing of the certificate a writ of error was allowed, and in the petition and assignments of errors it clearly appeared that the writ of error was prosecuted solely upon the question of jurisdiction arising from overruling of the demurrers to the pleas to the jurisdiction.

Mr. **Consider H. Willett** submitted the cause for plaintiffs in error:

The record showing that the only question involved is one of jurisdiction, such record takes the place of a bill of exceptions showing that the only question embraced in the record is one of jurisdiction.

Excelsior Wooden Pipe Co. v. *Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22

Sup. Ct. Rep. 681; *Huntington* v. *Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *Smith* v. *McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Chappell* v. *United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Van Wagenen* v. *Sewall*, 160 U. S. 369, 372, 40 L. ed. 460, 461, 16 Sup. Ct. Rep. 370; *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375.

Two years is the limitation prescribed for writs of error to the United States Supreme Court from a circuit court, where suit is dismissed on the sole ground of a want of jurisdiction.

Excelsior Wooden Pipe Co. v. *Pacific Bridge Co.* 185 U. S. 282–285, 46 L. ed. 910–913, 22 Sup. Ct. Rep. 681; *Allen* v. *Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; *Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

As a part of such writ of error, and in compliance with act of Congress of March 3, 1891 (26 Stat. at L. 826, chap. 517, § 5, U. S. Comp. Stat. 1901, p. 549), where a writ of error is sued out, the court having jurisdiction, the court whose clerk has charge of the record at the time of making application for the writ of error must certify that the only question involved in the writ of error is one of jurisdiction, and at the same time the same judge must require a bond of plaintiffs in error.

Excelsior Wooden Pipe Co. v. *Pacific Bridge Co.* and *Huntington* v. *Laidley*, *supra*.

A bill of exceptions is only essential when facts *dehors* the record are to be preserved. Where the record itself shows that the plaintiffs lose their rights upon pleas to the jurisdiction because the defendants in error are not properly served with summons within the judicial district where suit is brought, such facts appear of record and require no bill of exceptions to preserve them. In such case a certificate that the only question involved in a writ of error from such judgment is one of jurisdiction is mere recital of facts existing of record, to save labor to the Supreme Court, and puts no new facts into the record.

Interior Constr. & Improv. Co. v. *Gibney*, *supra*.

Plaintiffs being aliens, having a cause of action against defendants, who were citizens of Illinois, some of whom resided in the northern division of the northern district of Illinois, where suit was brought, the court erred in holding that a duplicate summons could not issue to defendants, residents of the southern district of Illinois.

East Tennessee, V. & G. R. Co. v. *Atlanta & F. R. Co.* 15 L.R.A. 109, 49 Fed. 608; *Goddard* v. *Mailler*, 80 Fed. 422; *New Jersey Steel & I. Co.* v. *Chormann*, 105 Fed. 532; Hughes, Fed. Proc. p. 234.

The fact that the earliest controlling statute is special and the other two general creates a presumption that the first special statute is to be construed as remaining an exception to the general statutes, such general statutes making no provision for the particular case where more than one defendant are parties to a suit.

Pearce v. *Bank of Mobile*, 33 Ala. 693; *McFarland* v. *Bank of State*, 4 Ark. 410; *Thorpe* v. *Adams*, L. R. 6 C. P. 125; *Fitzgerald* v. *Champenys*, 30 L. J. Ch. N. S. 782; *State* v. *Rackley*, 2 Blackf. 249; *Stockett* v. *Bird*, 18 Md. 484; *Crane* v. *Reeder*, 22 Mich. 322; *State ex rel. Fosdick* v. *Perrysburg*, 14 Ohio St. 472; *Brown* v. *Philadelphia County*, 21 Pa. 37; *Rounds* v. *Waymart*, 81 Pa. 395; *Harrisburg* v. *Sheck*, 104 Pa. 53; *Morrison* v. *Fayette County*, 127 Pa 110, 17 Atl. 755; *Murdock's Petition*, 142 Pa. 341, 24 Atl. 222; *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*), 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *Rodgers* v. *United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; *Henderson's Tobacco* (*United States* v. *356 Caddies of Tobacco*) 11 Wall. 652, 20 L. ed. 235.

Where several affirmative statutes relate to the same subject-matter, but have different objects, none are repealed, but all stand.

Gibson v. *Ackermann*, 70 Ill. App. 399; *Casey* v. *Harned*, 5 Iowa, 1; *Safe Deposit & T. Co.* v. *Fricke*, 152 Pa. 231, 25 Atl. 530; *Mills* v. *State*, 23 Tex. 295; *United States* v. *Claflin*, 97 U. S. 546, 24 L. ed. 1082; *People ex rel. Murphy* v. *McAllister*, 10 Utah, 357, 37 Pac. 578; *Re Gannett*, 11 Utah, 289, 39 Pac. 496.

Repeals by implication are not favored.

Conner v. *Southern Exp. Co.* 37 Ga. 397; *Bruce* v. *Schuyler*, 9 Ill. 221; *People ex rel. Freeman* v. *Barr*, 44 Ill. 198; *Casey* v. *Harned*, *supra*; *Goddard* v. *Boston*, 20 Pick. 407; *M'Cartee* v. *Orphan Asylum Soc.* 9 Cow. 437, 18 Am. Dec. 516; *Dodge* v. *Gridley*, 10 Ohio, 173; *Wood* v. *United States*, 16 Pet. 342, 10 L. ed. 987; *McCool* v. *Smith*, 1 Black, 459, 17 L. ed. 218; *Arthur* v. *Homer*, 96 U. S. 137, 24 L. ed. 811; *Red Rock* v. *Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*) *supra*; *Cope* v. *Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *Frost* v. *Wenie*, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; *United States* v. *Healey*, 160 U. S. 136, 147, 40 L. ed. 369, 373, 16 Sup. Ct. Rep.

247; *United States* v. *New York*, 160 U. S. 598, 609, 40 L. ed. 551, 555, 16 Sup. Ct. Rep. 402; *United States* v. *Greathouse*, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629.

Mr. **David S. Lansden** argued the cause, and, with *Messrs. Angus Leek, John M. Lansden*, and *M. Paul Noyes*, filed a brief for defendants in error:

The certificate of the question of jurisdiction not having been made by the circuit court during the December term, 1902, at which term said cause was dismissed for want of jurisdiction, the writ of error from this court should be dismissed for want of jurisdiction to entertain the same.

Colvin v. *Jacksonville*, 158 U. S. 456, 461, 39 L. ed. 1053, 1054, 15 Sup. Ct. Rep. 866; *The Bayonne*, 159 U. S. 687–694, 40 L. ed. 306–309, 16 Sup. Ct. Rep. 185.

The certificate of the question of jurisdiction should have been made, the bill of exceptions signed, and the writ of error allowed by Honorable J. Otis Humphrey, Judge, who heard and decided the cause in the circuit court, and not by Honorable Christian C. Kohlsaat, Judge, who was not present at the hearing and decision. This court having decided that a bill of exceptions must be signed by the judge before whom the cause was tried, the same being a judicial act, by analogy it should be held that the granting of the certificate of the question of jurisdiction is also a judicial act, which should be performed by the judge who heard and decided the cause.

Malony v. *Adsit*, 175 U. S. 281–291, 44 L. ed 163–167, 20 Sup. Ct. Rep. 115.

The statement in the certificate, made by Judge Kohlsaat, that Judge Humphrey, who heard the cause, resided at Springfield, Illinois, in the southern district of Illinois, and that he was out of the territorial limits of the northern district of Illinois at the time the certificate was granted, constitutes no excuse whatever for the failure of plaintiffs in error to have the certificate made by Judge Humphrey.

Western Dredging & Improv. Co. v. *Heldmaier*, 49 C. C. A. 264, 111 Fed. 123.

This judgment does not present to the court the definite question of jurisdiction upon which the case was decided.

Huntington v. *Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* 185 U. S. 285, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

The defendants in error are inhabitants of the southern district of Illinois, and were served with process in that district. The plaintiffs in error are aliens. The defendants in error, therefore, could not be sued in the northern district of Illinois, in which district this suit was brought, although the other defendants were residents of said northern district. The circuit court properly overruled the demurrers of plaintiffs in error to the pleas to the jurisdiction filed by defendants in error.

McCormick Harvesting Mach. Co. v. *Walthers*, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; *Denton* v. *International Co.* 36 Fed. 1; *Smith* v. *Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Greeley* v. *Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *New Jersey Steel & I. Co.* v. *Chormann*, 105 Fed. 532; *Jenkins* v. *York Cliffs Improv. Co.* 110 Fed. 807; *Freeman* v. *American Surety Co.* 116 Fed. 549; *French* v. *Spencer*, 21 How. 228, 16 L. ed. 97; *Gibson* v. *United States*, 194 U. S. 182, 48 L. ed. 926, 24 Sup. Ct. Rep. 613; *M'Iver* v. *Ragan*, 2 Wheat. 25, 4 L. ed. 175; *Denn* v. *Reid*, 10 Pet. 524, 9 L. ed. 519; *United States* v. *Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Potter's Dwarr. Stat. p. 221; *Hankins* v. *People*, 106 Ill. 628; Cooley, Const. Lim. p. 64; Sutherland, Stat. Constr. § 328; *Hamilton* v. *Rathbone*, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155; *Harwood* v. *Wentworth*, 162 U. S. 547, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890; *Guthrie Nat. Bank* v. *Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513; *Waite* v. *Santa Cruz*, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327; *Arms* v. *Ayer*, 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *Rodgers* v. *United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

A motion to dismiss the writ of error first requires our attention. It is urged that the writ should be dismissed because the bill of exceptions filed below and the certificate made as to the question of jurisdiction on this writ of error were authenticated by a judge other than the trial judge, and further, because the certificate was not made at the term in which the judgment complained of was entered. We are relieved, however, from the necessity of considering these objections, for the reason that the judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only

matter tried and decided in the circuit court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions or formal certificate in respect to the matter decided was required, and the question of jurisdiction alone was sufficiently certified to this court, as required by the act of March 3, 1891. 26 Stat. at L. 827, chap. 517, § 5, U. S. Comp. Stat. 1901, p. 549; *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272, and cases cited; *Chappell* v. *United States*, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397.

We pass, then, to a consideration of the merits. The plaintiffs in error insist that the circuit court for the northern division of the northern district of Illinois had jurisdiction over the defendants, who, being citizens of Illinois, were residents of the southern district of that state, because such jurisdiction was expressly conferred by § 740, Rev. Stat., U. S. Comp. Stat. 1901, p. 587, and by the terms of a special act [493] relating to the judicial districts *in Illinois, approved March 2, 1887. 24 Stat. at L. 442, chap. 315, U. S. Comp. Stat. 1901, p. 345. On the contrary, in effect, the defendants in error maintain that the court below rightly held that it had no jurisdiction over the defendants who resided in the southern district of Illinois, because § 740 of the Revised Statutes had been repealed by the judiciary acts of March 3, 1875 (18 Stat. at L. 470, chap. 137), and March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), and because no such jurisdiction was given by the special act of March 2, 1887, and, if it was conferred by that act, the act was repealed by the judiciary act of March 3, 1887.

In order, as far as may be, to narrow the question for decision to the case before us, we shall come first to consider the contentions concerning jurisdiction, based on the special act of March 2, 1887, which deals alone with the state of Illinois, since, if we conclude that that act gave the jurisdiction and has not been repealed, we will be relieved of the necessity of determining whether the general provision (Rev. Stat. § 740, U. S. Comp. Stat. 1901, p. 587), applicable to all states having more than one judicial district, is yet in force.

In approaching the consideration of the special act relating to the Illinois districts we shall assume, for the purposes of such consideration, that the provisions of § 740, Rev. Stat., were repealed by any or all of the judiciary acts of March 3, 1875, and the act of March 3, 1887, as corrected by the act of August 13, 1888.

In coming to consider the special act two questions arise: 1. Did the terms of that act give jurisdiction to the circuit courts of the United States in Illinois as to all the defendants in a civil action where there were two or more such defendants residing in different districts of the state? 2. If the act conferred such jurisdiction, was it repealed at the time of the bringing of the action?

First. The special act of March 2, 1887, was entitled "An Act to Amend Section 536 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 344], Relating to the Division of the State of Illinois into *Judicial Districts. . . . " At the time [494] of the passage of this special act there were two judicial districts in the state of Illinois, —the northern and the southern. The 1st section of the act took certain counties from the southern district, and added them to the northern district. The 2d section divided the northern district, as enlarged, into two divisions. The 3d section fixed the place and times of holding courts in said divisions of the northern district. The 4th section, relating to jurisdiction, was as follows:

"Sec. 4. That all civil suits not of a local nature, and criminal prosecutions, must be brought in the division of the said northern district of Illinois where the defendant or defendants reside or the offense is committed; but, if there are two or more defendants in civil suits, residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside. When the defendant is a nonresident of the district, action may be brought in either division of said district wherein the defendant may be found." [24 Stat. at L. 442, chap. 315, U. S. Comp. Stat. 1901, p. 345.]

The remaining sections contain provisions rendered necessary by the change in both districts and the subdivision of the northern district.

The first part of the opening sentence of § 4 clearly lays down the general rule controlling suits against residents of the northern district, and directs in what division of that district suit may be brought. This general rule being thus laid down, the sentence proceeds to carve out an exception in the following language: ". . . but if there are two or more defendants in civil suits, residing in different divisions or districts, the action may be brought in either in which either of the defendants may reside." In other words, the exception plainly confers jurisdiction, in the cases for which it

provides, upon the courts of either district, and as to such exception gives the right to bring the suit in either district, and, if brought in the northern district, requires it to be brought in the division of that district in which one of the defendants resided.

[495] The *text making this provision is free from ambiguity, and, if its plain import be followed, is decisive. But the argument is that the words "or district," contained in the sentence, were manifestly a mistake, and should be read "of the district," so as to cause the sentence to read as follows: but if there are two or more defendants in civil suits, residing in the different divisions of the district, the action may be brought in either in which either of the defendants may reside. To adopt this view, however, would compel us to strike out the word "or" and insert in its stead the words "of the," and to strike out the word "districts" and insert in its stead the word "district." To do this would be not interpretation, but legislation. It is insisted, however, that this would not be the case, because to thus restrict the section in question is compelled by a consideration of the subject with which it dealt and the purpose which Congress had in mind in enacting the statute; that is to say, the argument is that, as by the act the purpose of Congress was only to divide the northern district of Illinois into two divisions, and to deal exclusively with the district thus subdivided, therefore the words used must be construed so as to cause them to relate exclusively to such subject-matter. This argument, however, misconceives the avowed purpose of the act as shown by its title and context. The title, as we have seen, expressly purported to deal with and amend the section of the Revised Statutes creating two judicial districts in Illinois, and the very first section of the act dealt with the southern as well as with the northern district. And that the mind of Congress was addressed to the existence of two districts in the state, and that the wisdom of legislating on that basis was present to its mind is shown not only by the provisions in question, but by the subsequent sections of the act, wherein frequent mention is made of both districts.

And the error of the assumption that, because the act of Congress primarily provided for the division of the northern district, therefore that body could not have contemplated a provision concerning the right

[496] of election to bring a suit in *either of the districts of the state where two or more defendants resided in the different districts, is refuted by legislation enacted at the same session of Congress in which the Illinois act was passed,—that is, by an act approved February 28, 1887, two days before the approval of the Illinois act,—dividing the eastern and western districts of Missouri into divisions, in which act it was provided in the 4th section as follows (24 Stat. at L. 425, chap. 271, U. S. Comp. Stat. 1901, p. 387):

"Sec. 4. That hereafter all suits to be brought in the courts of the United States in Missouri, not of a local nature, shall be brought in the division having jurisdiction over the county where the defendants, or either of them, reside; but, if there be more than one defendant, and a part of them reside in different divisions or districts of said state, the plaintiff may sue in either division of either district where one of such defendants resides, and send duplicate writs to the other division or district, directed to the marshal of said district, on which said writs shall be indorsed, by the plaintiff or his attorney, that the same is a duplicate of the original writ sued out of the court of the proper division and district. . . ."

Now, it will be observed that Congress in this provision uses the very words found in the Illinois act, accompanied with such directions as to service of process as leaves no possible room for contention that the words "division or district" were used by Congress as synonymous and without a comprehension of the plain distinction which existed between them. And, as we shall proceed hereafter to demonstrate, the prior and subsequent legislation of Congress relating to the division of states into judicial districts or of a judicial district into divisions, all demonstrate that in enacting such legislation Congress usually deemed it wise to provide for joining in a single action in either district a number of defendants residing in the particular state, but in different districts thereof.

Holding, as we do, that the special act of 1887, as to Illinois, conferred jurisdiction upon a court of either district in a civil cause wherein two or more defendants resided in different *districts in the state, we [497] are brought to consider the second question, which is, Was the act in question repealed by the act of March 3, 1887, as corrected by the act of August 13, 1888?

As previously said, we assume, for the purposes of the argument, that the effect of the judiciary act of March 3, 1875, was to repeal § 740, Rev. Stat., U. S. Comp. Stat. 1901, p. 587, conferring in general terms throughout the United States the character of jurisdiction referred to, and we also concede, for the sake of the argument, that, if the act of 1875 had not caused a repeal of § 740, the act of March 3, 1887, as corrected by the act of August 13, 1888, did so. Does it follow from these concessions,

however, that the judiciary act of March 3, 1887, as corrected, repealed the special act, which was approved only one day before the approval of the judiciary act of 1887?

Undoubtedly the act of 1887 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508], in the 1st section thereof, declared the general rule to be that no civil suit should be thereafter brought in a circuit or district court by any original "process of [or] proceeding" in any other district than that whereof the defendant was an inhabitant, and that where the jurisdiction was founded only on the fact that the action was between citizens of different states, suit should be brought only in the district of the residence of either the plaintiff or defendant. So, also, the act contained a general clause repealing all laws and parts of laws in conflict with the provisions of the act.

It is elementary that repeals by implication are not favored, and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject, and the subsequent law is general in its operation. To hold, then, that the general terms of the act of 1887 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508] repealed the special and particular provisions of the act of 1887 [24 Stat. at L. 442, chap. 315, U. S. Comp. Stat. 1901, p. 345] relating to the districts in Illinois, we must conclude that there was such conflict between the two that it cannot reasonably be inferred that Congress intended that the two should coexist.

[498] *The conclusion, in effect, therefore, would have to be that it cannot be supposed that Congress intended, when it legislated generally concerning the jurisdiction of the courts of the United States, to leave in force a special act as to the districts in Illinois, which would take those districts out of the general rule otherwise governing elsewhere. But to adopt this proposition would compel us to ignore the entire course of legislation by Congress concerning the courts of the United States from the beginning, both prior to and after the adoption of the general act of 1887. By the original judiciary act (1 Stat. at L. 79, chap. 20) suits were permitted to be brought, either in a circuit or district court, in the district whereof the defendant was an inhabitant or wherein he was found at the time of serving the writ. Each state, then, practically constituted a single judicial district. Whilst this general provision was in force, many special acts were passed by Congress creating more than one district in a state, and providing that where a suit was brought against two or more defendants residing in different districts in a state, the plaintiff might sue in either district. See act of June 18, 1838, § 4, as to Mississippi districts, 5 Stat. at L. 248, chap. 115; act of January 18, 1839, § 7, as to Tennessee, 5 Stat. at L. 314, chap. 3; act of February 6, 1839, § 5, as to Alabama, 5 Stat. at L. 315, chap. 20; act of August 11, 1848, § 5, as to Georgia, 9 Stat. at L. 281, chap. 151; act of March 3, 1849, § 3, as to Iowa (state made into divisions), 9 Stat. at L. 411, chap. 124; and act of February 10, 1855, § 9, as to Ohio, 10 Stat. at L. 606, chap. 73.

If the theory of irreconcilability between such statutes and the existence of a general provision to the contrary, necessarily involved in the argument to establish that the special Illinois statute was repealed by the act of 1887, be sound, it must follow that either these special acts, passed long after the judiciary act of 1789, never took effect, or that the consequence of their passage was to destroy the provision of the judiciary act, prescribing the place where civil suits might be brought, which, of course, is an impossible hypothesis.

Now, it was not until May 4, 1858 (11 Stat. at L. 272, chap. 27), that a general law was passed, making a provision like unto that contained in the special acts to which we have referred, of general application throughout the United States; and it was this general provision which was subsequently incorporated into § 740, Rev. Stat., U. S. Comp. Stat. 1901, p. 587. And, even after the passage of the act of 1858, in at least one special act, Congress incorporated a like provision to that we have been considering. Act Feb. 24, 1863, § 9, as to Michigan, 12 Stat. at L. 662, chap. 54, U. S. Comp. Stat. 1901, p. 587.

And the refutation of the argument of inherent incompatibility between a *general [499] rule regulating jurisdiction and a special act departing from that rule as to a particular state, which results from a consideration of the legislation of Congress from the beginning to the time of the adoption of the act of 1875, likewise results from a consideration of the legislation since that act. Thus under the contention, which we have assumed to be sound, the effect of the passage of the act of 1875 was to repeal the provision of § 740, Rev. Stat. This being the case, it resulted that the act of 1875 announced the general rule as to jurisdiction, which was in conflict with the rule theretofore generally prevailing under the terms of § 740, Rev. Stat. But that Congress did not deem that a special provision as to a particular state or states was irreconcilable with the existence of the general rule is conclusively shown by the fact that,

after the adoption of the act of 1875, various special acts were passed, dividing particular states into two or more districts, or dividing a district or districts into divisions, and expressly declaring that, in civil suits, not of a local nature, two or more citizens of the state might be joined as defendants, although residing in different districts of the state, and that suit might be brought in either district. See act as to Louisiana, 1881 (21 Stat. at L. 507, § 2, chap. 144, U. S. Comp. Stat. 1901, p. 364), as to Mississippi, 1882 (22 Stat. at L. 102, § 3, chap. 218, U. S. Comp. Stat. 1901, p. 378); as to Missouri, Feb. 28, 1887, § 4 (24 Stat. at L. 425, chap. 271, U. S. Comp. Stat. 1901, p. 387). To which may be added the statute relating to Illinois, which we are considering.

Indeed, the legislation of Congress since the passage of the act of 1887 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508], under the hypothesis of the repeal
[500] of § 740, *Rev. Stat., by that act, also demonstrates that it was considered that the passage of a special statute as to a particular state, vesting jurisdiction in the courts of either district within the state, where two or more defendants resided in different districts therein, was not irreconcilable with the existence of a general rule to the contrary in a statute having a general operation. This is shown by the fact that a special law of the character stated has been enacted as recently as 1894. Act as to Mississippi (28 Stat. at L. 115, § 4, chap. 144, U. S. Comp. Stat. 1901, p. 383). The subject-matter dealt with by that act—*viz.*, the division of a judicial district of Mississippi into minor subdivisions—is like unto the Illinois act which we are considering, and the identical language used in the Illinois act, "division or district," is also found in the Mississippi act, accompanied, however, with a provision leaving no possible room to contend that it was not the intention of Congress to allow the joinder in one action of defendants residing in different districts within the state. Section 4 of the act reads as follows:

"Sec. 4. That if there be more than one defendant in a cause, and the defendants reside in different divisions of the said southern district, or any of the defendants reside in the northern district, the plaintiff may sue in either division or district where any defendant resides, and send duplicate writs for the other defendant or defendants to the other division or district where such defendant or defendants reside, and said writs, when executed and returned into the court from which they issued, shall constitute one suit, and be proceeded in accordingly."

Concluding, as we do, that the special act of March 2, 1887, relating to the judicial districts of Illinois, was in force at the time of the bringing of this action, and still remains in force, and that, by the terms of § 4 of the act and under the pleadings in the action, jurisdiction was conferred upon the circuit court of the northern division of the northern district of Illinois over all the defendants named in the declaration, as well those residing *in the southern dis- [501]
trict as those residing in the northern district of Illinois, it follows that the court below erred in overruling the demurrers to the pleas to the jurisidiction, and rendering judgment of dimissal, and such judgment must, therefore, be reversed, and the cause remanded for further proceedings.

Reversed.

JAMES FOPPIANO, *Plff. in Err.*,
v.
ROBERT A. SPEED, as Clerk of the County Court of Shelby County.

(See S. C. Reporter's ed. 501–520.)

Commerce in intoxicating liquors—state license tax on sales on board interstate carriers.—The exaction by a state of a license fee from a person engaged in selling intoxicating liquors within the state, over the bar, on board a ferryboat employed in interstate commerce, is authorized by the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting to state laws enacted in the exercise of the police power all intoxicating liquors arriving in the state.

[Nos. 67, 68.]

Argued and submitted November 9, 1905. Decided December 4, 1905.

NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

State licenses or taxes as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On commerce in intoxicating liquors—see notes to State v. Creeden, 7 L.R.A. 296; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616, and Rhodes v. Iowa, 42 L. ed. U. S. 1089.

IN ERROR to the Supreme Court of the State of Tennessee to review two judgments of affirmance of judgments of the Circuit Court of Shelby County, in that state, enforcing a license tax for the sale of intoxicating liquors within the state on board a ferryboat employed in interstate commerce. *Affirmed.*

See same case below, 113 Tenn. 167, 82 S. W. 222.

Statement by Mr. Justice **Peckham:**

The plaintiff in error was compelled to pay for a license to sell liquors while on a ferryboat at the city of Memphis, in the state of Tennessee, the ferryboat plying between ports in the states of Arkansas and
[502] Tennessee. The license was demanded *by the clerk of the county court of Shelby county, by virtue of the following state statute:

"Liquor Dealers . . .

"Persons selling beer or any quantities of liquor on steamboats, flatboats, or any other vessel or water craft, or from railroad cars, shall pay a tax, each, in lieu of all other taxes, to be paid in any county they may elect, per annum, $200 dollars."

He denied his liability to pay, because, as he averred, he was engaged in interstate commerce, and was not subject to be taxed by the state in such case. The taxing officers insisting, he paid the license for the past years 1901, 1902, 1903, and also for the then coming year of 1904, under protest, and to avoid the taking of his property under a distress warrant, and he then commenced these actions to recover the money so paid. They both involve the same question, one action being brought to recover for the back taxes paid, and the other for the taxes paid for the future, from January 1, 1904. Judgment went against him in the trial court, which was affirmed in the supreme court of the state. 113 Tenn. 167, 82 S. W. 222. The plaintiff brings the cases here by writs of error.

The record shows that Speed, the defendant in error, being clerk of the county court of Shelby county, Tennessee, undertook to assess the plaintiff in error, under the Tennessee statute, and the plaintiff in error denying his liability to pay any tax, the parties agreed upon the following facts for the purpose of having the question presented judicially and determined by the court, under the practice in Tennessee:

"That the West Memphis Packet Company is, and has been for more than fifteen years last past, a corporation duly created and existing under and in accordance with the laws of the state of Arkansas, located and having its situs at West Memphis, in the county of Crittenden, in the state of Arkansas, situated just opposite the lower end of the city of Memphis, across the Mississippi river, having power by its charter to buy or build *and own one or more steam-
[503] boats, barges, and flatboats, and other water craft, to be used in transporting freight and passengers on the Mississippi river, and the lakes, bayous, and other navigable streams connecting therewith, within the limits of the state of Arkansas; and during the time the said James Foppiano was engaged in selling beer and liquors, as herein stated, the said West Memphis Packet Company was in the exercise of its corporate powers and privileges, and engaged continuously in commerce between the city of Memphis, in the state of Tennessee, and points contiguous thereto, situated along the Arkansas shore of the Mississippi river.

"For more than fifteen years the West Memphis Packet Company has been operating a ferry across the Mississippi river from Hopefield Point, in Crittenden county, Arkansas, and other points adjacent thereto in the state of Arkansas, to and from the state of Tennessee, under licenses to operate such ferry, regularly granted and issued to it, the West Memphis Packet Company, by the county court of Crittenden county, Arkansas, the tribunal authorized by the Constitution and laws of the state of Arkansas to grant and issue such licenses, and under such licenses the West Memphis Packet Company had been making landings regularly, at its dock, at the wharf in the city of Memphis, on the Mississippi river, and there receiving and discharging freight and passengers transported or to be transported by means of such ferry along and across the Mississippi river. It had made but one landing regularly in the course of such business in the state of Tennessee, and two or more in the state of Arkansas.

"For more than four years last past the West Memphis Packet Company has used and employed the steamboat Chas. H. Organ as its regular ferryboat in carrying on the ferry aforesaid, under its said licenses, and such steamboat had made stated regular trips during all that time, between Memphis and the points aforesaid, in the state of Arkansas, constituting such ferry landings.

"The steamboat Chas. H. Organ was
[504] owned by the West *Memphis Packet Company, and was duly enrolled and licensed as a steam vessel, to navigate the Mississippi river and its tributaries, under the laws of the United States regulating the coasting trade, and for other purposes, in the custom house at Memphis,—Memphis being the nearest port of the United States to the residence of the West Memphis Packet Company, and the home port of the said steam-

boat for each of the said years 1901, 1902, and 1903, and before that time.

"Ever since the West Memphis Packet Company began the keeping and maintaining of a ferry across the Mississippi river, as before stated, a bar has been, and was, during the years 1901, 1902, and 1903, kept and maintained on the steamboat it used and operated for that purpose, by some individual to whom it rented the privilege of keeping such bar, and carrying on at the same the sale of beer and liquors, by retail, to persons transported, or to be transported, or upon the said steamboat.

"During the years 1901, 1902, and 1903, James Foppiano was the lessee of the West Memphis Packet Company, and rented such bar on the steamboat Chas. H. Organ from it, and at such bar, during the said time, when the boat was in transit along or across the river, or when temporarily at the landings on the one side or the other of the river, he made sales by retail of beer and liquors to persons transported, or being transported, or to be transported, upon such steamboat, or who were thereon and applied to make purchases. And for the said years 1901, 1902, and 1903 he paid no taxes on such business, and took out no licenses therefor.

"For carrying on the said business for the said years 1901, 1902, and 1903, respectively, in the manner aforesaid, the defendant, Robert A. Speed, as clerk of the county court, insists that the said James Foppiano was required to and should have taken out a license for each year, and also was required to and should have paid the tax for each year, prescribed by the law levying such taxes, and the costs and charges therefor collected by him, as before
[505] stated, and not having done so, *that he was authorized and required by law to make such collections, and is not liable to repay the same.

"The said James Foppiano denies that, under the facts, he was required by law to take out any licenses, or pay any taxes, for carrying on the said business for the said years 1901, 1902, and 1903, respectively, or either of them, in the manner aforesaid. He denies that the said Robert A. Speed was authorized or required by law to collect either the taxes collected by him in the manner aforesaid, or the costs or charges aforesaid, or any part thereof, and claims that all such sums have been illegally exacted of and collected from him and against his will, and that he is entitled to recover them back."

Messrs. **William M. Randolph** and **Wassell Randolph** submitted the cause for plaintiff in error. *Mr. George Randolph* was on the brief:

There is nothing in the Wilson act affecting the questions in this case.

Re Rahrer (*Wilkerson* v. *Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Norfolk & W. R. Co.* v. *Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; *American Exp. Co.* v. *Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Cook* v. *Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233.

Mr. **Charles T. Cates, Jr.**, argued the cause and filed a brief for defendant in error:

The effect of the Wilson act was to remove all impediments to the enforcement of the state laws in respect of the sale and taxation of intoxicating liquors, even when such liquors were imported in original packages, and to withdraw from the protection of the commerce clause of the Federal Constitution persons and corporations bringing liquor into a state for the purpose of sale, without regard to the condition or means by which such liquor was held or sold.

Re Rahrer (*Wilkerson* v. *Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 446, 42 L. ed. 1103, 18 Sup. Ct. Rep. 674; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The plaintiff in error contends that he rented the bar privilege from the company owning the ferryboat, and that he conducted the business of selling liquors over the bar on the boat pursuant to his lease, and while doing so was engaged in interstate commerce, and therefore was not liable in any manner to be taxed on account of conducting his business in the way he did, while within the boundaries of the state of Tennessee.

There is a distinction to be observed between the business of the plaintiff in error in selling intoxicating liquors and any other business which might have been conducted by him on the ferryboat under the same circumstances. The general right of the states to regulate or prohibit the sale of intoxicating liquors within their borders is not denied; but how far they could prohibit the entrance of the liquors, or their sale, after having been brought into the state, has been a subject of examination and decision within late years by this

court. *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy* [517] v. *Hardin*, *135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer* (*Wilkerson* v. *Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The result of the *Bowman* and *Leisy Cases* together was to uphold the right of a party to send intoxicating liquors into another state and sell the same in such state in their original packages. The decisions in those cases were followed by the passage of an act of Congress, commonly known as the Wilson act, approved August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), which provided that intoxicating liquors, when transported into another state or territory should, upon arrival therein, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been produced in said state or territory. This act was held to be constitutional in the case of *Re Rahrer* (*Wilkerson* v. *Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865, and that by virtue of said act, state statutes might operate upon the original packages of intoxicating liquors before sale in the state. *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, and *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, held that the state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but that, after such delivery, the state had power to prevent the sale of the liquors, even in the original package.

If the liquors kept for sale at the bar on the ferryboat had been consigned to the plaintiff in error from Arkansas, addressed to him at Memphis, although the plaintiff in error would have had the right to a delivery of the liquors to him at the wharf in Memphis, yet, under the act of Congress, as construed by this court, the state could then at once have prohibited absolutely the sale thereof, even in original packages. Of course, if it could totally prohibit such sale, it would permit the sale conditionally. In this case there is no consignment to anyone, but we do not see that the distinction is material. The liquors were owned by the plaintiff in error while on the boat, and carried along from port to port, and to be used on the boat as the demand at the bar made necessary. The thing which *the plaintiff in error did was [518] to sell the intoxicating liquors on this ferryboat when temporarily at the wharf in Memphis, or within the boundaries of the state, to persons then on the boat, and it was on account of these sales that he was compelled to take out a license and pay the tax therefor. Although there was no consignment of the liquor, yet it was in the possession of the plaintiff in error on the boat, within the state, the same as if he had received it therein on a consignment to him from outside the state, and had taken portions of it while in the state, sold it to different persons then on the boat, and those persons had then and there taken and drank the liquor, and then and thus the transaction had been commenced and ended. The law provided no tax on any liquor in any way, but it made it necessary for the plaintiff in error to get a license for this sale of liquor within the state. There was no tax levied upon the boat or crew, nor upon any of the passengers, nor on any portion of the property of the company, nor on the freight carried by it on the boat. Neither the boat nor its officers nor crew were subjected to the payment of any fees for navigating the waters of the river. The supreme court of the state observed that the case did not show that the charter permitted the company to maintain a bar on board its boat, nor that the liquors sold in Tennessee came from any other state; and it may be stated here that there was no proof that the liquors were sold in original packages, but, as they were sold over the bar, there might, perhaps, be a presumption that they were not so sold. Without deciding the case on these grounds, the state court, interpreting the above-mentioned act of Congress, and believing that it was following the decisions of this court, held that, by virtue of that act, the state had the right to exact a license as a condition precedent to the exercise of the right on the part of the plaintiff in error to sell intoxicating liquors over the bar on board the boat, while within the boundaries of the state of Tennessee. We think the supreme court was right in that view of the case.

The counsel for plaintiff in error, in a most elaborate brief, *exhibiting very great [519] learning and industry, has sought to show that the plaintiff in error was entitled to the free navigation of the Mississippi river, under various treaties and compacts as well as by the national Constitution, and to support that contention has gone back to a time prior to the war between Great Britain and France, in 1756, and has cited many cases in this court to maintain his position. That the navigation of the Mis-

sissippi river is free to every citizen of the United States is a fact not to be questioned at this time. No one could successfully dispute it; but we think that question is not involved in this case. When the ferryboat entered the boundaries of the state of Tennessee, and fastened up at the wharf in Memphis, and the plaintiff in error then sold liquors to customers as they asked for them, he became subject to the police laws of that state regarding the sale of intoxicating liquors. Enforcing that law, even if it did incidentally affect the free navigation of the Mississippi river, is justified under the act of Congress, and the decisions of this court interpreting the same. As the boat is free to be navigated without molestation, let, or hindrance on account of any fees, taxes, licenses, or otherwise, it cannot be held that the navigation of the Mississippi river is not free, because, while within the boundaries of the state of Tennessee, and under the authority of the act of Congress, the barkeeper on the boat is prohibited from there selling the liquors he carries with him, without first having paid the license demanded by the state statute.

The case of *State* v. *Frappart*, 31 La. Ann. 340, was decided in 1879, before the act of Congress was passed, and is, therefore, not applicable to the facts of this case.

The plaintiff in error also contends that when the packet company, being a corporation of the state of Arkansas, employed the ferryboat in interstate commerce between the states of Arkansas and Tennessee, the boat was a part of the territory of Arkansas, and the plaintiff in error, in selling liquors upon the boat, was located outside the jurisdiction of the state of Tennessee, even though, in fact, he sold the
[520] liquors while the *boat was tied to the wharf in the city of Memphis. Many cases are cited in counsel's brief where tangible property was directly taxed by the state, and where it was held that the state had no jurisdiction, because, although the property was temporarily within the state, it was not there permanently. *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254, *Morgan* v. *Parham*, 16 Wall. 471, 21 L. ed. 303, were cases of vessels not abiding within the state where they were taxed, and were there but temporarily while engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid. See also *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686. Here, however, there is no taxation of any property whatever, either of the boat or the plaintiff in error. He is simply called upon to pay a tax for the privilege of doing the business in which he was engaged—that is, the retailing of intoxicating liquors at the bar of the ferryboat—while that boat was within the jurisdiction of the state of Tennessee. The fact that he was so engaged within the actual territory of that state cannot be blotted out in such a case as this by any fiction suggested by the counsel for plaintiff in error. As we have said, we see no objection to this exercise of the power of the state, regard being had to the act of Congress already mentioned.

The judgments of the Supreme Court of Tennessee are affirmed.

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*VALENTIN TRONO, Maximo Angeles, and [521]
Timoteo Natividad, *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 521-540.)

1. **Constitutional law—former jeopardy—conviction in appellate tribunal.**—A person is not placed twice in jeopardy within the meaning of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), for the government of the Philippine Islands, by a conviction of homicide in the supreme court of those islands, on an appeal taken by the accused from a judgment of the trial court, which, after acquitting of murder, convicted the accused of assault, which is included in the crime of murder charged in the complaint.

2. **Appeal in criminal cases—conviction in appellate tribunal—power of supreme court of Philippine Islands.**—The supreme court of the Philippine Islands has jurisdiction, on an appeal taken by the accused from a conviction in the trial court, to reverse the judgment, and convict the accused of a higher degree of the offense charged.

[No. 34.]

Argued October 31, 1905. Decided December 4, 1905.

IN ERROR to the Supreme Court of the Philippine Islands to review the judgment of that court which, on an appeal

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NOTE.—*On the right of a state to appeal in a criminal case*—see note to People *ex rel.* Hodson v. Miner, 19 L.R.A. 342.

On former jeopardy—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; *Ex parte* Lange, 21 L. ed. U. S. 872; and United States v. Perez, 6 L. ed. U. S. 165.

taken by the accused from a conviction in the court of first instance in the province of Bulacan, reversed the judgment, and convicted the accused of a higher degree of the offense charged. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The plaintiffs in error were proceeded
[522] against in the court *of first instance of the province of Bulacan, Philippine Islands, upon a complaint accusing them of causing the death of Benito Perez "with great cruelty and evident premeditation . . . by means of blows given with the butts of guns, they co-operating one with the other." In other words, the accused were complained of as guilty of murder in the first degree.

They were tried in the court above mentioned, and were acquitted of the crime of murder, and convicted of the crime of assault, which is included in the crime of murder charged in the complaint, and they were therefore sentenced by the court to suffer a penalty of six months' imprisonment, and to pay a certain sum to the heirs of Perez, with subsidiary imprisonment in case of insolvency.

All three of the accused appealed to the supreme court of the Philippine Islands from the judgment and sentence of the trial court. The supreme court, having heard the case, reversed the judgment of the court of first instance, and convicted the accused of the crime of homicide (in substance, murder in the second degree), which is included in, and is a lower degree of, the crime charged in the complaint, but is a higher degree of crime than that of which the accused were convicted in the court below. Two of them (Angeles and Trono) were sentenced to fourteen years, eight months, and one day, and Natividad to imprisonment for eight years and one day, and all three to the payment of an indemnity to the heirs of the deceased.

The accused have brought the case here by writ of error to the supreme court of the Philippine Islands, for the purpose of reviewing the judgment of that court.

Mr. **Aldis B. Browne** argued the cause, and, with *Messrs. Alexander Britton* and *Maurice Kelly,* filed a brief for plaintiffs in error:

In convicting Trono, Angeles, and Natividad of homicide after their acquittal thereof by the court of first instance, the court below placed them twice in jeopardy of punishment for the same offense.

Kepner v. *United States,* 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797.

By appeal from the conviction of assault, the accused did not waive their immunity from second jeopardy on the charge of homicide.

United States v. *Harding,* 1 Wall. Jr. 127, Fed. Cas. No. 15,301; *Hopt* v. *Utah,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; *Thompson* v. *Utah,* 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *People* v. *Dowling,* 84 N. Y. 478. See also *Guenther* v. *People,* 24 N. Y. 100; *People* v. *Cignarale,* 110 N. Y. 23, 17 N. E. 135; *Stuart* v. *Com.* 28 Gratt. 950; *State* v. *Martin,* 30 Wis. 216, 11 Am. Rep. 567; *State* v. *Hill,* 30 Wis. 416; *State* v. *Belden,* 33 Wis. 120, 14 Am. Rep. 748; *Campbell* v. *State,* 9 Yerg. 333, 30 Am. Dec. 417; *Slaughter* v. *State,* 6 Humph. 410; *Brennan* v. *People,* 15 Ill. 511; *Barnett* v. *People,* 54 Ill. 325; *Sipple* v. *People,* 10 Ill. App. 144; *Hurt* v. *State,* 25 Miss. 378, 59 Am. Dec. 225; *Morris* v. *State,* 8 Smedes & M. 762; *Johnson* v. *State,* 29 Ark. 31, 21 Am. Rep. 154; *State* v. *Tweedy,* 11 Iowa, 350; *State* v. *Ross,* 29 Mo. 32; *State* v. *Kattlemann,* 35 Mo. 105; *Johnson* v. *State,* 27 Fla. 245, 9 So. 208; *Golding* v. *State,* 31 Fla. 262, 12 So. 525; *State* v. *Dennison,* 31 La. Ann. 847; *State* v. *Murphy,* 13 Wash. 229, 43 Pac. 44; *Bell* v. *State,* 48 Ala. 684, 17 Am. Rep. 40; *Berry* v. *State,* 65 Ala. 117; *Brown* v. *United States,* 2 Ind. Terr. 582, 52 S. W. 56; *Jones* v. *State,* 13 Tex. 168, 62 Am. Dec. 550; *State* v. *Steeves,* 29 Or. 85, 43 Pac. 947; *People* v. *Knapp,* 26 Mich. 112; *People* v. *Comstock,* 55 Mich. 405, 21 N. W. 384; *George* v. *State,* 59 Neb. 163, 80 N. W. 486; *State* v. *Kittle,* 2 Tyler (Vt.) 472.

In the states of Kentucky, Indiana, and Kansas, a different rule has been adopted, based on statutory provisions, to the effect that a new trial places the parties in the same position as if no trial had been had.

Com. v. *Arnold,* 83 Ky. 1, 4 Am. St. Rep. 114; *Morris* v. *State,* 1 Blackf. 37; *Veatch* v. *State,* 60 Ind. 291; *State* v. *McCord,* 8 Kan. 232, 12 Am. Rep. 469.

The California courts, however, hold, on a similar statutory provision, that there can be no second prosecution for the offense of which the defendant was acquitted on first trial.

People v. *Gilmore,* 4 Cal. 376, 60 Am. Dec. 620; *People* v. *Gordon,* 99 Cal. 227, 33 Pac. 901.

In Georgia and Missouri the common-law rule has been changed by the Constitution.

Waller v. *State,* 104 Ga. 505, 30 S. E. 835; *State* v. *Simms,* 71 Mo. 538.

And in Ohio and South Carolina the courts have adopted a different doctrine from that prevailing at the common law.

State v. *Behimer,* 20 Ohio St. 572; *State* v. *Cross Roads Comrs.* 3 Hill, L. 239.

The English courts have gone so far in

support of the maxim that no man ought to be twice brought in danger of his life for one and the same crime that they have always refused a new trial in cases of felony where the indictment is valid.

King v. *Mawbey*, 6 T. R. 619; *Atty. Gen.* v. *Bertrand*, L. R. 1 P. C. 520.

And in the earlier cases this was the construction of the courts in this country.

United States v. *Gibert*, 2 Sumn. 19, Fed. Cas. No. 15,204; *People* v. *Comstock*, 8 Wend. 549.

Solicitor General **Hoyt** argued the cause and filed a brief for defendant in error:

Under the Philippine law, the appeal given to the supreme court vested in that body the authority to review the entire case both upon the facts and upon the law.

United States v. *Atienza*, 1 Philippine Rep. 736; *United States* v. *Abijan*, 1 Philippine Rep. 83.

An appeal is a civil-law process, and removes a cause entirely, subjecting the law and fact to a review and retrial. A writ of error is a common-law process, and removes for re-examination nothing but the law.

United States v. *Goodwin*, 7 Cranch, 108, 3 L. ed. 284; *Dower* v. *Richards*, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452.

By taking their appeal the defendants assented to the conditions upon which it was granted, and thereby waived any right they had to rely to any extent upon the judgment finding them guilty of assault in the court of first instance, as a shield against their conviction for a higher offense by the supreme court upon appeal.

McKane v. *Durston*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913; *Andrews* v. *Swartz*, 156 U. S. 272, 275, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; *Kohl* v. *Lehlback*, 160 U. S. 293, 297, 40 L. ed. 432, 434, 16 Sup. Ct. Rep. 304; *Murphy* v. *Massachusetts*, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; *United States* v. *Keen*, 1 McLean, 429, Fed. Cas. No. 15,510; *Com.* v. *Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114; *Briggs* v. *Com.* 82 Va. 554; *State* v. *Hart*, 33 Kan. 218, 6 Pac. 288; *State* v. *McCord*, 8 Kan. 232, 12 Am. Rep. 469; *People* v. *Palmer*, 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213.

When, in any criminal case in which a single offense is charged, a verdict of guilty is set aside and a new trial granted, or a judgment upon a verdict of guilty is reversed in an appellate court and a new trial granted, the effect is to annul the action and finding of the jury as effectually as if the case had never been tried or a verdict returned.

United Staes v. *Keen, supra;* 4 Bl. Com. 336, 337; *Lockwood* v. *Jones*, 7 Conn. 436; *Zaleski* v. *Clark*, 45 Conn. 397; *Rasmussen* v. *State*, 63 Wis. 1, 22 N. W. 835; *Bailey* v. *State*, 26 Ga. 579; *Reg.* v. *Drury*, 3 Cox, C. C. 544; *Donahue* v. *Klassner*, 22 Mich. 252; *Crawford* v. *Morris*, 5 Gratt. 90; *People* v. *Gordon*, 99 Cal. 232, 33 Pac. 901; *Edwards* v. *Edwards*, 22 Ill. 123; *Grayson* v. *Com.* 6 Gratt. 712.

The ultimate question in this case is whether the supreme court of the Philippine Islands, upon the trial of the appeal of the accused persons by trying them anew upon the charge of murder and finding them guilty of homicide after they had been found guilty of assault only by the court of first instance, twice placed them in jeopardy upon the charge of murder.

The cases which, as we think, sustain the government's position, are the following:

United States v. *Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; *United States* v. *Keen, supra; People* v. *Keefer*, 65 Cal. 232, 3 Pac. 818; *People* v. *Carty*, 77 Cal. 213, 19 Pac. 490; *State* v. *Lee*, 65 Conn. 265, 27 L.R.A. 498, 48 Am. St. Rep. 202, 30 Atl. 1110; *Bailey* v. *State, supra; Small* v. *State*, 63 Ga. 386; *Veatch* v. *State*, 60 Ind. 291; *State* v. *McCord, supra; State* v. *Terreso*, 56 Kan. 126, 42 Pac. 354; *Com.* v. *Arnold, supra; Bohanan* v. *State*, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390; *People* v. *Palmer, supra; State* v. *Stanton*, 23 N. C. (1 Ired. L.) 424; *State* v. *Behimer*, 20 Ohio St. 572; *State* v. *Cross Roads Comrs.* 3 Hill, L. 239; *State* v. *Bradley*, 67 Vt. 465, 32 Atl. 238; *Briggs* v. *Com.* and *Rasmussen* v. *State, supra.*

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The plaintiffs in error seek a reversal of the judgment in their case on the ground that the supreme court of the Philippine Islands had no power to reverse the judgment of the court of first instance, and then find them guilty of a higher crime than that of which they had been convicted in that court, and of which higher crime that court had acquitted them, and they contend that such a conviction by the supreme court of the islands was a violation of the act of Congress, passed July 1, 1902 (32 Stat. at L. 691, chap. 1369), a portion of the 5th section of that act providing that "no person for the same offense shall be twice put in jeopardy of punishment."

This language is to be found in connection with other language in the same act, providing for the rights of a person accused of crime in the Philippine Islands. The whole language is substantially taken from the Bill of Rights set forth in the amend-

ments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the 13th Amendment, and also prohibiting the passage of bills of attainder and *ex post facto* laws.

The important question to be determined is whether this action of the supreme court of the islands did violate the act of Congress by placing the accused twice in jeopardy.

The meaning of the phrase, as used in the above-mentioned act of Congress, was before this court in *Kepner* v. *United* [529]**States*, decided in May, 1904 (195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797), where will be found a very full discussion of the subject. The plaintiff in error in that case had been acquitted of the crime charged against him in the court of first instance, but the government, not being satisfied with the decision, appealed to the supreme court, and that court reversed the judgment of acquittal, and found Kepner guilty of the crime of which the court of first instance had acquitted him, and sentenced him to a term of imprisonment, and suspended him from any public office or public trust, and deprived him of the right of suffrage. This court, upon writ of error, held that, in reversing, upon the appeal of the government, the judgment of the court of first instance, and itself convicting the accused and pronouncing judgment against him, the supreme court of the islands violated the provision in question, and its judgment was therefore reversed and the prisoner discharged. It was also held that the government had no power to obtain a review of a judgment or decision of the trial court acquitting an accused party, and that the phrase in question was to be construed as the same phrase would be construed in the instrument from which it was originally taken, *viz.*, the Constitution of the United States; and that the settled and well-known meaning of the language, as used in the Constitution, must also be taken when the same language is used in the act of Congress, and not as it might possibly be construed with reference to Spanish law or Spanish procedure.

The difference between that case and the one now before the court is obvious. Here the accused, while acquitted of the greater offense charged in the complaint, were convicted of a lesser offense included in the main charge. They appealed from the judgment of the court of first instance, and the government had no voice in the matter of the appeal, it simply followed them to the court to which they appealed. We regard that fact as material and controlling. The difference is vital between an attempt by the government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the *judgment and asking for its re-[530] versal, even though that judgment, while convicting him of the lower offense, acquits him of the higher one charged in the complaint.

We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and, upon an appeal from that judgment by the accused, a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court.

This question has given rise to much diversity of opinion in the various state courts. Many of them have held that the new trial must be confined to the lesser offense of which the accused had been convicted on the first trial, while other courts have held precisely the contrary, and that upon a new trial the whole case was open as if there had been no former trial. Most, if not all, of these two classes of cases have been cited by the respective counsel in this case and will be found in their briefs herein. It would be unprofitable to cite and refer to each of them in detail here. They have been carefully examined.

Those cases which limit the new trial proceed upon the ground, as stated in *People* v. *Dowling*, 84 N. Y. 478, 483, by Folger, Chief Judge, as follows:

"The matter at the bottom is the constitutional provision that 'no person shall be subject to be twice put in jeopardy for the same offense' (N. Y. Const. art. 1, par. 6), and yet new trials are granted in criminal cases on the motion of the accused, and, if he gets a new trial, he is thus subject to be twice put in jeopardy. This is done on the ground that, by asking for a correction of errors made on the first trial, he does waive his constitutional protection, and does himself ask for a new *trial[531] though it brings him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself ex-

tends it. His application for a correction of the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offense. He, therefore, waives his privilege as to one and keeps it as to the other. It is upon this principle that where, by a verdict of guilty on one count or for one offense, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that, the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offense of which the verdict was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought."

But in the subsequent case of *People* v. *Palmer*, 109 N. Y. 413, 419, 4 Am. St. Rep. 477, 17 N. E. 213, the effect of the statute of New York known as §§ 464 and 544 of the Code of Criminal Procedure, was under consideration. Those sections enacted as follows:

"Sec. 464. The granting of a new trial places the parties in the same position as if no trial had been had.

"Sec. 544. When a new trial is ordered it shall proceed in all respects as if no trial had been had."

The statute was held valid, and that it did not violate the constitutional provision against subjecting a person to be twice put in jeopardy for the same offense, as the jeopardy was incurred with the consent of, and as a privilege granted to, the defendant upon his application.

And generally, it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that, in appealing from the judgment, the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the
[532] judgment is one entire *thing, and that, as he brings up the whole record for review, he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, *viz.*, a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused, but also in regard to the lesser grades of that offense, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set aside, and when so set aside and reversed the judgment is held as though it had never been. This was in substance decided in *United States* v. *Harding*, tried in the United States circuit court in 1846, 1 Wall. Jr. 127, Fed. Cas. No. 15,301, before Mr. Justice Grier, then a member of this court, and this is the ground substantially upon which the decisions of the other courts are placed.

In *Kring* v. *Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443, it was stated by Mr. Justice Miller, who delivered the opinion of the court, that it was admitted that by the law of Missouri, as it stood at the time of the homicide, the prisoner having been convicted of murder in the seceond degree upon an indictment charging him with murder in the first degree, if that conviction was set aside he could not again be tried for murder in the first degree. That law was in force at the date of the homicide for which Kring was sentenced to death, but it was subsequently, and before his retrial, changed so as to deprive him of the benefit to which he would otherwise have been entitled, and this court held that that change was, as to him, *ex post facto* and void. It was also said by the court that there was "no question of the right of the state of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question here is, Does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that, as to that offense, it is *ex post facto?*" This court answered that question in the affirmative.

*In our opinion the better doctrine is [533]
that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been. The accused, by his own action, has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be procceded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses

to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.

It is urged, however, that he has no power to waive such a right, and the case of *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, is cited as authority for that view. We do not so regard it. This court held in that case that in the territory of Utah the accused was bound, by provisions of the Utah statute, to be present at all times during the trial, and that it was not within the power of the accused or his counsel to dispense with such statutory requirement. But, on an appeal from a judgment of this nature, there must be a waiver to some extent on the part of the accused when he appeals from such judgment. When the first trial is entered upon, he is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as *United States* v. *Ball*, 163 U. S. 662, 671, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192 (and nobody now doubts it), that if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial
[534] of the offense of which he was *convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. This holding shows that there can be a waiver of the defense by reason of the action of the accused. As there is, therefore, a waiver in any event, and the question is as to its extent (that is, how far the accused by his own action may be decmed to have waived his right), it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When, at his own request, he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party while himself asking for a reversal of the judgment.

There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not, cover the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable.

A further question is made as to the power of the supreme court of the islands to reverse the judgment appealed from and itself convict the accused on appeal. The supreme court, in so doing, acted within its power and jurisdiction. It is a result of the ordinary procedure in the courts of that country, proceeding under the act of Congress already referred to. See statement of the procedure, in the case heretofore cited,—*Kepner* v. *United States*, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797.

**The judgment of the Supreme Court of* [535] *the Philippine Islands is right, and it is affirmed.*

Mr. Justice **Holmes** concurs in the result.

Mr. Justice **Harlan**, dissenting:

The plaintiffs in error were tried by one of the courts of first instance in the Philippine Islands for the crime of murder. The trial was before a single judge, without a jury, and simply upon a written complaint filed by an individual with a justice of the peace. The judge who tried the accused found them not guilty of murder, and guilty only of assault. For the latter offense they were each sentenced to six months' imprisonment. Upon appeal by the accused to the supreme court of the islands, the judgment of the trial court was reversed, and two of the accused were condemned to the penalty, each one, of fourteen years, eight months, and one day of *reclusión temporal*, the other one to the penalty of eight years and one day of *prisión mayor*, and all three to the indemnification of five hundred Philippine *pesos* to the heirs of the deceased.

I did not so state in a separate opinion in *Kepner* v. *United States*, 195 U. S. 101, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, but my concurrence in the judgment in that case was upon the ground that, from the moment of the complete acquisition of the Philippine Islands by the United States, and without any act of Congress, or a proclamation of the President upon the subject, the people of those islands became entitled, of right, to the benefit of all the fundamental guaranties of life, liberty, and property to be found in that instrument. Hence, my approval of the review announced in *Kepner's Case*, that the accused was en-

titled to the benefit of the jeopardy clause of the Constitution.

Assuming that it was competent for the court of first instance to proceed without a jury against the accused upon a mere complaint by an individual, I desire to express my concurrence in the dissenting opinion [536] of Mr. Justice McKenna, so far as it *holds that the accused in the present case were entitled to the benefit of the jeopardy clause of the Constitution, and that, after their acquittal in the tribunal assuming jurisdiction to try them for the crime of murder, they could not thereafter, in any appellate tribunal deriving its authority from the United States, be again tried for that crime or for any crime more serious than the one of which they were convicted in the court of first instance.

But I dissent from the opinion and judgment of the court in the present case upon the broader ground that, as the Constitution of the United States is the supreme law of the land, as that instrument declares that, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, "*no person* shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and that "the trial of *all* crimes, except in cases of impeachment, *shall* be by jury," and as the people of the Philippine Islands are as much under the authority and jurisdiction of the United States as are the people within the limits of the several states and of the organized territories of the United States, the prosecution of the accused, based only upon the written complaint of an individual, filed with a justice of the peace, and their trial by a single judge, was without authority of law, and a nullity from beginning to end. I repeat substantially what has been said by me in former cases, that no person within the territory and subject to the sovereign jurisdiction of the United States can be legally deprived of his life or liberty for crime committed by him against the United States, except in the mode prescribed by the Constitution of the United States. I am unable to perceive how a principle declared by the supreme law of the land to be essential in all prosecutions for crime against the United States can be recognized as applicable to a part of the people subject to the sovereign jurisdiction of the United States, and yet be denied to another part of the people equally subject to the national authority. No tribunal or officer deriving its [537] authority *from the United States can disregard the mandatory injunctions of the Constitution by which the government of the United States is created, and under the sanction of which alone that government exists and performs its functions. It may be that the application of these principles to the Philippine Islands and to the people who inhabit them may, particularly in criminal prosecutions, prove sometimes to be inconvenient. But no authority exists anywhere to set aside plain provisions of the supreme law of the land, and substitute the law of convenience for the written fundamental law.

Mr. Justice **McKenna**, with whom concurs Mr. Justice **White**, dissenting:

I am unable to concur in the judgment of the court.

When the United States acquired the Philippine Islands, the system of jurisprudence which prevailed there was different from our Anglo-Saxon jurisprudence. Trial by jury was unknown. The trial court, called the court of first instance, had full authority to find the facts and adjudge the law, subject, however, to a review by a higher court of both the facts and law.

This system was continued substantially by the orders of the President and the act of July 1, 1902, providing for the government of the islands.

Therefore, when *Kepner* v. *United States*, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, was decided, I was of opinion that, under such a system, there could be no justifiable foundation for the plea of *autrefois acquit*, resulting from a judgment of acquittal by the lower court, when such judgment had been reversed by the higher court; in other words, that there could be no foundation for the plea of *autrefois acquit* arising from an acquittal in a case where the acquittal was subsequently reversed as a result of a right to review, not only the law, but the facts, given by the very statutes which provided for the trial. The court, however, decided otherwise, and I joined in a dissent to the opinion. The *Kepner Case* is not overruled. It is said to be so clearly distinguishable as *not to call for much attention. [538] I think otherwise. What was the *Kepner Case* and what is this?

Kepner was charged with the crime of embezzlement. He was tried in the court of first instance, without a jury, and acquitted. Upon the appeal of the United States to the supreme court of the Philippine Islands, the judgment of the court of first instance was reversed, and he was found guilty, and sentenced to a term of imprisonment. This court reversed the judgment, and discharged Kepner on the ground that, by his trial in the court of first instance, he had been in jeopardy, and

to try him again upon the merits, even in an appellate court, was to put him a second time in jeopardy for the same offense. In the case at bar the plaintiffs in error were charged with murder. They were tried in the court of first instance without a jury. They were convicted of simple assault. They appealed to the supreme court, and that court reversed the judgment of the court of first instance, and convicted them of murder in the second degree. I will not stop to demonstrate that the conviction of the lesser crime of assault was an acquittal of the greater charge of murder. It has been made unnecessary by clear concession in the opinion that plaintiffs in error were acquitted of murder. Indeed (though it probably makes no difference in principle), it was explicitly so found and pronounced in the judgment of the court of first instance. There is an exact parallel, therefore, between this case and the *Kepner Case* in all particulars but one. In the *Kepner Case* the appeal was by the United States; in the case at bar it was by the accused; and this difference is especially made the ground of decision. It is, in effect, held that because the defendants (plaintiffs in error) appealed and sought a review, as authorized by the statute, of the minor offense for which they were convicted, the United States was given the right to try them for the greater offense for which they were acquitted. In some of the cases quoted in the opinion such a result is said to arise from the consent of the accused, deemed to be given by taking an appeal. An accused would
[539] not purposely and consciously *appeal from an acquittal of a grave crime, and cast from himself the immunity that such an acquittal gives him. Should such consent be imputed? Let it be remembered that we are dealing with a great right, I may even say a constitutional right, for the opinion of the court discusses the case as though it were from a circuit court of the United States. Should such a right be narrowly or grudgingly considered? Should it be put in balance with other rights, and lost by their exercise? I think that the guaranties of constitutions and laws should not be so construed. The life and liberty of the citizen are precious things,—precious to the state as to the citizen; and concern for them is entirely consistent with a firm administration of criminal justice. I submit that the state seeks no convictions except in legal ways, and because it does not, it affords means of review of erroneous rulings and judgments, and freely affords such means. It does not clog them with conditions or forfeit by their exercise great and constitutional rights. Yet, in my judgment, such is the effect of the decision just rendered.

The opinion says that as the accused takes up the whole record for review, "he thereby waives the benefit of the provision in question [once in jeopardy] for the purpose of attempting to gain what he thinks is a greater benefit, *viz.*, a review and reversal by the higher court of the judgment of conviction." I repeat again, that constitutional guaranties and statutory remedies should not be put in such barter; that a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime.

In the opinion in the *Kepner Case* it was said: "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without congressional legislation." Resting the decision on that legislation, the court further observed: "How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent *adjudication in the [540] courts of this country, and the maintenance of which has been ever deemed essential to our government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken? It is a well-settled rule of construction that language used in a statute, which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *The Abbotsford* (*The Abbotsford* v. *Johnson*) 98 U. S. 440, 25 L. ed. 168."

If this language expresses a proper and determining test of once in jeopardy against the appeal of the United States, it must also be the test of once in jeopardy against the appeal of the accused in the case at bar. By that test the judgment should be reversed. Here and there may be found a decision which supports the exposition of once in jeopardy expressed in the opinion. Opposed to it is the general concensus of opinion of American textbooks on criminal law and the overwhelming weight of American decided cases. Which may we suppose Congress adopted in its legislation, the interpretation of a few cases (able, it may be, and highly sanctioned by the reputation of the courts that delivered them), or the interpretation of the

courts of a large number of the states of the Union? See cases in the margin.†

The CHIEF JUSTICE also dissented.

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†Alabama.—Bell v. State, 48 Ala. 684, 17 Am. Rep. 40; Berry v. State, 65 Ala. 117; Sylvester v. State, 72 Ala. 201.

California.—People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Apgar, 35 Cal. 389; People v. Gordon, 99 Cal. 227, 33 Pac. 901.

Florida.—Johnson v. State, 27 Fla. 245, 9 So. 208; Golding v. State, 31 Fla. 262, 12 So. 525.

Illinois.—Brennan v. People, 15 Ill. 511; Barnett v. People, 54 Ill. 325.

Iowa.—State v. Tweedy, 11 Iowa, 350; State v. Helm, 92 Iowa, 540, 61 N. W. 246.

Louisiana.—State v. Dennison, 31 La. Ann. 847; State v. Victor, 36 La. Ann. 978.

Michigan.—People v. Knapp, 26 Mich. 112, 114; People v. Comstock, 55 Mich. 405, 407, 21 N. W. 384.

Minnesota.—State v. Lessing, 16 Minn. 75, Gil. 64.

Mississippi.—Morris v. State, 8 Smedes & M. 762; Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225.

Missouri.—Prior to alteration effected by constitutional amendment of 1875, as to which see State v. Simms, 71 Mo. 538, in State v. Ross, 29 Mo. 32; State v. Kattlemann, 35 Mo. 105; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643.

New York.—Prior to alteration effected by the Code of Procedure, as to which see People v. Palmer, 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213, in Guenther v. People, 24 N. Y. 100; People v. Dowling, 84 N. Y. 478; and see People v. Cignarale, 110 N. Y. 23, 30, 17 N. E. 135.

Oregon.—State v. Steeves, 29 Or. 85, 43 Pac. 947.

Tennessee.—Campbell v. State, 9 Yerg. 333, 30 Am. Dec. 417; Slaughter v. State, 6 Humph. 410, 415.

Texas.—Jones v. State, 13 Tex. 168, 62 Am. Dec. 550.

Virginia.—Before alteration by statute, as to which see Briggs v. Com. 82 Va. 554, doctrine enforced in Stuart v. Com. 28 Gratt. 950. Reinstated by later statute, as to which see Forbes v. Com. 90 Va. 550, 19 S. E. 164, and Benton v. Com. 91 Va. 782, 21 S. E. 495.

Washington.—State v. Murphy, 13 Wash. 229, 43 Pac. 44.

Wisconsin.—State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Hill, 30 Wis. 416; State v. Belden, 33 Wis. 120, 14 Am. Rep. 748. But not in cases of misdemeanors,—Rasmussen v. State, 63 Wis. 1, 22 N. W. 835.

Georgia, owing to constitutional provisions, and by statute in the states of Indiana, Kansas, and Kentucky, when a new trial is granted on motion of an accused, he may be tried again for the greater offense of which he was acquitted on the first trial. Morris v. State, 1 Blackf. 37; Veatch v. State, 60 Ind. 291; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114.

*ALLEN C. CLARK, Sarah P. Clark, His[541] Wife, and Barton L. Walker, *Appts.*,

v.

JOHN E. ROLLER, Intervener. (No. 72.)

JOHN E. ROLLER, Intervener, *Appt.*,

v.

ALLEN C. CLARK, Sarah P. Clark, and Barton L. Walker. (No. 451.)

(See S. C. Reporter's ed. 541–546.)

1. **Appeal—final decree.**—A decree of the court of appeals of the District of Columbia, although involving a decision upon the merits of the case, is not final for the purpose of an appeal to the Supreme Court of the United States, where it contemplates and requires further proceedings not inconsistent with its opinion.

2. **Partition—effect of adverse possession.**—Proceedings in a partition suit in which a possession adverse to complainants is asserted under a tax title should be postponed until complainants shall have established their title at law.

3. **Judgment—effect of dismissal as to a party—right to intervene if subsequent proceedings affect his interest.**—A party asserting possession of real property under a tax title may obtain relief by intervention against proceedings in a partition suit which would cast a cloud upon his title after the bill has been dismissed as to him on the grounds of lack of jurisdiction, multifariousness, and laches, barring complainants from equitable relief against him.

4. **Appeal—final decree.**—A decree confirming the report of commissioners appointed in a partition suit is not final for the purpose of appeal, where the plan adopted was dependent upon a sale of a part of the property, which had not taken place, and which required the confirmation of the court.

[Nos. 72, 451.]

Argued November 9, 10, 1905. Decided December 4, 1905.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of that District, dismissing a suit for the partition of real property in which an adverse possession under a tax title is asserted. Modified by allowing complainants a reasonable time to establish their title at law, and as so *modified, affirmed.*

NOTE.—*As to what judgments or decrees are final for purposes of review*—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

On the right of one out of possession to partition—see note to Weston v. Stoddard, 20 L.R.A. 624.

See same case below, 19 App. D. C. 539, on first appeal.

The facts are stated in the opinion.

Mr. **Leo Simmons** argued the cause and filed a brief for Clark *et al.:*

There need be no authorities cited to this court to sustain the proposition that a decree dismissing one party from a suit is a final decree.

As to the decree of June 30th, 1896, confirming the report of the commissioners in partition, and whether or not the same was final, see—

Washington G. & A. R. Co. v. *Bradley* (*Washington, G. & A. R. Co.* v. *Washington*) 7 Wall. 575, 19 L. ed. 274; *Thomson* v. *Dean* (*Dean* v. *Nelson*) 7 Wall. 342, 19 L. ed. 94; *Bank of Lewisburg* v. *Sheffey,* 140 U. S. 445, 35 L. ed. 493, 11 Sup. Ct. Rep. 755; *Willard* v. *Willard,* 145 U. S. 116, 36 L. ed. 644, 12 Sup. Ct. Rep. 818. See also *Mackall* v. *Willoughby,* 6 App. D. C. 125, 167 U. S. 681, 42 L. ed. 323, 17 Sup. Ct. Rep. 954; *St. Louis, I. M. & S. R. Co.* v. *Southern Exp. Co.* 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; *Ex parte Norton,* 108 U. S. 237, 27 L. ed. 709, 2 Sup. Ct. Rep. 490.

The second attempt of Roller to get into the case was nothing more than a motion for rehearing, which was not subject to an appeal.

Clerks' Invest. Co. v. *Sydnor,* 19 App. D. C. 97.

The ruling of the court of appeals in the case at bar is wholly inconsistent with any other case it has passed upon.

District of Columbia v. *Humphries,* 11 App. D. C. 68; *Chisholm* v. *Cissell,* 12 App. D. C. 180.

The order of May 5, 1896, dismissing Roller, was either final or interlocutory. If final, certainly it was incumbent upon him to complete his appeal in forty days. If not final, it was necessary to ask for the allowance of a special appeal. The court of appeals in the case of *National Cable Co.* v. *Washington & G. R. Co.* 8 App. D. C. 478, held that an application for the allowance of an appeal, made thirty days after the order was passed, came too late.

Mr. **John E. Roller** *in propria persona* argued the cause, and, with *Mr. O. B. Roller,* filed a brief for himself as intervener.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree dismissing a bill brought by the Clarks for partition of certain land in the District of Columbia, and a cross appeal by Roller, to protect his rights in case the whole record should be held to be brought up by the appeal. A short history of the case is necessary to make the questions intelligible. The bill was filed on November 24, 1893. On January 23, 1894, Roller petitioned to be made a party, on the ground that he claimed the title, and two days later his petition was granted. On February 13 he answered, setting up a tax title in himself and the exercise of all rights of ownership and possession for nearly half a century, and also a previous decree between the parties. By a supplemental bill the plaintiffs alleged defects in the tax title, and prayed that it might be declared void. The previous decree referred to was rendered in an earlier suit, which was like the present, except that it made Roller a party. In that suit Roller demurred on the grounds of laches, and that the bill ought not to be maintained until the *plaintiffs had established their title at [543] law, and the bill was dismissed as against Roller in general terms. There was testimony that the judge stated that he dismissed the bill for laches and on the other grounds set up.

On May, 5, 1896, the present bill was dismissed as to Roller, on the grounds that the court had no jurisdiction as against him, that the bill was made multifarious by joining him, and that the plaintiffs were barred from equitable relief against him by laches. The next day the court ordered partition and appointed commissioners. The same month Roller entered an appeal from these decrees, which, however, was dismissed on October 24, 1898, for failure to give security for costs. On May 29, 1896, the commissioners made return, and on June 30, 1896, their report was confirmed. A conveyance of a part of the property was ordered, and a sale of the rest. It was further ordered that, on a ratification of the sale by the court, and payment, the purchase money should be brought into court, to be disposed of under its direction. A sale was not advertised until June, 1901. On July 26, 1901, Roller made a new application to come in, on the ground that the proceedings should have stopped after the decision and decree as to him, that he was in possession, and that the sale had not taken place, and if it did would be a cloud upon his title. On September 9, 1901, answers were filed to this petition, denying Roller's title and possession, and setting up that the possession was in one of the defendants in partition, and that the matters alleged had been adjudicated by the decrees in the cause. On November 6, of the same year, Roller's new petition was denied by the supreme court. He appealed, and in 1902, the mandate being filed on February 20, 1903, the decree of

the supreme court was reversed by the court of appeals of the District, and the cause was remanded for further proceedings not inconsistent with the opinion of the court. The opinion is reported in 19 App. D. C. 539.

In that opinion it was stated that the proper course was to suspend proceedings under the bill in order to give the com-
[544] plainants *reasonable time to establish their title at law. An application for rehearing was denied, and it was stated that the plaintiffs virtually conceded that the decree of partition was at least premature, but relied on the ground that it became final at the expiration of the term at which it was rendered. The plaintiffs, on November 27, 1903, filed a paper alleging that they were in possession, and that the matter was adjudicated as against Roller, and stood upon the record. Thereupon, on January 6, 1904, a final decree was entered by the supreme court, dismissing the bill without prejudice. This was affirmed by the court of appeals on May 24, 1904. From the latter decree the parties have taken the present appeals. It will be seen from what had preceded that the bill was dismissed because the plaintiffs, by their election of November 27, 1903, had declined to accept the suggested suspension of the bill and to proceed at law. The question is whether, generally and specially in the stage the case had reached, the condition attached to further proceeding with this cause was right.

A preliminary question is raised by the defendant Roller, who argues that the previous decree of the court of appeals, reversing the denial of his petition to come into the case a second time, was a final decree and settled the merits of the case. No doubt it did pass upon the merits, as we have explained, but it was not a final decree. It contemplated and required further proceedings; and not until the plaintiffs had elected to stand upon the record could it be known what those proceedings would be. Only then was it determined that the bill should be dismissed rather than suspended with a possibility that, after a suit at law, the partition might go on.

It was adjudicated in the other suit that the plaintiffs were not entitled to have Roller's claims disposed of summarily as an incident to a suit for partition, and therefore they cannot be heard to maintain in this suit that those claims are absurd. Indeed, whatever may be the final result, it is obvious that Roller shows a good deal more than a naked averment of title. That he holds under tax sale is not disputed, although it is
[545] *argued that the sale was void. He kept the land fenced from shortly after his purchase in 1887 into 1892, and he sets up that his possession continued when the suit was brought. He paid the taxes on the land, except for one year, and he says that the payment for that year was omitted by oversight. So far as general principles go, we certainly should not reverse the decision of the court of appeals that the petitioners ought to establish their title at law before partition should be decreed. *Wilkin* v. *Wilkin*, 1 Johns. Ch. 111; *Giffard* v. *Williams*, L. R. 5 Ch. 546. "A bill for partition cannot be made the means of trying a disputed title." *Bolton* v. *Bolton*, L. R. 7 Eq. 298 note, 300; *Potter* v. *Waller*, 2 De G. & S. 410, 417.

It would seem from what we have quoted that this was pretty nearly admitted before the court of appeals, but it was and is argued that the point was not open. It is said in the first place that when the bill was dismissed as against Roller, on May 5, 1896, that was a final decree as to him, and that he could not be heard later in this court. No doubt the decree was final as to what it decided, and he is not likely to quarrel with it. But it would be an extraordinary result of a decision that nothing could be done to a party's prejudice in a suit, if it were held to preclude him from reappearing at a later stage to protest when the court was about to cast a cloud upon his title. If later unexpected features arose, we see nothing in the dismissal of the bill as against Roller to prevent his again being heard. That dismissal gave him a right to expect that a sale of property to which he was recognized as having a colorable claim would not be ordered until the title of the plaintiffs was made good. Even if he properly should have been allowed to remain a party to the bill in order to make sure that no decree should be made prejudicial to his rights, as to which we need not express an opinion, the dismissal of him from the suit, on the ground that no such decree could be made, cannot be turned into a weapon against him to prevent his objecting to the decree when it is made in fact.

It is argued further that the decree of June 30, 1896 confirming *the commissioners' [546]
report, was final. But this cannot be so. The set-off of a parcel to certain parties was part of a scheme of division by which other parties were to be paid in money, and those to whom the land was set off were to receive a small additional sum. The whole plan, therefore, was dependent upon a sale of the remaining land, which had not taken place, and which required the confirmation of the court. If the sale produced a much smaller sum than expected, the set-off necessarily would fall, and a new order would be required. The whole matter was *in fieri*, and subject to change if, for any reason, it became necessary or desirable to change

the plan. See *Iowa* v. *Illinois*, 151 U. S. 238, 38 L. ed. 145, 14 Sup. Ct. Rep. 333; *McGourkey* v. *Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32. In *Willard* v. *Willard*, 145 U. S. 116, 36 L. ed. 644, 12 Sup. Ct. Rep. 818, it is true, an appeal was entertained from a general decree of sale for partition. The question whether the decree was final was not considered, but there was no such element of uncertainty in the scheme as in the present. Whatever the result of this sale, it was the proper means of division, and was to take place in any event.

The argument took a wider range than the matters which we have discussed, but we deem nothing further material for the decision of the case. The defendant Roller seeks to have us now consider his title and declare it good. But it is obvious that he gets all that he can hope for by his intervention when partition is postponed to a trial at law. With regard to the plaintiffs' contention that they are in possession, if they desire to rest on that, they can. If they prefer to sue and to settle the matter, it is not likely that Roller will deny the possession which in this case he affirms. But, to secure the plaintiffs' rights, the decree may be modified so as to allow them a reasonable time to sue, the bill to be dismissed unless they do so and it may be made a condition of the decree that, in case a suit is brought, Roller shall admit that he is in possession, as he now avers.

Decree modified and affirmed.

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[547] *THOMAS M. RIGGINS, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 547–551.)

Habeas corpus—to test sufficiency of indictment.—The sufficiency of an indictment found in a Federal district court and removed to a circuit court cannot, in the absence of exceptional circumstances, be tested by habeas corpus in the latter court, on the application of the accused, who is in custody under a capias issued on the indictment, made before he has been compelled to take any step in the cause.

[No. 169.]

Submitted November 9, 1905. Decided December 11, 1905.

APPEAL from the Circuit Court of the United States for the Northern District of Alabama to review an order discharging a writ of habeas corpus to inquire into a detention under a capias issued on an indictment found in the District Court for the Northern Division of the Northern District of that state, and removed to the Circuit Court. *Reversed* and remanded with directions to quash the writ of habeas corpus and dismiss the petition without prejudice.

See same case below, 134 Fed. 404.

Statement by Mr. Chief Justice **Fuller:**

Riggins and Powell were indicted under §§ 5508, 5509, Revised Statutes, U. S. Comp. Stat. 1901, p. 3712, in the district court for the northern division of the northern district of Alabama, at the October term, 1904, thereof; and on the 24th day of October, 1904, the indictment was remitted to the next session of the circuit court in and for that division and district by order of the circuit court, the district judge presiding. A capias was issued to take Riggins into custody to answer the indictment, October 26, 1904. On the same day a severance was ordered as between Powell and Riggins, and thereupon Riggins filed his petition for habeas corpus; the writ was issued; the marshal made his return; the circuit court, held by the district judge, heard the case, and discharged the writ, and remanded Riggins to custody; a bill of exceptions was signed and sealed, and an appeal to this court was prayed, allowed, and perfected, by the giving of a bond in the penal sum of $250, which was approved by the judge; certificate of certain questions of jurisdiction was filed; as also assignments of error; and a citation was issued and served; all on the said 26th day of October, 1904. The opinion of the district judge will be found reported 134 Fed. 404.

[548] *The petition for habeas corpus alleged that Riggins was restrained of his liberty by the United States marshal under the capias issued on the indictment, a copy of which capias was attached, as also a copy of the indictment. That indictment in brief set up that Riggins and others entered into a conspiracy to take one Maples, a citizen of the United States, of African

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NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; *Re* Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164; and Glass v. The Betsey, 1 L. ed. U. S. 489.

descent, from the state officers, to whose custody he had been lawfully committed under a charge of murder, and to hang him until he was dead, and that said conspiracy was formed and its purpose executed because Maples was of African descent. The petition averred that the indictment charged no offense punishable under the laws of the United States; that the indictment did not show that Riggins had violated any right, privilege, or immunity guaranteed to Maples under the Constitution of the United States; or that any Federal law was violated providing for the punishment of such offense; and that it did not appear from the indictment that the conspiracy, combination, or confedcration therein alleged was formed or entered into under any law of the state of Alabama, or that any law of that state authorized its citizens or other persons to enter into any conspiracy to injure, threaten, or oppress Maples by denying to him, by reason of his race, the right, privilege, and immunity of a trial by jury to determine his guilt or innocence on an indictment for murder pending against him in the courts of Alabama.

Mr. **Lawrence Cooper** submitted the cause for appellant.

Assistant to the Attorney General **Purdy** submitted the cause for appellee. *Mr. Otis J. Carlton* was on his brief.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is settled that the writ of habeas corpus will not issue unless the court under whose warrant petitioner is held is without jurisdiction, and that it cannot be used merely to correct errors. Ordinarily the writ will not be granted when there is a [549] remedy *by writ of error or appeal, yet, in rare and exceptional cases, it may be issued, although such remedy exists.

In *New York* v. *Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30, It was held that Congress intended to invest the courts of the Union and the justices and judges thereof with power, upon writ of habeas corpus, to restore to liberty any person within their respective jurisdictions held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States; that the statute contemplated that cases might arise when the power thus conferred should be exercised during the progress of proceedings instituted in a state court against the petitioner on account of the very matter presented for determination by the writ of habeas corpus; but that the statute did not imperatively require the circuit court by that writ to wrest the petitioner from the custody of the state officers in advance of his trial in the state court; and that while the circuit court had the power to do so, and could discharge the accused in advance of his trial, if restrained in violation of the Constitution, it was not bound in every case to exercise such power immediately upon application being made for the writ. The conclusion was that in a proper exercise of discretion, the circuit court should not discharge the petitioner until the state court had finally acted upon the case, when it could be determined whether the accused, if convicted, should be put to his writ of error or the question determined on habeas corpus whether he was restrained of his liberty in violation of the Constitution of the United States.

These principles were fully discussed in the cases of the appeals of Royall from judgments in habeas corpus in the circuit court of the United States for the eastern district of Virginia. *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734. And, in addition, Royall made an original application to this court for a writ of habeas corpus, which was denied upon the grounds stated in the previous cases. 117 U. S. 254, 29 L. ed. 872, 6 Sup. Ct. Rep. 742.

While special reasons may exist why this should be the rule in respect of proceedings in state courts, which are not applicable *to [550] cases in the courts of the United States, nevertheless, we have frequently applied the same principle to such cases. *Re Chapman*, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; *Re Lancaster*, 137 U. S. 393, 34 L. ed. 713, 11 Sup. Ct. Rep. 117; *Re Huntington*, 137 U. S. 63, 34 L. ed. 567, 11 Sup. Ct. Rep. 4; *Ex parte Mirzan*, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341.

In *Chapman's Case* we held that it was a judicious and salutary general rule not to interfere with proceedings pending in the courts of the District of Columbia or in the circuit courts of the United States in advance of their final determination. And we said:

"We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings. If judgment goes against petitioner, and is affirmed by the court of appeals, and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. If, on the other hand, a writ of error does not lie to this court, and the supreme court of the district was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus. We discover no exceptional circumstances which demand our interposition in advance of adjudica-

tion by the courts of the District upon the merits of the case before them."

In *Re Lancaster*, this court denied an application for leave to file a petition for habeas corpus in the circumstances stated in the opinion, which opinion was as follows:

"The petitioners were indicted under §§ 5508 and 5509 of the Revised Statutes, on the 20th of November, 1890, in the circuit court for the southern district of Georgia, and have been taken into custody. They have not invoked the action of the circuit court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus upon the ground that the matters and things set forth and charged do not constitute any offense or offenses under the laws of the United States, or cognizable in the circuit court, and that for other
[551] reasons the indictment *cannot be sustained. In this posture of the case we must decline to interfere."

We are of opinion that the rule therein laid down should have been followed by the circuit court.

True, the present case is not one of the issue of the writ of habeas corpus in respect of confinement under state authority, nor of an application to this court for the writ, but is the case of custody taken under a capias issued on an indictment returned in the district court and removed to the circuit court, and an application to that court for the writ before defendant had been compelled to take any step in the cause.

Defendant might have raised his objections to the indictment by motion to quash or otherwise. If the indictment were held good, as we are advised by the opinion of the circuit court it would have been, defendant would have pleaded and gone to trial, and might have been acquitted. If convicted, the remedy by writ of error was open to him.

There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed, and, if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obligated to decide questions in advance of final adjudication, contrary to the settled rule, and to many decisions we have heretofore announced upon the subject.

If we should affirm or reverse the final order in this case, we should recognize a proceeding below which we would not ourselves have entertained; and we are not disposed to hold that this manner of testing such questions as are argued here ought to have been pursued.

Final order reversed and cause remanded with a direction to the Circuit Court to quash the writ of habeas corpus, and dismiss the petition without prejudice.

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*PEOPLE OF THE STATE OF NEW YORK [552] *ex rel.* SIMON LIEBERMAN, *Plff. in Err.*,

v.

JOHN E. VAN DE CARR, Warden, etc., *Deft. in Err.*

(See S. C. Reporter's ed. 552–564.)

1. **Constitutional law—due process of law—licensing milk business—discretion of board of health.**—A provision of the sanitary code of the city of New York which is construed by the state courts to confer discretionary power on the board of health, within reasonable limits, to grant or withhold permits to sell milk in that city, cannot be deemed to be lacking in the due process of law guaranteed by the 14th Amendment to the Federal Constitution, in the absence of any showing of arbitrary or oppressive exercise of such power.

2. **Constitutional law—equal protection of the laws—municipal regulation of milk business.**—Singling out the milk business in the city of New York as a proper subject for regulation does not deny the equal protection of the laws, where all milk dealers in the city are equally affected by such regulation.

[No. 71.]

Argued and submitted November 9, 1905. Decided December 11, 1905.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to a mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court for the First Department, which had, in turn, affirmed an order of the Supreme Court at a special term held in and for the county of New

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NOTE.—*As to what constitutes due process of law*—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

York, dismissing a writ of habeas corpus to inquire into a detention on a charge of violating a section of the sanitary code of that city, prohibiting the sale of milk without a permit from the board of health. *Affirmed.*

See same case below, in appellate division, 81 App. Div. 128, 80 N. Y. Supp. 1108. In court of appeals, 175 N. Y. 440, 67 N. E. 913.

The facts are stated in the opinion.

Mr. **Frank Moss** argued the cause and filed a brief for plaintiff in error:

The language of the regulation in question permits unjust discrimination and favoritism, and the evils of its abuse cannot be corrected by mandamus.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Noel* v. *People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Dunham* v. *Rochester*, 5 Cow. 462; *St. Paul* v. *Laidler*, 2 Minn. 190, 72 Am. Dec. 89, Gil. 159.

A city ordinance prohibiting the storage by any person within the city limits of inflammable oils, except upon permission from the common council, leaving it to the common council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to whom to grant permission, and allowing the permission to be revoked at the will of the council, is invalid because of the power of arbitrary discrimination it vests in the council.

Richmond v. *Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312.

A city ordinance making it unlawful to carry on the business of a tannery within 1 mile of the city limits without a permit from the city council, and which does not define the conditions on which tanneries may be conducted, or on which such permit shall issue, but leaves the propriety of granting such permit to the uncontrolled discretion of the board of health and common council, is invalid.

Plymouth v. *Schultheis*, 135 Ind. 339, 35 N. E. 12.

A city ordinance which declares that it shall not be lawful for anyone to establish a private market for the sale of meats, fish, vegetables, etc., without permission of the city council is illegal and void, since the discretion vested by such an ordinance in the city council is in no way regulated or controlled, leaving it within the power of the council to grant or refuse the privilege at pleasure.

State v. *Dubarry*, 44 La. Ann. 1117, 11 So. 718; *State* v. *Deffes*, 45 La. Ann. 658, 12 So. 841.

An ordinance which provides that no person shall erect, add to, or generally change, any building without first obtaining the permission of the board of aldermen is void in reserving to the board the arbitrary power to refuse the application of one person and grant that of another.

State v. *Tenant*, 110 N. C. 609. 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387.

When the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity, and to nullify the legislative attempt to invade the citizens' rights.

People ex rel. Nechamcus v. *Warden*, 144 N. Y. 535, 27 L.R.A. 718, 39 N. E. 686.

The validity of a statute is not to be determined by what has been done in a particular instance, but by what may be done under it.

Rochester v. *West*, 164 N. Y. 514, 53 L.R.A. 548, 79 Am. St. Rep. 650, 58 N. E. 673.

Mr. **Theobore Connoly** submitted the cause for defendant in error:

The 14th Amendment does not take away from the state the power to pass police regulations affecting the health, safety, and morals of the people.

Barbier v. *Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Minncapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26–29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Jones* v. *Brim*, 165 U. S. 180–182, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282.

The presumption which exists in favor of the constitutionality of a statute is especially strong in the case of statutes intended for the protection of the health and comfort of the community; and it will be presumed that each state legislature has most knowledge of the needs of its people.

Powell v. *Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Atkin* v. *Kansas*, 191 U. S. 207–223, 48 L. ed. 148–158, 24 Sup. Ct. Rep. 124.

There is no need of argument to prove that one of the fundamental duties of the state is to exercise the police power to protect and preserve the health of its people.

Com. v. *Alger*, 7 Cush. 53; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Hawker* v. *New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358.

Health measures taking the form of legislative enactments or ordinances passed under legislative authority by the municipal departments of cities, which regulate the con-

ditions under which the supply of milk to the community may be had, are valid police regulations.

Fischer v. *St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Johnson* v. *Simonton*, 43 Cal. 242; *State* v. *Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; *Kansas* v. *Cook*, 38 Mo. App. 660; *Sanders* v. *Com.* 25 Ky. L. Rep. 1165, 77 S. W. 358; *State* v. *Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; *State* v. *Dupaquier*, 46 La. Ann. 577, 26 L.R.A. 162, 49 Am. St. Rep. 334, 15 So. 502; *State* v. *Stone*, 46 La. Ann. 147, 15 So. 11; *State* v. *Rogers*, 95 Me. 94, 85 Am. St. Rep. 395, 49 Atl. 564; *Deems* v. *Baltimore*, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *State* v. *Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *Com.* v. *Farren*, 9 Allen, 489; *Com.* v. *Nichols*, 10 Allen, 199; *Com.* v. *Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Com.* v. *Evans*, 132 Mass. 11; *Com.* v. *Luscomb*, 130 Mass. 42; *State* v. *Nelson*, 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066; *State* v. *Crescent Creamery Co.* 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *Littlefield* v. *State*, 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; *State* v. *Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *State, Shivers, Prosecutor*, v. *Newton*, 45 N. J. L. 469; *Polinsky* v. *People*, 73 N. Y. 65; *People* v. *Cipperly*, 37 Hun, 324, 101 N. Y. 634, 4 N. E. 107; *People* v. *West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *People* v. *Kibler*, 106 N. Y. 321, 12 N. E. 795; *People* v. *Briggs*, 114 N. Y. 56, 20 N. E. 820; *People* v. *Biesecker*, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; *People* v. *Bowen*, 182 N. Y. 10, 74 N. E. 489; *State* v. *Smith*, 10 R. I. 258; *State* v. *Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State* v. *Groves*, 15 R. I. 208, 2 Atl. 384; *Norfolk* v. *Flynn*, 101 Va. 473, 62 L.R.A. 771, 99 Am. St. Rep. 918, 44 S. E. 717.

Similar legislation regulating the sale and standard of oleomargarine has received uniform support from the courts.

Powell v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Re Brosnahan*, 4 McCrary, 1, 18 Fed. 62; *Cook* v. *State*, 110 Ala. 40, 20 So. 360; *State* v. *Armour Packing Co.* 124 Iowa, 323, 100 N. W. 59; *State* v. *Rogers*, *supra*; *McAllister* v. *State*, 72 Md. 390, 20 Atl. 143; *Pierce* v. *State*, 63 Md. 592; *Fox* v. *State*, 89 Md. 381, 73 Am. St. Rep. 193, 43 Atl. 775; *Wright* v. *State*, 88 Md. 436, 41 Atl. 795; *Com.* v. *Huntley*, 156 Mass. 236, 15 L.R.A. 839, 30 N. E. 1127; *People* v. *Rotter*, 131 Mich. 250, 91 N. W. 167; *Armour Packing Co.* v. *Snyder*, 84 Fed. 136; *Butler* v. *Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; *State ex rel. Weideman* v. *Horgan*, 55 Minn. 183, 56 N. W. 688; *State* v. *Addington*, 77 Mo. 110; *State* v. *Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Beha* v. *State*, 67 Neb. 27, 93 N. W. 155; *State* v. *Marshall*, 64 N. H. 549, 1 L.R.A. 51, 15 Atl. 210; *State* v. *Collins*, 70 N. H. 218, 45 Atl. 1080, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *State* v. *Ball*, 70 N. H. 40, 46 Atl. 50; *State, Waterbury, Prosecutor*, v. *Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *People* v. *Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Palmer* v. *State*, 39 Ohio St. 236, 48 Am. Rep. 429; *State* v. *Ransick*, 62 Ohio St. 283, 56 N. E. 1024; *Com. ex rel. Allegheny County* v. *Weiss*, 139 Pa. 247, 11 L.R.A. 530, 23 Am. St. Rep. 182, 21 Atl. 10; *Com.* v. *Vandyke*, 13 Pa. Super. Ct. 484; *Com.* v. *McCann*, 14 Pa. Super. Ct. 221; *Com.* v. *Diefenbacher*, 14 Pa. Super. Ct. 264; *State* v. *Myers*, 42 W. Va. 822, 35 L.R.A. 844, 57 Am. St. Rep. 887, 26 S. E. 539.

In a like manner, statutes regulating the production and sale of lard have been held valid as a proper exercise of the police power.

State v. *Snow*, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777; *State* v. *Aslesen*, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220.

Similar legislation affecting the production and manufacture of vinegar has also been sustained.

People v. *Girard*, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; *People* v. *Niagara Fruit Co.* 75 App. Div. 11, 77 N. Y. Supp. 805, 173 N. Y. 629, 66 N. E. 1114; *People* v. *Henry J. Heinz Co.* 90 App. Div. 408, 86 N. Y. Supp. 141; *People* v. *Windholz*, 92 App. Div. 569, 86 N. Y. Supp. 1015; *People* v. *Worden Grocery Co.* 118 Mich. 604, 77 N. W. 315; *Weller* v. *State*, 53 Ohio St. 77, 40 N. E. 1001.

Statutes regulating the standard of baking powder used in the making of food have also been held constitutional.

Stolz v. *Thompson*, 44 Minn. 271, 46 N. W. 410; *State* v. *Sherod*, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417; *State* v. *Layton*, 160 Mo. 474, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

A statute of the state of New York pro-

hibiting the adulteration of coffee was held constitutional by this court in *Crossman* v. *Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234.

The performance by boards of health of the duties intrusted to their care by the state legislature, although the fulfilment of these responsibilities carries with it the excreise of a reasonable diseretion, is not a delegation of legislative power reposed solely in the legislature, but an exercise of administrative and ministerial functions by agents best qualified to understand the conditions of the ease, and to appreeiate the necessities of the exercise of their power.

Barbier v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Crowley* v. *Christensen*, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *Davis* v. *Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; *Wilson* v. *Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Fiseher* v. *St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; *Re Flaherty*, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981; *Fitts* v. *Atlanta*, 121 Ga. 567, 67 L.R.A. 803, 104 Am. St. Rep. 167, 49 S. E. 793; *Blue* v. *Beach*, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Isenhour* v. *State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; *Hengehold* v. *Covington*, 108 Ky. 752, 57 S. W. 495; *State* v. *Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 205, 43 Atl. 773; *Love* v. *Recorder's Ct. Judge* (*Love* v. *Phalen*) 128 Mich. 552, 55 L.R.A. 618, 87 N. W. 785; *Com.* v. *Plaisted*, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Polinsky* v. *People*, 73 N. Y. 65; *People ex rel. Neehameus* v. *Warden*, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; *State* v. *Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361.

Beeause offieials abuse their power, the law granting them such powers is not invalid and violative of the Federal Constitution.

Powell v. *Pennsylvania*, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *Williams* v. *Mississippi*, 170 U. S. 213, 225, 42 L. ed. 1012, 1016, 18 Sup. Ct. Rep. 583; *People ex rel. Neehameus* v. *Warden*, *supra*.

The cases passing upon the questions of class legislation which have arisen in this court are far too numerous to include within the limits of a brief. For that reason we have submitted to the court but a few of the decisions in which that question has been presented to the court for consideration.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Missouri* v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 22, 25 L. ed. 989; *Barbier* v. *Connolly*, *supra*; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 519, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110; *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 305; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Powell* v. *Pennsylvania*, 127 U. S. 678, 687, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Paeifie Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *St. Louis & S. F. R. Co.* v. *Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Jones* v. *Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Davis* v. *Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; *Central Loan & T. Co.* v. *Campbell Commission Co.* 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; *Fiseher* v. *St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358.

Mr. Justiee **Day** delivered the opinion of the court:

Simon Lieberman was arrested and held for trial by a magistrate of the city of New York, charged with violating § 66 of the sanitary code of New York city. After being committed to the custody of the warden of the eity prison, plaintiff in error sued out a writ of habeas eorpus.

At the hearing before a justice of the supreme court at special term, the writ was dismissed, and the prisoner remanded to the custody of the warden. Upon appeal to the appellate division of the supreme court, the order of the special term was affirmed. This judgment was affirmed by the court of appeals of the state of New York (175 N. Y. 440, 67 N. E. 913), and

the case remitted to the supreme court, where judgment was entered on the remittitur. The case was then brought here by writ of error.

The section of the sanitary code complained of is as follows:

"Sec. 66. No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof."

The violation of the sanitary code is made a misdemeanor. That the board of health had power to pass the sanitary code, which includes this section, is not open to question here, as it has been affirmatively decided in the state court. The objections on Federal grounds for our consideration are two-fold: [558] *First, that the section under consideration devolves upon the board of health absolute and despotic power to grant or withhold permits to milk dealers, and is, therefore, not due process of law; second, that singling out the milk business for regulation is a denial of the equal protection of the laws to people engaged therein.

The record discloses that the plaintiff in error, engaged in selling milk in the city of New York before his arrest, had a permit, which was revoked by the board of health. He was thereafter found engaged through an agent in selling milk without a permit. In the testimony it appears, in a conversation between the plaintiff in error and an inspector in the department of health, the latter admitted that Lieberman's milk "stood well."

The right of the state to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare, has been so often and so recently before this court that it is only necessary to refer to some of the cases which sustain the proposition that the state has a right, by reasonable regulations, to protect the public health and safety. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306, *ante*, 204, 26 Sup. Ct. Rep. 100; *Gardner* v. *Michigan*, 199 U. S. 325, *ante*, 212, 26 Sup. Ct. Rep. 106.

The contention of counsel for plaintiff in error is not that a business so directly affecting the health of the inhabitants of the city as the furnishing of milk may not be the subject of regulation under the authority of the state, but that the court of appeals of New York has sustained this right of regulation to the extent of authorizing the board of health to exercise arbitrary power in the selection of those it may see fit to permit to sell milk under the section quoted; and, thus construed, it works the deprivation of the plaintiff in error's liberty and property [559] *without due process of law. We do not so understand the decision of the highest court of New York. As we read it, the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion. In the opinion of the appellate division, whose judgment was affirmed in the court of appeals, it was said:

"Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer [in a lawful commodity] and refuse a license to another similarly situated, undoubtedly it would be invalid (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Noel* v. *People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Dunham* v. *Rochester*, 5 Cow. 462; *Brooklyn* v. *Breslin*, 57 N. Y. 591); but such was not its purpose, nor is that its fair construction. It is unnecessary now to determine whether the action of the board in refusing or revoking such a permit would be judicial, and thus reviewable by mandamus or certiorari, or whether, if the authority should be arbitrarily or improperly exercised, the only remedy would be an application for the removal of the officers; for those are questions that may arise in the administration of the law, but do not go to its validity. The section, properly construed, does not permit unjust discrimination, and, therefore, it is valid." [81 App. Div. 132, 80 N. Y. Supp. 1108.]

The court of appeals, affirming the decision of the appellate division, did not speak with equal emphasis upon this point, but it leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion. While that court held that the discretion to grant or withhold permits might be vested in a board of health with opportunities to know and investigate local conditions and surroundings, it is further said:

"In the case before us the requirement of § 66 of the sanitary code, that the relator should not sell milk without a permit,

is reasonable, and violates neither Federal nor state Constitution, is in accordance with law and long-established precedent.

[560] *"In the argument of this case several questions have been discussed that are not presented by the appeal. It is, for instance, argued that, even conceding a permit to be necessary, the provision that the holder is to be 'subject to the conditions thereof' cannot be sustained for a variety of reasons suggested.

"It is a complete answer that the form of the permit is not in the record; it does not appear that it has attached to it conditions reasonable or otherwise. We consequently express no opinion on the subject.

"What we have already said applies with equal force to the argument that the permit might be loaded with conditions, the nature of which is not limited or stated; that it may be used to build up monopoly, to help a favored few as opposed to the many; that there is no other statute which presents such possibilities for blackmail and oppression. These and many other like criticisms are indulged in by appellant.

"If the question was before us, the well-settled canon of construction permits of no such argument.

"It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law."

We do not think that this language leaves any question as to the disposition of the highest court of New York to prevent the oppression of the citizen or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt. In *Davis* v. *Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731, an ordinance of the city of Boston, providing that no person shall make any public address in or upon the public grounds, except in accordance with a permit from the mayor, was held not in conflict with the 14th Amendment to the Constitution of the United States. In *Wilson* v. *Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317, an ordinance [561] requiring persons *to obtain written permission from the mayor or president of the city council, or, in their absence, a councilor, before moving a building upon any of the public streets of the city, was sustained as not violative of the Federal Constitution. In the opinion of the court a number of instances were given in which acts were prohibited except with the consent of an administrative board, and which were sustained as proper exercises of the police power. In *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, an ordinance was sustained permitting the mayor to license persons to deal in cigarettes when he was satisfied that the person applying for the license was of good character and reputation, and a suitable person to be intrusted with their sale. And in the recent case of *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, this court sustained a compulsory vaccination law which delegated to the board of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination. And in *Fischer* v. *St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673, an ordinance of the city of St. Louis providing that no dairy or cow stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the passage of the ordinance should be maintained on any premises, unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power. After sustaining the right to vest in a board of men acquainted with the local conditions of the business to be carried on, power to grant or withhold permits, this court said:

"It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual (*Chicago* v. *Trotter*, 136 Ill. 430, 26 N. E. 359; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State* v. *Fiske*, 9 R. I. 94; *Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Sioux Falls* v. *Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156), and in others that such authority cannot be delegated to the adjoining lot owners (*St. Louis* v. *Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245). But the authority to delegate that discretion to a board appointed *for that purpose is sustained by the [562] great weight of authority (*Quiney* v. *Kennard*, 151 Mass. 563, 24 N. E. 860; *Com.* v. *Davis*, 162 Mass. 510, 26 L. R. A. 712, 44 Am. St. Rep. 389, 39 N. E. 113), and by this court the delegation of such power, even to a single individual, was sustained in *Wilson* v. *Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317, and *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633."

These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the 14th Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. In the case of *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, it was insisted that the compulsory vaccination ordinance was broad enough to require a person to submit to compulsory vaccination when his physical condition might be such as to render such treatment dangerous to life and even cruelly oppressive. But it was held that the case presented no such situation; that the person complaining of the enforcement of the ordinance was, for aught that appeared, an adult in good health and a proper subject for vaccination; that the supreme court of Massachusetts had not sustained the authority of the board in the extreme case supposed, and that the individual complaining made no case wherein the operation of the statute deprived him of his constitutional right of protection. So, in the present case, there is nothing in this record to show why the permit which had been granted to the plaintiff was revoked or the conditions upon which, in the exercise of the power conferred by § 66, a permit to carry on the business was granted or withheld. It is true that a conversation was proved in which the milk inspector said to Lieber-
[563] man that the milk *sold by him "stood well;" but there is nothing to show upon what ground the action of the board was taken. For aught that appears, he may have been conducting his business in such wise, or with such surroundings and means, as to render it dangerous to the health of the community; or his manner of selling or delivering the milk may have been objectionable. There is nothing in the record to show that the action against him was arbitrary or oppressive and without a fair and reasonable exercise of that discretion which the law reposed in the board of health. We have, then, an ordinance which, as construed in the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law.

In such cases it is the settled doctrine of this court that no Federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority, and approved by the highest court of the state. Nor do we think there is force in the contention that the plaintiff in error has been denied the equal protection of the laws because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code. It is primarily for the state to select the kinds of business which shall be the subject of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon other businesses of a different kind. *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 736; *Fischer* v. *St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673.

We find no error in the judgment of the Supreme Court of New York, and the same is affirmed.

*Mr. Justice **Holmes**: I do not gather [564] from the statute or from the decision of the court of appeals that the action of the board of health was intended to be subject to judicial revision as to its reasonableness. But whether it was or was not, I agree that the statute, which in substance is older than the 14th Amendment, was not repealed or overthrown by the adoption of that Amendment.

PETER O. SJOLI, *Plff. in Err.*,
v.
CHARLES DRESCHEL.

(See S. C. Reporter's ed. 564–569.)

Public lands—railroad land grants—indemnity selections—necessity of approval.— No interest in lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat. at L. 365, chap. 217), was acquired by that company by virtue of a filing of its list of selections of such lands to supply deficiencies within the

NOTE.—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

place limits, but such lands remained open as before to settlement or occupation under the pre-emption or homestead laws until the selections were formally approved by the Secretary of the Interior.

[No. 79.]

Submitted November 27, 1905. Decided December 18, 1905.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Ottertail County, in that state, in favor of defendant in an action of ejectment. *Reversed* and remanded for further proceedings.

See same case below, 90 Minn. 108, 95 N. W. 763.

The facts are stated in the opinion.

Mr. **Moses E. Clapp** submitted the cause for plaintiff in error.

Mr. **William E. Hale** submitted the cause for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This case was tried upon a stipulation of facts. It involves the title to the northeast quarter of the southeast quarter of section 5, township 133 north, of range 42, west of the 5th principal meridian. Minnesota, which is situated opposite to and coterminous with a part of the line of the Northern Pacific Railroad as definitely located on the 21st day of November, 1871, and is within the first indemnity limits of the grant of public lands made by the act of Congress of July 2d, 1864, in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast. 13 Stat. at L. 365, chap. 217.

The state court adjudged that plaintiff, Sjoli, was not entitled to the land, and that the defendant, Dreschel, who asserts title under the railroad company, was the owner.

From the numerous cases in this court relating to the above act of July 2d, 1864, the following propositions are to be deduced:

That the railroad company will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of *general* route and having the same approved by the Secretary of the Interior, although, upon the *definite location* of its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within primary or place limits, not theretofore reserved, sold, granted, or otherwise disposed of, and free from pre-emption or other claims or rights, become segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant who becomes such after definite location;

That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior;

*That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, [566]

That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road.†

These principles, it would seem, make it easy to determine the present case, the controlling facts in which are undisputed. Let us see.

The plaintiff, Sjoli, a qualified entryman, settled upon the land in dispute in 1884, with the intention in good faith to perfect his title under the homestead laws. He grubbed and broke about 2½ acres, built a house and stable thereon, and moved into the house with his family on the 4th day of October, 1884. He has lived upon the premises continuously with his family ever since

†Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Nelson v. Northern P. R. Co. 188 U. S. 109, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; United States v. Northern P. R. Co. 152 U. S. 284, 296, 38 L. ed. 443, 448, 14 Sup. Ct. Rep. 598; Northern P. R. Co., v. Sanders, 166 U. S. 620, 634, 635, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 671; Menottl v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; United States v. Oregon & C. R. Co. 176 U. S. 28, 42, 44 L. ed. 358, 364, 20 Sup. Ct. Rep. 261; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 5, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 726, 28 L. ed. 872, 874, 5 Sup. Ct. Rep. 334; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 501, 24 L. ed. 1095, 1098; Cedar Rapids & M. River R. Co. v. Herring, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; Grinnell v. Chicago, R. I. & P. R. Co. 103 U. S. 739, 26 L. ed. 456; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; Wilcox v. Eastern Oregon Land Co. 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269; Northern P. R. Co. v. Miller, 7 Land Dec. 109, 120; Northern P. R. Co. v. Davis, 19 Land Dec. 87, 90; Spicer v. Northern P. R. Co. 10 Land Dec. 440, 443; Northern P. R. Co. v. McCrimmon, 12 Land Dec. 554; Northern P. R. Co. v. Plumb, 16 Land Dec. 80.

that time. At the time of the bringing of this action he had broken about 22 acres, constructed 220 rods of fencing, and made improvements of the value of $500. In 1889 he applied at the proper local land office to make entry of this land under the
[567] homestead laws. That *application was rejected because the land was then erroneously supposed to be within the granted limits of the St. Paul, Minneapolis, & Manitoba Railroad Company. No appeal from that order seems to have been taken. But Sjoli did not abandon the land or his claim upon it; for, in 1895, and relying upon his settlement of 1884, he again applied at the proper land office to enter the land under the homestead laws. His application was resisted by the Northern Pacific Railroad Company, and, upon a hearing before the local land office as between him and that company, in March, 1895, the case was decided in his favor. Subsequently, Sjoli having made his final proofs, as required by the homestead laws, a patent was issued to him under date of June 18th, 1901. His title rests upon that patent.

Dreschel's claim to the land arises out of a contract made by him April 21st, 1900, with the Northern Pacific Railway Company, by which that corporation agreed to sell to him the land in question. The parties agree that that company succeeded to whatever rights belonged to the Northern Pacific Railroad Company.

If the railway company was not entitled to the land as between it and Sjoli,—if it had no interest to sell,—then the defendant Dreschel has no claim as between himself and the plaintiff.

We have seen that Sjoli's settlement upon the land was in 1884, and his original application to enter it was in 1889; whereas, the railroad company made and filed its list of selections of lands within indemnity limits to supply alleged deficiencies in place limits in 1885, Sjoli being still in occupancy of the land. But, as already stated, the result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selections, nor until its selections were approved by the Secretary of the Interior.

In *Musser* v. *McRae*, 38 Minn. 409, 411, 38 N. W. 103, the supreme court of Minnesota had occasion to construe the act of Congress granting lands in aid of the Chi-
[568] cago, St. Paul, Minneapolis & *Omaha Railway Company. That act provided among other things that if, when the line of railroad should be definitely fixed, the United States have sold, or rights of pre-emption should have attached to any such granted sections or parts thereof, then, in lieu thereof, any agent to be appointed by the governor might select, subject to the approval of the Secretary of the Interior, from the lands of the United States, so much land as should be equal to those sold or pre-empted, etc. Chief Justice Gilfillan, speaking for that court, said: "As to the lands in place, the title attached upon the definite location of the line of road. As soon as that was done, the acts pointed out the lands. As to those to be taken for deficiencies, it was necessary that something more than fixing the line of the road should be done; it was necessary that there should be a selection, and an approval of such selection by the Secretary of the Interior. Until that was done, the title granted did not attach to any lands outside of the 10-section [place] limit." In the later case of *Resser* v. *Carney*, 52 Minn. 397, 400, 54 N. W. 89, referring to the grant of 1864 to the Northern Pacific Railroad Company, the same court said: "The selection of indemnity lands, which was to be made 'under the direction of the Secretary of the Interior' (13 Stat. at L. 367, chap. 217, § 3) did not become effectual, nor did the title pass from the United States, at least until the selection was approved, or in some way sanctioned by the Secretary of the Interior," etc. These cases are in accord with the decisions of this court above cited.

Now, it is stipulated in this case that the Secretary of the Interior has never approved the selection by the railroad company of the land here in question to supply deficiencies in place limits. So that, when Sjoli settled upon the land, it was, so far as the railroad company was concerned, part of the unappropriated public lands open to settlement under the homestead laws. The railroad company had no direct legal interest in it. The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity *lands did not have the effect to [569]
exclude them from occupancy under the preemption or homestead laws. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior, and the lands withdrawn from settlement or sale. No such approval ever occurred.

It results that the patent issued to Sjoli is evidence of the better title and must prevail. His settlement upon the land, with the intention to perfect his title under the homestead laws, was not a violation of the act of 1864. On the contrary, he thereby

acquired, within the meaning of the act of 1864, a claim upon the land which was perfected by the patent issued to him by the United States. The learned state court erred in not so holding, and in adjudging that the Northern Pacific Railway Company acquired an interest in the land immediately upon filing its list of selections, and that the defendant in error was the owner of it. The relief asked by the plaintiff should have been granted.

The judgment of the Supreme Court of Minnesota is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **Brewer** did not participate in the decision of this case.

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[570]*RUSSIAN-AMERICAN PACKING COMPANY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 570–579.)

1. Public lands—rights of settlers in Alaska.—No intention on the part of Congress to permit rights to public lands in Alaska to be initiated by a settlement made after the enactment of the act of May 17, 1884 (23 Stat. at L. 24, chap. 53), can be gathered from the provision of § 8 of that act that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress," especially when considered with a subsequent clause of that section that "nothing contained in this act shall be construed to put in force in said district the general land laws," and with the provision of § 12 for the appointment of a commission to report the facts to enable Congress to determine what limitations or conditions should be imposed when the land laws should be extended to the district.

2. Public lands—settlers in Alaska—reservation for fish-culture station.—Any rights previously acquired under the act of March 3, 1891 (26 Stat. at L. 1100, chap. 561), §§ 12, 13 (U. S. Comp. Stat. 1901, pp. 1467, 1468), by settlement upon and survey of public lands in Alaska, were terminated by the proclamation of the President that the land in question was reserved for the purpose of establishing a fish-culture station, in accordance with the declaration of § 14 of that act, that the provisions of the two preceding sections shall not be so construed as to warrant the sale of any lands belonging to the United States which shall be reserved for public purposes or selected for fish culture stations.

3. Public lands—trespassers—recovery for improvements.—The value of improvements made on public lands in Alaska by a mere trespasser, occupying the land without a shadow of title, cannot be recovered from the United States upon the selection of the land in question by the government, in accordance with the act of March 3, 1891, (26 Stat. at L. 1100, chap. 561), § 14, for a fish-culture station.

[Nos. 85, 86.]

Argued November 29, 1905. Decided December 18, 1905.

APPEAL from the Court of Claims to review a judgment rejecting a claim for the value of improvements erected on public lands in Alaska which have been selected by the government for a fish-culture station. *Affirmed.*

See same case below, 39 Ct. Cl. 460.

Statement by Mr. Justice **Brown:**

This is an appeal from a judgment of the court of claims, rejecting a claim of the Russian-American Packing Company for [571] the value of certain improvements erected by it on the island of Afognak, off the coast of Alaska. The packing company was incorporated in 1889, under the laws of California, for the purpose of carrying on the business of packing salmon on the island of Afognak; and for that purpose purchased and shipped materials for a cannery and buildings to be used in canning salmon, and also, without authority or license from the United States, took possession of a tract of about 159.52 acres of land, and erected thereon buildings, machinery, etc., at a cost of about $45,000. Prior to this time no one had been in possession of this tract. Claimants remained in possession for four years, and until December 24, 1892, and carried on a canning business at a profit of about $100,000, about $35,000 of which was subsequent to the passage of the act of March 3, 1891 [26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1535].

On April 1, 1892, claimant applied to the Surveyor General for a survey of the tract, under the act of 1891, and deposited in the subtreasury at San Francisco $433.80, as the estimated cost of such survey. The survey was made, was approved March 15, 1893, and forwarded to the Commissioner of the General Land Office. Prior to December 24, 1892, the tract so occupied had not been reserved by the United States for fish culture or any other purpose; nor had the same been purchased or applied for by any other person. On that day the President issued a proclamation [27 Stat. at L. 1052] declaring the whole island reserved for the purpose of establishing thereon a United

States fish-culture station, and warned all persons to depart therefrom. In July, 1893, claimant was informed of this proclamation by agents of the government, and ordered to leave the island, which it did, and has not returned thereto. On January 15, 1895, the Commissioner of the General Land Office, in passing upon the survey transmitted to him, addressed a letter to the Surveyor General, calling attention to the President's proclamation, and rejected the survey on that ground, as well as upon the ground that the survey was not in square form, as required by statute. No appeal was taken from his decision.

[572] *The court found as a conclusion of law that claimant was not entitled to recompense for the value of the improvements, nor for the loss of profits arising from its removal from the island, but was entitled to recover the amount deposited for the expense of the survey.

Mr. **Alexander Britton** argued the cause, and, with *Mr. Aldis B. Browne*, filed a brief for appellant.

Mr. **Frederick De Courcy Faust** argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

It is well understood that the mere settlement upon public lands, without taking some steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States. *Landsdale* v. *Daniels*, 100 U. S. 113, 116, 25 L. ed. 587, 588; *Maddox* v. *Burnham*, 156 U. S. 544, 39 L. ed. 527, 15 Sup. Ct. Rep. 448; *Northern P. R. Co.* v. *Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.

Petitioner, however, bases its right to recover upon certain statutes which, it is insisted, recognized the right of the petitioner to settle upon this island and make the improvements in question. The first of these is the act of May 17, 1884, "providing a civil government for Alaska" (23 Stat. at L. 24, chap. 53), wherein it was enacted by § 8 "that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or *now* claimed by

[576] *them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

It is quite clear that this section simply recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress. As the petitioner did not take possession of this land until five years after the act of 1884 was passed, it was a mere trespasser, and not in a position to avail itself of any contract which might be extorted from the language of the act in favor of the Indians or other persons who might have been in possession of the land at the passage of the act.

That this act was intended merely as a preliminary to future legislation and for the temporary protection of Indians and other settlers is made more manifest by § 12 of the same act:

"That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district."

So far from Congress intending by this act to invite a settlement upon public lands in Alaska, a contrary inference arises from a subsequent clause of § 8, that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

We come now to the act of March 3, 1891 (26 Stat. at L. 1100, chap. 561), § 12 (U. S. Comp. Stat. 1901, pp. 1467, 1468) of which provides:

"Sec. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States or of any state or territory of the United States, now authorized *by law [577] to hold lands in the territories, now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre. . . ."

Section 13 provides for a survey, a deposit of the cost of such survey, a report to the Commissioner of the General Land Office, and an approval by him of the survey, and for the final issue of the patent. Section 14 of the act is important, and reads as follows:

"Sec. 14. That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States

. . . to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the island of Kadiak and Afognak for the purpose of establishing fish-culture stations, . . . and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon."

Even if § 14 had not been enacted, it would not follow that petitioner, by §§ 12 and 13, became entitled to a patent of the United States by procuring a survey of such lands. We have had occasion in several cases to hold that, although the occupation and cultivation of public lands with a view to pre-emption confers a preference over others in the purchase of such lands by the bona fide settler, which will enable him to protect his possession against other individuals, it does not confer a vested right as against the United States in the land so occupied. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the [578] purchaser. *Until this has been done it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler. *Frisbie* v. *Whitney*, 9 Wall. 187, 19 L. ed. 668. When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local land office and ultimately to a patent. *Yosemite Valley Case* (*Hutchings* v. *Low*) 15 Wall. 77, 87, 21 L. ed. 82, 85; *Campbell* v. *Wade*, 132 U. S. 38, 33 L. ed. 242, 10 Sup. Ct. Rep. 9; *Shiver* v. *United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54.

The case of *Lytle* v. *Arkansas*, 9 How. 314, 13 L. ed. 153, is much relied upon by the petitioner and is carefully criticized and distinguished by Mr. Justice Field in the *Yosemite Valley Case*. In that case proofs were taken and decided both by the register and the receiver of the land office to be sufficient, and the money was *paid* by the claimant, and received by the commissioner; but, through misconduct or neglect, the register refused afterward to permit claimant to enter the section, and it was held that the right of the pre-emptor thus acquired could not be impaired by a selection of land by a subsequent act of Congress. Commenting on this case Mr. Justice Field observed in the *Yosemite Valley Case* (p. 93, L. ed. 87) that—

"The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases whenever necessary for their decision between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, providing a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

But if there were any doubt regarding the rights of the petitioner in connection with the above case, they are completely resolved by the language of § 14 of the act, which declares *that the provisons of the [579] preceding sections shall not be so construed as to warrant the sales of any lands belonging to the United States which shall be reserved for public purposes, or selected by the Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak, for the purposes of establishing a fish-culture station. As the President exercised the rights thus reserved, and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement, were terminated by the proclamation. Petitioner gained no additional consideration from the improvements put upon the land, since, if for no other reason, these were made prior to the act of 1891, when it was a mere trespasser, and occupying the land without a shadow of title.

Affirmed.

ROYAL PACKING COMPANY,
v.
UNITED STATES.

(See S. C. Reporter's ed. 579.)

[No. 86.]

See same case below, 39 Ct. Cl. 566.

PER CURIAM.

This case depends upon a similar state of facts, involves the same question of law, and is also *affirmed.*

[580] *SOFRE L. ALEXANDER, *Appt.*,
v.
SEFERINO CROLLOTT, Justice of the Peace, etc.

(See S. C. Reporter's ed. 580, 581.)

Prohibition—to restrain excess of jurisdiction—other remedy.—The existence under N. M. Code, § 3358, of the right to appeal to the district court from judgments of a justice of the peace in actions of forcible entry and detainer, justifies the territorial supreme court in refusing to restrain the justice from taking further proceedings in actions of that nature in which judgment had been given against a defendant claiming to be the owner of the property, and alleging a want of jurisdiction to determine the question of ownership in such a proceeding.

[No. 118.]

Submitted November 27, 1905. Decided December 18, 1905.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment quashing a writ of prohibition issued out of that court to compel a justice of the peace to refrain from further proceedings in actions of forcible entry and detainer. *Affirmed.*

Statement by Mr. Justice **Brown:**

This is an appeal from a judgment of the supreme court quashing a writ of prohibition issued by that court to the defendant Crollott, a justice of the peace of the county of Bernalillo, which commanded him to desist and refrain from any further proceedings in five several actions of forcible entry and detainer, instituted by one Cleland before said justice and against Alexander and four other parties.

An appeal was taken from the order quashing the writ to this court.

Mr. **Neill B. Field** submitted the cause for appellant.

Mr. **William B. Childers** submitted the cause for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Although a writ of prohibition will lie to an inferior court where it is acting manifestly beyond its jurisdiction, such writ will issue only when there is no other remedy. *Smith* v. *Whitney*, 116 U. S. 167, 29 L. ed 601, 6 Sup. Ct. Rep. 570; *Re Cooper*, 143 U. S. 472, 495, 36 L. ed. 232, 239, 12 Sup. Ct. Rep. 453; *Re Rice*, 155 U. S. 403, 39 L. ed. 201, 16 Sup. Ct. Rep. 149; **Re New York*[581] *S. S. Co.* 155 U. S. 531, 39 L. ed. 249, 15 Sup. Ct. Rep. 183.

By his answer Alexander claimed to be the owner of the property, and alleged a want of jurisdiction on the part of the justice to determine the question of ownership in a proceeding for forcible entry and detainer. The justice decided against him. Under such circumstances he should have taken an appeal to the district court under § 3358 of the New Mexican Code, which provides that "an appeal shall be allowed to the district court in all cases wherein judgment may be hereafter rendered in forcible entry and unlawful detainer, or both." No reason is apparent why this appeal was not taken.

The fact that the judgment may have been void will not prevent its reversal upon appeal (*Capron* v. *Van Noorden*, 2 Cranch, 126, 2 L. ed. 229; *Kempe* v. *Kennedy*, 5 Cranch, 173, 3 L. ed. 70; *Scott* v. *Sandford*, 19 How. 393, 473, 518, 566, 15 L. ed. 691, 728, 747, 767; *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; *Jordan* v. *Dennis*, 7 Met. 590; *Waters* v. *Randall*, 8 Met. 132; *Striker* v. *Mott*, 6 Wend. 465; *Langford* v. *Monteith*, 102 U. S. 145, 26 L. ed. 53), nor does the requirement of a bond obviate the necessity of an appeal. It is one of the ordinary incidents of litigation.

Affirmed.

ECLIPSE BICYCLE COMPANY, *Appt.*,
v.
WILLARD M. FARROW.

(See S. C. Reporter's ed. 581–592.)

1. Reference — scope — accounting for royalties under sale of invention.— Royalties upon any device found to come within a contract for the sale of an invention are within the scope of a reference to an auditor to state the account, under a decree declaring, in general terms, the rights of the complainant to royalties upon all devices manufactured by the defendant and embodying the inventions mentioned in the contract, although both the bill and the decree specifically mentioned but a single device, the bill averring complainant's ignorance of details and want of means of learning them except by discovery, and praying a disclosure, obviously intended to include substitutes for his invention.

2. Patents—sale of invention—royalties

NOTE.—*On prohibition as substitute for writ of error or appeal*—see note to Walcott v. Wells, 9 L.R.A. 59.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State *ex rel.* Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

—effect of partial rejection of claims.—The refusal of patents for some of the claims of invention only exonerates the vendee of such invention from any obligation to pay further royalties on devices made and sold by it which do not embody what remains of the claims, where the contract requires the payment of royalties on all devices embodying the invention until final adverse action by the Patent Office.

3. Sale—rescission—duty to return benefits.—The vendee in a contract for the sale of an invention cannot rescind for failure of consideration because of the rejection of patents for some of the claims, without returning to the vendor those parts of the supposed invention for which patents were allowed.

4. Patents—sale of invention—royalties—effect of lack of novelty.—The lack of novelty in a supposed invention does not, until the final adverse action by the Patent Office, which is to terminate the contract for its sale, relieve the vendee of its obligation under the contract to pay royalties "on all the devices made or sold embodying the invention," where the vendee took an assignment of the inventor's right, title, and interest, took charge of his applications for patents, and agreed to defend the invention against infringement.

5. Patents—sale of invention—royalties—use of device not embodying the invention.—The obligation of the vendee in a contract for the sale of an invention of an improved automatic coaster brake for bicycles to pay royalties on all devices made or sold embodying the invention, and to use due business diligence to push their sale, cannot be so extended as to require an account for the manufacture and sale of a new device, accomplishing the same results, but differing radically in construction and operation, which may reasonably and honestly have been regarded as superior to the vendor's invention.

[Nos. 40, 217.]

Argued November 3, 6, 1905. Decided December 18, 1905.

APPEALS from the Court of Appeals of the District of Columbia to review a decree which affirmed, with some modifications, a decree of the Supreme Court of that District in favor of complainant in a suit to compel an accounting for royalties due under a contract for the sale of an invention; and, in the event of such decree being held not to be final for the purpose of appeal, to review a decree of the Court of Appeals of the District affirming a judgment of the Supreme Court, entered pursuant to the mandate of the Court of Appeals on the first appeal. Decree *reversed* and case remanded with directions to reinstate the auditor's report so far as it disallows a certain claim.

See same case below, 24 App. D. C. 311; on prior appeal, 23 App. D. C. 411.

The facts are stated in the opinion.

Messrs. **A. S. Worthington** and **Howard L. Osgood** argued the cause, and, with *C. Schuyler Davis* and *D. S. Mackall*, filed a brief for appellant.

Messrs. **Henry M. Earle** and **John C. Gittings** argued the cause and filed a brief for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a final decree upon a bill for an account. As there was a technical doubt whether the decree first appealed from was final, a second decree was entered and a second appeal taken; but no point is made upon that matter here. There is one question and one case. See 16 App. D. C. 468, 18 App. D. C. 101.

The bill was brought upon an agreement under seal, dated June 5, 1897, of which the material portions are as follows: It begins with a recital that Farrow has invented certain improvements in bicycles, etc., pertaining to automatic mechanism for coasting and braking, for which he has made two numbered applications for patents and intends to file additional ones, and that the Eclipse Bicycle Company desires to acquire the entire right and title "to said inventions as described in the above *identified applica- [583] tions, and any letters patent that may be issued thereon," and to all improvements that may be made by Farrow upon the same. Then Farrow conveys to the company "his entire right, title, and interest in and to the inventions in bicycles, as fully described and claimed in the applications above referred to," letters patent and improvements as above. The company is to pay $2,500 within certain short times as advanced payments on royalties, and to pay royalties, as specified, "on all the devices made or sold embodying the invention above referred to," and to that end to make returns of the number of devices sold. The title is to revert to Farrow in default of payment for more than sixty days. Arrangements are made for taking out foreign patents, and then the company agrees to "defend said invention against piracy or infringement," and to "use due business diligence in the manufacture and sale of the devices embodied in said letters patent, and to push the sale by all proper and legitimate enterprise." Then follow further agreements as to taking out foreign patents, and finally it is covenanted that in case Farrow "for any reason fails to procure letters patent of the United States for the improvements above referred to, the [company] shall be relieved from the payment of all royalties from and after the date of final adverse action of the Patent Office on the application or applications for pat-

cnts for said improvements." The invention described was an automatic brake and coaster, one of the applications being for a hub brake, the other for a tire brake, both operating on the rear wheel by back pedaling.

The bill alleges that, soon after this agreement was made, one Morrow, the defendant's general manager, applied for a patent on a device in effect the same as Farrow's, accomplishing the same result and being a mere mechanical equivalent for the same, that he forthwith assigned a half interest to the company's president, and that the company began to manufacture and sell the Morrow device. It further charges a failure to use the diligence which the company covenanted to use in pushing the Farrow device, and a sale of substituted things. A supple-
[584] mental *bill alleges that, upon the consummation of the sale of Farrow's interest, the company caused an assignment to it of Farrow's application to be made, and a power of attorney to be executed by Farrow to the company's attorney for the purpose of permitting the company to prosecute applications for patents, after which, under its rules, the Patent Office would recognize Farrow no more. It charges that the company, thus having the whole matter in his own hands and power, is failing to prosecute the applications, and will allow the claims to be rejected or lapse upon points easily obviated, in furtherance of a scheme to substitute the reproduction of Farrow's device and thus, it is implied, to get rid of the contract.

The answer does not need to be stated. It admits the contract, but denies the plaintiff's case, charges him with fraud, and sets up that his invention had been anticipated by a patent to Stover and Hance and otherwise, and that it was impossible to obtain a patent for it, and that, therefore, the defendant was not bound by the contract further. The case went to a hearing and a decree was made to the effect that the plaintiff was entitled to royalties upon all the devices manufactured by the defendant embodying the inventions mentioned in the plaintiff's applications, and specifically upon devices manufactured under the patent to Morrow, and the cause was referred to an auditor to state the account. This decree was affirmed by the court of appeals for the District. 16 App. D. C. 468. It was found that one of Farrow's applications was placed in interference after its patentability had been allowed, and thereupon was abandoned, his acquiescence not appearing, and that the other was not contested, and, after some modification, was allowed and authorized to go to an issue, but was permitted by the company to lapse. The purchase by the company of the Stover and Hance patent, and an interest in the Morrow patent, and the adoption of the latter for the purpose of evading the contract with Farrow, were found.

After the decree which we have mentioned, the defendant moved for leave to amend its answer, and to introduce new testimony, *on [585] the grounds that the plaintiff knew that the broad claim for a coasting device in combination with a back-pedaling device had been anticipated by the Stover and Hance patent when he made the contract, that the defendant had been under a misapprehension as to the scope of the contract and of the suit until the former decision, and that it now had learned that there were other patents which would defeat any broad claim on the part of Farrow, etc. The motion was allowed by the supreme court, but, on a second special appeal, the court of appeals held that the supreme court was not at liberty to allow the motion after the decree directing an account had been affirmed by the court of appeals, until leave had been granted by the latter; and also held that no sufficient grounds for an amendment were shown, as no fraud on the plaintiff's part was made out, and it appeared that the company knew of the Stover and Hance patent and sufficiently understood the situation when it made the contract; and as the company certainly knew the facts when its former answer was filed. 18 App. D. C. 101. We are satisfied that the company suffered no injustice by this decision, and, in view of our conclusion upon the merits, we need say no more about it.

The case went to an account, and, before the auditor, Farrow sought to make the defendant account not only for the Morrow device heretofore mentioned, but also for another, known as Exhibit E 10, which the company had been manufacturing since the bill was filed. The auditor rejected this claim on the ground that an important part of the Farrow device was not used in E 10, that there was a radical difference in both construction and operation, and that one could not be called the mechanical equivalent of the other. On exceptions the auditor was directed by the supreme court to include royalties on E 10 in his account. Accordingly he made a further report, which, after some subordinate modifications, was confirmed by the supreme court and by the court of appeals (23 App. D. C. 411), and the defendant ordered to pay the amount found due. From this decree the defendant appeals. It takes the technical objection *that E. 10 was not within the [586] scope of the bill or the reference, and the substantial one that it was not within the scope of the contract. There is also an objection to the allowance of interest, be-

cause it was not claimed in the earlier hearing, but, as the defendant says, was waived.

We do not perceive any sufficient reason for saying that the plaintiff was estopped to claim interest. As to the technical objections to including E 10 in the account, the bill charges that a large number of devices similar to Farrow's are being manufactured and sold by the defendant, avers the plaintiff's ignorance of details and want of means of learning them except by discovery, and prays for disclosure of the number of both the devices manufactured, sold, and held by the defendant. The word "both" means in the context the Farrow brake and the Farrow coaster, and the disclosure obviously is intended to include substitutes. An account is prayed of the Farrow brakes and of the device substituted by the defendant for the same. This, we think, means not merely the specific Morrow device previously referred to, but any device the defendant might be using, in view of the plaintiff's alleged ignorance, as is made plainer by the fact that the bill goes on to pray that any improvement or elaboration in the original device may be declared to have been made by the defendant for the benefit of the parties to the contract. The decree directing an account specifically mentions the first Morrow device, it is true; but it declares in general terms the rights of the plaintiff to royalties upon all devices manufactured by the defendant and embodying the inventions mentioned in the contract, and directs an account in accordance with the decree. We are of opinion that these terms warranted the auditor in charging royalties upon any device found to come within the contract, and we agree with the court of appeals that the defendant had sufficient opportunity to contest the claim, and that therefore the objection is purely formal. No special point is made of the fact that the use was after the filing of the bill.

The real questions in the case are whether the first-mentioned *Morrow device and [587] the subsequent E 10 fall within the scope of the contract, and these questions depend more upon a careful construction of that instrument than upon nice discriminations between the patents that were or might have been issued. If either of the contrivances used embodies the invention described in Farrow's applications, then the defendant is bound to account for it by the express terms of its covenant, unless the contract is at an end. It is argued that the contract is at an end, that there was a total failure of consideration, because, it is said, there was no invention disclosed by Farrow. In answer to this it is enough to say that, although patents were refused upon some of his claims irrespective of any fault of the defendant, others were allowed, and there was no such final adverse action of the Patent Office upon either application as a whole as to exonerate the defendant by the terms of the agreement which we have recited. An appreciable part of Farrow's supposed invention was upheld and remained in the defendant's hands. We are spared the necessity of considering how much, or whether there was so considerable a failure of what was expected that it would have warranted a rescission of the contract outside of its express terms, by the fact that the defendant still keeps what was assigned to it. On February 15, 1898, it wrote to Farrow that it could not get a patent that was worth a pinch of snuff; but, so far from tendering a reconveyance, went on to say that if the work which the company was turning out "holds up all right, we may be able to work your brake in with ours, but as to this it is uncertain and we doubt it." Of course the defendant could not rescind the contract without returning what it had received under it. So the contract remained in force. See *United States* v. *Harvey Steel Co.* 196 U. S. 310, 315, 316, 49 L. ed. 492, 493, 25 Sup. Ct. Rep. 240.

We come back to the construction of the contract. The royalty is to be paid on the "invention above referred to." The use of the word "invention" does not open the state of the art and allow the defendant to meet the plaintiff's claim by proving that he had invented nothing new. The royalty is to *be paid on the invention described in the [588] specified applications—that is to say, on the contrivances there described—unless and until there is final adverse action by the Patent Office. That is the measure of the defendant's self-protection. It could not have asked or been allowed more. For it took an assignment of Farrow's right, title, and interest, took charge of his applications, and agreed to defend the invention against infringement, which, of course, involved maintaining its novelty and patentability. It had all Farrow's interests in its hands, and it took the risk of their worth, except as against what the Patent Office might do. It should be repeated that, so far as the company made any device embodying Farrow's invention, by the fair construction of its express covenant it was bound to account, whether the manufacture was ostensibly Farrow's or not, and he was not left merely to an action for such damages as he could prove.

On the other hand, the contract was not made on the footing that no coaster or no combination of coaster and brake ever had been invented, and that the whole field belonged to Farrow. Both parties knew some-

thing of the state of the art. The very facts which show that they stood on an equal footing, and that the company was not deceived by Farrow, show that. The contract shows the same thing on its face. It recites that Farrow has invented not a mechanism for coasting and braking, but an improvement pertaining to such mechanism. It was a contract having definite reference to the course of the Patent Office, and was for the contents of the application already filed. The application recognizes the existence of coasters. So that the contract only embraces what the parties reasonably may be understood to have expected to be patented. Furthermore, the provision for the cessation of payments on final adverse action must be applied to such claims as were rejected for want of novelty; and, after such rejection, Farrow can make the defendant account only for the use of devices embodying what remained of his claims. Obviously, also, the fact that, subject to the foregoing qualifications, the defendant took
[589] the risk of *the value of Farrow's alleged invention, even when coupled with its covenant to use due business diligence in pushing their sale, did not preclude it from using any later invention, if one were made which superseded Farrow's and did not embody it. Due business diligence would not require it to enter into a hopeless contest, and would not prevent it from avoiding such a contest by purchase. In that event it would not be accountable to Farrow for royalties on the new machine. See *Thorn Wire Hedge Co.* v. *Washburn & M. Mfg. Co.* 159 U. S. 423, 40 L. ed. 205, 16 Sup. Ct. Rep. 94.

Applying this construction to the case, there is little difficulty in arriving at our judgment. The defendant at the original hearing, when the first Morrow device alone was in question, offered no evidence to controvert that of the plaintiff's expert that it was a palpable attempt to evade Farrow's rights. Its argument upon that point before us depended largely upon the contention that, in view of the state of the art, Farrow's claims must be narrowly limited, and gave too little effect to the contract. It is evident from the latter as well as from the evidence that a patent of a certain breadth was expected. The plaintiff, on the other hand, did not chiefly rely upon maintaining that the second device, E 10, would have been an infringement of any patent that the contract can be taken to have contemplated, but depended mainly upon construing the contract as binding the defendant to pay royalties if any other than Farrow's braking and coasting device were used. Therefore a summary statement of the nature of the different devices is all that is necessary to complete our disposition of the case.

In Farrow's application and Morrow's first device there was the same clutch mechanism on the rear wheel to permit coasting, and in both a contrivance for bringing a brake shoe to bear upon the rear wheel by back pedaling. Farrow accomplished this result by means of a hood pivoted to the bicycle frame, embracing the upper run of the chain and having a pivoted tooth or pawl. With the hood is connected a rod having the brake shoe on its end. Back pedaling, causing the chain to *slacken, lets it drop [590] down upon the pawl and engage it, and thereby pulls back the hood and rod and brings the brake shoe to bear. By a second device, which the defendant is not in a position to say was not patentable, the brake was applied by the front instead of the rear sprocket wheel, which, in case of back pedaling, engaged a lever and put on the brake. Morrow used the front sprocket wheel and made it apply a lever with a brake shoe by means of a clutch. The details of the means of application differ, but it cannot be doubted that, assuming the novelty in Farrow's invention which the contract assumes, Morrow, in the language of the contract, was embodying that invention. It covered the very thing which Farrow's invention was expected and mainly relied on to supply. Taking into account the fact that the defendant did not make due efforts to carry out his application, and that it certainly does not appear that the Morrow device was so much, if at all, better than Farrow's, that due business diligence did not require the company still to push the latter, we are of opinion that on this item it properly was held to account.

Farrow also embraced a hub brake in his applications. One of his devices was to have the rear sprocket wheel connect with the hub of the rear wheel by a screw clutch. When the sprocket wheel was moving forward it was screwed into fixed connections with the hub. When the pedals were held fast, so as to hold the sprocket wheel also fast through the medium of the chain, the bicycle, continuing its motion, unscrewed the sprocket wheel from the hub, disconnected it, and coasted. Back pedaling brought a projection on a spring in and attached at one end to the rear sprocket and encircling the hub, into contact with a fixed point on the frame, and thus caused the spring to embrace the hub so long as pressure was applied. On the pressure being released, the spring expanded and allowed the hub to revolve loosely within it. In the coasting or braking, it will be seen, the sprocket wheel was moved along its axis a short distance outward from the rear

wheel, thus giving a slant to the chain. When a forward movement was resumed, the [591] tendency *of the chain under the pressure upon it to get back into a straight line was enough to carry the sprocket wheel inward again upon its axis so as to lock it once more to the rear wheel by the screw clutch. There are further details but this simple outline is enough for our purposes, which are only those of broad comparison and contrast.

In Exhibit E 10 the characteristic lateral motion of the sprocket wheel on the extension of the hub does not appear, and neither Farrow's rotating brake spring nor his lever is used. The engagements are effected by the movement of a clutch ring with cam inclines, the sprocket wheel having co-operating cam inclines. When the sprocket wheel moves forward, the latter cam inclines ride upon the former, force the clutch ring inward, and allow it to grasp the hub by friction, and revolve with it. On back pedaling the square shoulders of the cam inclines engage, the clutch ring is moved backward with the sprocket wheel, and cam inclines on the inner side of the ring force a brake ring inward into a hollow conical brake shoe connected with the frame of the machine, and having no rotary movement. The brake shoe thus is forced inwardly into a brake cup and effects the braking by its friction. In this case, as in the former, a general indication of the nature of the device is sufficient on the question whether the latter embodies the former in the sense of the contract. This question is answered by the description which we have given. It is true that in both the sprocket wheel is arranged to engage or disengage with the main wheels of the machine, to allow coasting and to brake by a reverse action of the rider's feet. But the methods by which these results are accomplished are so different that it is only on the assumption that Farrow was, in the broadest sense, a pioneer, and had covered the whole ground, or at least that the contract put him in that position relatively to the defendant, that the claim in respect of E 10 could be allowed. It is not pretended that Farrow occupied such a position as an inventor, and our construction of the contract does not give it the supposed extent. The auditor found that [592] there was a radical *difference between the contrivances in construction and operation, and there has not been and could not be a finding to the contrary. The ground on which the account was ordered was that the contract required it, notwithstanding all the difference which the auditor found. We could not come to that conclusion unless we at least were satisfied that it was inconsistent with due business diligence in pushing Farrow for the defendant to take up with E 10. The witnesses pointed out important superiorities in the latter, which we need not repeat, in the way of avoiding clogging by mud or ice, in applicability to a chainless machine, in more immediate and certain operation, and in requiring a less continuous exercise of force. On these points they were not contradicted. If, as we think, E 10 did not embody Farrow's invention, and if the company reasonably and honestly thought it a better thing, it had a right to do what it did. We cannot say that it was not warranted in its preference of E 10, or that it was not honest in its choice. It follows that, with regard to this, the decree must be reversed.

There was evidence that the defendant had sold out to another company of a nearly similar name. It is enough to say that it does not appear that the defendant is not still in existence, but, on the contrary, it would seem that the corporation still exists.

Decree reversed and case remanded with directions to reinstate the auditor's first report so far as the same disallows a claim in respect of E 10.

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*MINNESOTA IRON COMPANY, *Plff. in Err.*, [593]

v.

MARK M. KLINE.

(See S. C. Reporter's ed. 593–598.)

Constitutional law—equal protection of the laws—legislative abrogation of fellow-servant rule.—The equal protection of the laws is not denied by construing the proviso excepting cases of injuries sustained by railway employees "while engaged in the construction of a new road or any part thereof not open to public travel or use," from the provisions of Minn. Gen. Stat. 1894, § 2701, abrogating the fellow-servant rule, as only exempting incomplete railroads, and therefore as not excepting from the operation of the statute an accident on a narrow-gauge track on which dump cars were run by a mining company for the purpose of stripping the earth from the surface of its mine.

[No. 96.]

Argued December 5, 1905. Decided December 18, 1905.

NOTE.—*As to the validity of class legislation*—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment reversing a judgment of the District Court of the County of St. Louis, in that state, in favor of defendant in an action to recover damages for personal injuries, and remanding the cause for judgment in plaintiff's favor on the verdict of the jury. *Affirmed.*

See same case below, 93 Minn. 63, 100 N. W. 681.

The facts are stated in the opinion.

Mr. **Frank B. Kellogg** argued the cause, and, with *Messrs. W. W. Billson* and *Joseph B. Cotton*, filed a brief for plaintiff in error:

The irrationality of the distinction between new and old roads was acknowledged by the supreme court of the state in *Schneider* v. *Chicago, B. & N. R. Co.* 42 Minn. 68, 43 N. W. 783.

An invidious distinction in favor of a single class is as obnoxious to the equality clause as a similar discrimination against a particular class.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540, 554, 46 L. ed. 679, 687, 22 Sup. Ct. Rep. 431.

Nor is it necessary that the character of the discrimination or the attendant circumstances should justify an inference of malice, ill-will, or corrupt favoritism on the part of the legislature. It is enough that no rational basis for the discrimination can be discerned.

Smyth v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 112, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30.

In all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255.

While good faith and a knowledge of existing conditions on the part of the legislature is to be presumed, yet, to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

Legal discriminations cannot be based upon diversities of condition not logically and reasonably related to them.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Barbier* v. *Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 375; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 552, 563, 46 L. ed. 679, 686, 691, 22 Sup. Ct. Rep. 431.

Decisions holding fellow-servant statutes valid are clearly distinguishable from the case at bar. The statute in each case considered made a classification based upon the peculiar hazards incident to the use and operation of railroads. In no case which we have been able to find has such a classification as this been sustained; and, if it is once conceded that the legislature may make this classification, there is no limit to its power. It may make a railroad liable for the negligence of its employees in grading a railroad, and exempt a contractor in grading a street. It may make the employees of a corporation liable, and not those of an individual. This statute cannot, therefore, be brought within any of the rules laid down by this court.

Missouri P. R. Co. v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Chicago, R. I. & P. R. Co.* v. *Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Chicago, K. & W. R. Co.* v. *Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

Constructions placed by the state court upon the laws of the state, whether common or statutory, are reviewable here so far as necessary to determine whether the party bringing up the case has been denied by the state court any right or immunity secured to him by the Constitution of the United States.

Gibson v. *Mississippi*, 162 U. S. 565, 591, 40 L. ed. 1075, 1081, 16 Sup. Ct. Rep. 904; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 100, 43 L. ed. 911, 19 Sup. Ct. Rep. 609; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 248, 41 L. ed. 979, 988, 17 Sup. Ct. Rep. 581; *Scott* v. *McNeal*, 154 U. S. 34, 44–48, 38 L. ed. 896, 901, 902, 14 Sup. Ct. Rep. 1108.

The statute and its proviso should be read in the light of the railroad business as known to Minnesota and its legislators when the statute was framed and enacted.

Funk v. *St. Paul City R. Co.* 61 Minn.

435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099.

The proviso, instead of being used as a key to the object and policy of the law, as it should have been, has, despite the strong presumption of legislative rationality in which the courts ought to indulge, been regarded as arbitrary and inexplicable.

Schneider v. *Chicago, B. & N. R. Co.* 42 Minn. 68, 43 N. W. 783.

Legislation of this character is designed for the joint benefit of the employee and the public.

Missouri P. R. Co. v. *Mackey*, 127 U. S. 209, 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Williams* v. *Northern Lumber Co.* 113 Fed. 382; *Herrick* v. *Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

Mr. **Samuel A. Anderson** argued the cause, and, with *Mr. George M. Nelson*, filed a brief for defendant in error:

The national courts uniformly follow the construction of the Constitution and statutes of a state, given by its highest judicial tribunal, in all cases which involve no question of general or commercial law, and no question of right under the Constitution and laws of the nation.

Kibbe v. *Stevenson Iron Min. Co.* 136 Fed. 147; *Bolles* v. *Brimfield*, 120 U. S. 759, 763, 30 L. ed. 786, 788, 7 Sup. Ct. Rep. 736; *Detroit* v. *Osborne*, 135 U. S. 492, 499, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012; *Gut* v. *Minnesota*, 9 Wall. 35, 37, 19 L. ed. 573, 574; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 50, 52, 25 L. ed. 544, 545, 546; *Bank of Hamilton* v. *Dudley*, 2 Pet. 492, 7 L. ed. 496; *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 223, 235, 34 L. ed. 341, 346, 10 Sup. Ct. Rep. 1013.

The supreme court of Minnesota upheld the constitutionality of the statute in question by limiting its operation to that class of railroad employees that is exposed to the hazards and dangers incident and peculiar to the actual operation of railroads.

Lavallee v. *St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Schneider* v. *Chicago, B. & N. R. Co.* 42 Minn. 68, 43 N. W. 783; *Johnson* v. *St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Pearson* v. *Chicago, M. & St. P. R. Co.* 47 Minn. 9, 47 N. W. 302; *Steffenson* v. *Chicago, M. & St. P. R. Co.* 45 Minn. 355, 11 L.R.A. 271, 47 N. W. 1068; *Mikkelson* v. *Truesdale*, 63 Minn. 137, 65 N. W. 260; *Blomquist* v. *Great Northern R. Co.* 65 Minn. 69, 67 N. W. 804; *Kreuzer* v. *Great Northern R. Co.* 83 Minn. 385, 86 N. W. 413.

The manifest purpose of the statute is to give its benefit to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional.

Deppe v. *Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Missouri P. R. Co.* v. *Haley*, 25 Kan. 35; *Union P. R. Co.* v. *Harris*, 33 Kan. 416, 6 Pac. 571.

Logically and on constitutional grounds the statute was necessarily held to be applicable to persons or corporations operating railroads in their own private business, where they expose their employees to hazards and dangers of like character to those to which employees of commercial roads are exposed.

Schus v. *Powers-Simpson Co.* 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68; *Roe* v. *Winston*, 86 Minn. 77, 90 N. W. 122; *Kibbe* v. *Stevenson Iron Min. Co. supra.*

State legislation such as the statute in question, construed as it has been by the state supreme court of Minnesota and the supreme court of Kansas, is within the police power of the state, is a proper exercise thereof, and does not violate the Constitution of the United States.

Missouri P. R. Co. v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co.* v. *Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176.

Statutes passed by the state legislatures in exercise of the police power are not necessarily designed for the protection or welfare of the public generally, as distinguished from those of a particular class, as employees exposed to peculiar hazards.

Holden v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for the loss of an arm by the plaintiff, the defendant in error, while repairing an engine of the defendant, through the negligence of a fellow servant. A statute of Minnesota reads as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability; *provided*, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employee, agent, or servant while engaged in the construction of a new road, or any

part thereof, not open to public travel or use." Minn. Gen. Stat. 1894, § 2701. The track on which the accident happened was a narrow gauge track, on which dump cars were run by the defendant, a mining company, for the purpose of stripping the earth from the surface of its mine. The plaintiff had a verdict which afterwards was set aside by the trial court on the [597] ground that if the statute were *construed to apply to this case it would be contrary to the 14th Amendment of the Constitution of the United States. This ruling was reversed by the supreme court of the state and judgment was entered on the verdict. 93 Minn. 63, 100 N. W. 681. The case then was brought here.

The supreme court of Minnesota construed the act to apply to this case, and held it constitutional when so construed. Of course, if the statute as interpreted is not within the prohibitions of the 14th Amendment, we do not interfere with the construction adopted by the state court. The state court held that the act was confined to the dangers peculiar to railroads, and did not discriminate against railroad companies merely as such. It read the proviso as only exempting incomplete roads, marking the time when the statute should take effect, and not as confining it to roads intended for public travel. Before us it was argued that when the statute was passed there were no private railroads in the state, and that, if the proviso is taken to mean what the court said, the discrimination is senseless and unjustified; whereas, if it be taken to confine the statute to public roads after public travel has begun, the distinction may be maintained. We are of a different opinion. Some time must be fixed when the law shall begin to operate, and the time when the road is finished is a natural and proper time. There may be unavoidable and exceptional dangers before the track is finished and while cars are being run over it for construction purposes, and the legislature might think it proper that the servant should take the risk of these even if the negligence of a fellow servant co-operated, just as he takes the risk of the known peculiar dangers when he sets about repairing the effects of an accident. The fact that there may be also dangers like those on the finished road does not prevent the legislature from considering the situation as a whole and keeping the old rule on practical grounds until the exceptional risks come to an end. It was assumed in argument that the statute would not apply to a road like the present if it were built in aid of the construction of a public railroad which was not yet *completed. We see noth- [593] ing in the decision or the statute to warrant the assumption, and therefore need not discuss what the effect of such an exception would be. Of course, there is no objection to legislation being confined to a peculiar and well-defined class of perils, and it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work. *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

It was not argued that the statute was bad as interfering unduly with freedom of contract. There is no doubt that that freedom may be limited where there are visible reasons of public policy for the limitation. *Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. The constitutionality of the law, so far as it merely does away with the exception as to the negligence of fellow servants from the general law of master and servant in the case of railroads, is not disputed. *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed 107, 8 Sup. Ct. Rep. 1161. The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the 14th Amendment.

Judgment affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

EX PARTE: IN THE MATTER OF LEONIDAS M. LAWSON *et al.* [No. —, Original.]

(See S. C. Reporter's ed. 599.)

Motion for Leave to File Petition for a Writ of Mandamus.

Messrs. Chas. C. Dey, Ogden Hiles, Charles J. Hughes, Jr., L. R. Rogers, and *John A. Street* for petitioners.

October 16, 1905. *Denied.*

SAMUEL W. WATKINS, *Plaintiff in Error, v.* AMERICAN NATIONAL BANK OF DENVER. [No. 259.]

(See S. C. Reporter's ed. 599.)

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 67 C. C. A. 110, 134 Fed. 36.

Mr. George H. Noyes for plaintiff in error.

Messrs. T. J. O'Donnell and *R. T. McNeal* for defendant in error.

October 16, 1905. *Dismissed* for the want of jurisdiction. *Ex parte Jones,* 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Press Pub. Co.* v. *Monroe,* 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Arbuckle* v. *Blackburn,* 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224.

Petition for Writ of Certiorari denied.

E. A. WIMBISH, Superintendent, etc., *Appellant, v.* HENRY JAMISON. [No. 163.]

(See S. C. Reporter's ed. 599.)

Appeal from the District Court of the United States for the Southern District of Georgia.

See same case below, 130 Fed. 351.

Mr. Minter Wimberly for appellant.

Mr. Alexander Akerman for appellee.

October 16, 1905. Final order *reversed* with costs, and cause remanded, with a direction to quash the writ and dismiss the petition. *Minnesota* v. *Brundage,* 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; *Davis* v. *Burke,* 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *New York* v. *Eno,* 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Pepke* v. *Cronan,* 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34.

CEDAR RAPIDS WATER COMPANY, *Plaintiff in Error, v.* CITY OF CEDAR RAPIDS *et al.* [No. 3.]

(See S. C. Reporter's ed. 600.)

In Error to the Supreme Court of the State of Iowa.

See same case below, 118 Iowa, 234, 91 N. W. 1081.

Mr. Charles A. Clark for plaintiff in error.

Mr. John N. Hughes for defendants in error.

October 23, 1905. *Dismissed* for want of jurisdiction. *Kimball* v. *Kimball,* 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; *Mills* v. *Green,* 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *California* v. *San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876; *Little* v. *Bowers,* 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620.

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* FRANK O. ANDERSON, *Plaintiff in Error, v.* WILLIAM VREDENBURGH, Insurance Superintendent, etc. [No. 15.]

(See S. C. Reporter's ed. 600.)

In Error to the Supreme Court of the State of Illinois.

See same case below, 207 Ill. 316, 69 N. E. 775.

Mr. Charles H. Aldrich for plaintiff in error.

Mr. Geo. W. Wall for defendant in error.

October 23, 1905. *Dismissed* for want of jurisdiction. *Schlosser* v. *Hemphill,* 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

CONTINENTAL INSURANCE COMPANY, *Plaintiff in Error, v.* WILLIAM VREDENBURGH, Insurance Superintendent, etc. [No. 16.]

(See S. C. Reporter's ed. 600.)

In Error to the Supreme Court of the State of Illinois.

See same case below, 207 Ill. 512, 69 N. E. 779.

Mr. Charles H. Aldrich for plaintiff in error.

Mr. George W. Wall for defendant in error.

October 23, 1905. *Dismissed* for want of jurisdiction. *Schlosser* v. *Hemphill,* 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

NICHOLAS BOWDEN, Executor, etc., *et al. Appellants, v.* CITY & COUNTY OF SAN FRANCISCO. [No. 17.]

(See S. C. Reporter's ed. 600.)

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. S. W. and *E. B. Holladay* for appellants.

Messrs. Percy V. Long, W. I. Brobeck, and *John S. Partridge* for appellee.

October 23, 1905. Decree *affirmed* with costs. *Hoadley* v. *San Francisco* (*Clark* v. *San Francisco*) 124 U. S. 645, 31 L. ed. 556, 8 Sup. Ct. Rep. 659, 94 U. S. 4, 24 L. ed. 34, 50 Cal. 273, 70 Cal. 320, 12 Pac. 125; *Townsend* v. *Greeley,* 5 Wall. 326, 18 L. ed. 547; *Grisar* v. *McDowell,* 6 Wall. 379, 18 L. ed. 868; *Holladay* v. *San Francisco,* 124 Cal. 352, 57 Pac. 146; *Board of Education* v. *Martin,* 92 Cal. 209, 28 Pac. 799; *Trenouth* v. *San Francisco,* 100 U. S. 251, 25 L. ed. 626.

GEORGE E. GREEN, *Appellant, v.* CLINTON D. MACDOUGALL, United States Marshal, etc. [Nos. 250, 251, 252.]

(See S. C. Reporter's ed. 601.)

Appeals from the District Court of the United States for the Northern District of New York.

See same case below, 136 Fed. 618.

Mr. John G. Johnson for appellant.

The Attorney General, the *Solicitor General,* and *Assistant to the Attorney General Purdy* for appellee.

October 23, 1905. Final orders *affirmed* with costs. *Beavers* v. *Henkel,* 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; *Benson* v. *Henkel,* 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; *Hyde* v. *Shine,* 199 U. S. 84, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; *Greene* v. *Henkel,* 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218.

JOHN J. DELAHANTY, *Plaintiff in Error, v.* WILLIAM T. PITKIN *et al.* [No. 26.]

(See S. C. Reporter's ed. 602.)

In Error to the Supreme Court of Errors of the State of Connecticut.

See same case below, 76 Conn. 412, 56 Atl. 881.

Messrs. Lewis E. Stanton and *Sidney E. Clarke* for plaintiff in error.

Messrs. Charles E. Perkins and *Wm. Waldo Hyde* for defendants in error.

October 30, 1905. *Dismissed* for the want of jurisdiction. *Giles* v. *Teasley,* 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; *Remington Paper Co.* v. *Watson,* 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *Smalley* v. *Laugenour,* 196 U. S. 93, 49 L. ed. 400, 25 Sup. Ct. Rep. 216; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224.

FARMERS' LOAN & TRUST COMPANY *et al. Appellants,* v. CITY OF SIOUX FALLS *et al.* [No. 296.]

(See S. C. Reporter's ed. 601.)

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 131 Fed. 890.

Messrs. D. T. Watson, Bartlett Tripp, John H. Voorhees, Park Davis, and *Chas. O. Bailey* for appellants.

Messrs. Hosmer H. Keith and *R. H. Warren* for appellees.

October 23, 1905. *Dismissed* for the want of jurisdiction. *Arbuckle* v. *Blackburn,* 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Newburyport Water Co.* v. *Newburyport,* 193 U. S. 562, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; *Underground R. Co.* v. *New York,* 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; *Skaneateles Waterworks Co.* v. *Skaneateles,* 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; *McCain* v. *Des Moines,* 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644.

Petition for Writ of Certiorari denied.

EDWARD WHITE, *Appellant, v.* AUGUSTA PATTEN GLOVER *et al.* [No. 36.]

(See S. C. Reporter's ed. 602.)

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 23 App. D. C. 389.

Messrs. E. F. Colladay, L. T. Michener, Clayton E. Emig, and *Chester H. Krum* for appellant.

Messrs. Corcoran Thom and *Henry P. Blair* for appellees.

November 6, 1905. Decree *affirmed* with costs.

THOMAS R. SHAW, Receiver, etc., *Plaintiff in Error, v.* NATIONAL GERMAN-AMERICAN BANK OF ST. PAUL, MINN. [No. 115.]

(See S. C. Reporter's ed. 603.)

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 65 C. C. A. 620, 132 Fed. 658.

Mr. Guy C. H. Corliss for plaintiff in error.

Mr. J. W. Lusk for defendant in error.

November 13, 1905. Judgment *affirmed* with costs. *California Nat. Bank* v. *Kennedy,* 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank* v. *Hawkins,* 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Scott* v. *Deweese,* 181 U. S. 202, 45 L. ed. 822, 21 Sup. Ct. Rep. 585; *Matteson* v. *Dent,* 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419.

Case remanded to the Circuit Court of the United States for the District of Minnesota.

HARRY J. CANTWELL *et al., Plaintiffs in Error, v.* STATE OF MISSOURI. [No. 38.]

(See S. C. Reporter's ed. 602.)

In Error to the Supreme Court of the State of Missouri.

See same case below, 179 Mo. 245, 78 S. W. 569.

Messrs. Harry J. Cantwell and *John E. Risley* for plaintiffs in error.

Messrs. Herbert S. Hadley, North T. Gentry, and *John H. Murphy* for defendant in error.

November 6, 1905. Judgment *affirmed* with costs. *Holden* v. *Hardy,* 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; *Jackson ex dem. Hart* v. *Lamphire,* 3 Pet. 280, 7 L. ed. 679.

CITIZEN'S NATIONAL BANK *et al., Plaintiffs in Error, v.* COMMONWEALTH OF KENTUCKY, use, etc., of BOYLE COUNTY. [No. 43.]

(See S. C. Reporter's ed. 603.)

In Error to the Court of Appeals of the State of Kentucky.

See same case below, 25 Ky. L. Rep. 2100, 80 S. W. 158.

Mr. Robert T. Quisenberry for plaintiffs in error.

Mr. John W. Yerkes for defendant in error.

November 13, 1905. *Dismissed* for the want of jurisdiction. *Schlosser* v. *Hemphill,* 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

IN THE MATTER OF WILLIAM W. BIERCE, LIMITED, *Petitioner.* [No. 14, Original.]

(See S. C. Reporter's ed. 603.)

Petition for a Writ of Mandamus against the chief justice and associate justices of the Supreme Court of the Territory of Hawaii, commanding them to grant an appeal, or, in the alternative, for a Writ of Certiorari to bring the case before the Supreme Court of the United States.

See same case below, 16 Haw. 418.

Mr. Chas. H. Aldrich for petitioner.

No opposition.

December 4, 1905. Leave to file petition for Writs of Mandamus or Certiorari *granted,* and, on consideration thereof and of the record presented therewith, it is ordered that an appeal be, and it is hereby, allowed, without prejudice, from the judgment of the Supreme Court of the Territory of Hawaii in the case of *Bierce* v. *Hutchins,* 16 Haw. 418, on appellant giving bond in the penal sum of $1,000, conditioned according to law, and approved by the chief justice of said supreme court or an associate justice thereof.

ALLISON D. GIBBS, *Plaintiff in Error, v.* ROBERT S. McDOUGALL. [No. 42.]

(See S. C. Reporter's ed. 602.)

In Error to the Supreme Court of the Philippine Islands.

Messrs. John F. Shafroth, Platt Rogers, and *F. E. Gregg* for plaintiff in error.

No appearance for defendant in error.

November 13, 1905. *Dismissed* for the want of jurisdiction. *Schlosser* v. *Hemphill,* 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

JOHN C. GORE, JR., *et al., Appellants, v.* UNITED STATES *et al.* [No. 66.]

(See S. C. Reporter's ed. 604.)

Appeal from the Circuit Court of the United States for the Northern District of California.

Mr. Hamilton Gay Howard for appellants.

Messrs. H. G. Platt and *Richard Bayne* for appellees.

December 4, 1905. *Dismissed* for want of jurisdiction. *Gwin* v. *United States,* 184 U. S. 672, 46 L. ed. 746, 22 Sup. Ct. Rep. 526; *Lau Ow Bew* v. *United States,* 144 U. S. 47–56, 36 L. ed. 340–343, 12 Sup. Ct. Rep. 517; *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372–383, 37 L. ed. 486–491, 13 Sup. Ct. Rep. 758; *Borgmeyer* v. *Idler,* 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Muse* v. *Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; act of March 3, 1891 (26 Stat. at L. 826, chap. 517, §§ 5 & 6, U. S. Comp. Stat. 1901, pp. 549, 550).

WABASH RAILROAD COMPANY, *Plaintiff in Error, v.* GENEVIEVE HALSTEAD MATHEW. [No. 92.]

(See S. C. Reporter's ed. 605.)

In Error to the Kansas City Court of Appeals, State of Missouri.

See same case below (Mo. App.) 78 S.W. 271.

Mr. W. H. Blodgett for plaintiff in error.

Mr. Grant I. Rosenzweig for defendant in error.

December 11, 1905. Judgment *affirmed,* with 10 per cent damages, in addition to interest and costs.

LEONIDAS M. LAWSON *et al., Petitioners, v.* UNITED STATES MINING COMPANY. [No. 264.]

(See S. C. Reporter's ed. 605.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Ogden Hiles, Charles J. Hughes, Jr., L. R. Rogers, and *C. C. Dey* for petitioners.

Messrs. Geo. Sutherland, Waldemar Van Cott, and *Edward M. Allison, Jr.,* for respondent.

October 16, 1905. *Granted.*

MOBILE TRANSPORTATION COMPANY, *Appellant, v.* CITY OF MOBILE *et al.* [No. 103.]
(See S. C. Reporter's ed. 604.)

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 60 C. C. A. 689, 125 Fed. 1003.

Messrs. Frederick G. Bromberg and *Eugene H. Lewis* for appellant.

Messrs. Harry T. and *Gregory L. Smith* for appellees.

December 11, 1905. *Dismissed* for want of jurisdiction. Act March 3, 1891 (26 Stat. at L. 826, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 549); *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Rouse* v. *Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Carey* v. *Houston & T. C. R. Co.* 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Gableman* v. *Peoria, D. & E. R. Co.* 179 U. S. 335, 339, 45 L. ed. 220, 223, 21 Sup. Ct. Rep. 171; *Arbuckle* v. *Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Mobile Transp. Co.* v. *Mobile*, 187 U. S. 482, 47 L. ed. 269, 23 Sup. Ct. Rep. 170; *Mobile Transp. Co.* v. *Mobile*, 195 U. S. 631, 49 L. ed. 353, 25 Sup. Ct. Rep. 789.

R. J. WALBRIDGE, *Petitioner, v.* W. P. WALKER & Co. [No. 265.]
(See S. C. Reporter's ed. 605.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 68 C. C. A. 569, 136 Fed. 19.

Mr. R. L. Batts for petitioner.

No opposition.

October 16, 1905. *Denied.*

P. S. BAILEY, *Petitioner, v.* THOMAS F. WILLEFORD. [No. 277.]
(See S. C. Reporter's ed. 606.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 136 Fed. 382.

Mr. H. J. Haynsworth for petitioner.

Mr. Robert B. Redwine for respondent.

October 16, 1905. *Denied.*

JOSEPH BISSO *et al., Petitioners, v.* MALVINA L. QUINETTE. [No. 279.]
(See S. C. Reporter's ed. 606.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 136 Fed. 825.

Messrs. L. C. Quintero and *John D. Grace* for petitioners.

No opposition.

October 16, 1905. *Denied.*

JOSEPH R. DELAMAR, *Petitioner, v.* UTAH-NEVADA COMPANY. [No. 255.]
(See S. C. Reporter's ed. 605.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 66 C. C. A. 179, 133 Fed. 113.

Mr. E. S. Pillsbury for petitioner.

Messrs. James G. Maguire, W. H. Metson, and *J. T. Houx* for respondent.

October 16, 1905. *Denied.*

LEWIS C. BURNES *et al., Petitioners, v.* FRANCES B. BURNES *et al.* [No. 271.]
(See S. C. Reporter's ed. 605.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 137 Fed. 781.

Messrs. Stephen S. Brown, John E. Dolman, A. P. Jetmore and *S. M. Gardenhire* for petitioners.

Messrs. O. M. Spencer, Frank Hagerman and *Vinton Pike* for respondents.

October 16, 1905. *Denied.*

BIG SIX DEVELOPMENT COMPANY, *Petitioner, v.* S. DUFFIELD MITCHELL. [No. 276.]
(See S. C. Reporter's ed. 606.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 1 L.R.A.(N.S.) 332, 138 Fed. 279.

Messrs. Frank Hagerman and *Jno. W. Halliburton* for petitioner.

Mr. S. Duffield Mitchell pro se.

October 16, 1905. *Denied.*

ÆTNA INDEMNITY COMPANY, *Petitioner, v.* WILLIAM M. LADD *et al.* [No. 410.]
(See S. C. Reporter's ed. 606.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 68 C. C. A. 274, 135 Fed. 636.

Messrs. Joseph C. Campbell, Wm. H. Metson and *Geo. M. MacKellar* for petitioner.

Messrs. C. E. S. Wood and *Geo. H. Williams* for respondents.

October 16, 1905. *Denied.*

J. B. ORCUTT COMPANY *et al., Petitioners, v.* CHARLES H. GREEN *et al.* [No. 400.]
(See S. C. Reporter's ed. 606.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Chas. Cowles Tucker, J. Miller Kenyon, and *Reginald S. Huidekoper* for petitioners.

Mr. H. D. Bailey for respondents.

October 23, 1905. *Granted.*

AMERICAN SURETY COMPANY OF NEW YORK, *Petitioner, v.* CAMPBELL & ZELL COMPANY. [No. 379.]

(See S. C. Reporter's ed. 607.)

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 138 Fed. 531.

Mr. Henry Wheeler for petitioner.

Mr. Byron E. Croiwell for respondent.

October 23, 1905. *Denied.*

P. SANFORD ROSS, INCORPORATED, *Petitioner, v.* THE STEAMSHIP "CITY OF BIRMINGHAM," etc. [No. 418.]

(See S. C. Reporter's ed. 607.)

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 138 Fed. 555.

Mr. Robert D. Benedict for petitioner.

Mr. Charles S. Haight for respondent.

October 23, 1905. *Denied.*

T. W. HARRISON, *Petitioner, v.* REMINGTON PAPER COMPANY. [No. 423.]

(See S. C. Reporter's ed. 607.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 Fed. 385.

Messrs. W. H. Rossington and *Chas. Blood Smith* for petitioner.

No opposition.

October 23, 1905. *Denied.*

ERIE RAILROAD COMPANY, *Petitioner, v.* ERIE & WESTERN TRANSPORTATION COMPANY. [No. 433.]

(See S. C. Reporter's ed. 607.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. C. E. Kremer and *W. O. Johnson* for petitioner.

Messrs. Harvey D. Goulder, S. H. Holding, and *F. S. Masten* for respondent.

October 30, 1905. *Granted.*

UNITED STATES OF AMERICA *et al., Petitioners, v.* WILLIAM B. KIRK. [No. 442.]

(See S. C. Reporter's ed. 607.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 137 Fed. 753.

The Attorney General and the *Solicitor General* for petitioners.

Messrs. Abram J. Rose and *Alfred C. Pette* for respondent.

November 6, 1905. *Denied.*

PRESSED STEEL CAR COMPANY, *Petitioner, v.* JOHN M. HANSEN. [No. 445.]

(See S. C. Reporter's ed. 608.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 137 Fed. 403.

Mr. Philander C. Knox for petitioner.

Messrs. D. T. Watson and *Geo. B. Gordon* for respondent.

November 6, 1905. *Denied.*

EARL A. THISSELL, *Petitioner, v.* U. S. BOBBIN & SHUTTLE COMPANY. [No. 425.]

(See S. C. Reporter's ed. 608.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 137 Fed. 1.

Mr. Warren Ozro Kyle for petitioner.

Messrs. Cyrus M. Van Slyck and *Wm. M. Richardson* for respondent.

November 13, 1905. *Denied.*

WESTERN WOOLEN MILL COMPANY, *Petitioner, v.* NORTHERN ASSURANCE COMPANY OF LONDON. [No. 440.]

(See S. C. Reporter's ed. 608.)

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 139 Fed. 637.

Messrs. W. H. Rossington and *Chas. Blood Smith* for petitioner.

Messrs. Chas. J. Green and *Ralph W. Breckenridge* for respondent

November 27, 1905. *Denied.*

HARWAY DYEWOOD & EXTRACT MANUFACTURING COMPANY *et al., Petitioners, v.* HEMOLIN COMPANY. [No. 273.]

(See S. C. Reporter's ed. 608.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 138 Fed. 54.

Mr. W. P. Preble, Jr., for petitioners.

Mr. Harold Binney for respondent.

December 4, 1905. *Denied.*

ALEXANDER VON FABER-CASTELL, *Petitioner, v.* JOHN EBERHARD FABER. [No. 403.]

(See S. C. Reporter's ed. 609.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 139 Fed. 257.

Messrs. Joseph H. Choate and *Frederick W. Hinrichs* for petitioner.

Mr. Benjamin F. Tracy for respondent.

December 4, 1905. *Denied.*

AMERICAN SEWAGE DISPOSAL COMPANY OF BOSTON, *Petitioner*, *v.* CITY OF PAWTUCKET. [No. 444.]

(See S. C. Reporter's ed. 609.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 138 Fed. 811.

Mr. Edward P. Payson for petitioner.

Mr. Wm. R. Tillinghast for respondent.

December 4, 1905. *Denied.*

HAYES YOUNG TIE PLATE COMPANY, *Petitioner*, *v.* ST. LOUIS TRANSIT COMPANY. [No. 456.]

(See S. C. Reporter's ed. 609.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 137 Fed. 80.

Messrs. James L. Hopkins, Alfred A. Eicks, and *J. S. Barker* for petitioner.

No opposition.

December 4, 1905. *Denied.*

SEWERAGE & WATER BOARD OF NEW ORLEANS, *Petitioner*, *v.* NATIONAL CONTRACTING CO. [No. 502.]

(See S. C. Reporter's ed. 609.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 141 Fed. 325.

Messrs. Omer Villere and *S. L. Gilmore* for petitioner.

No opposition.

December 11, 1905. *Denied.*

CHEUNG HIM NIM, *Appellant*, *v.* UNITED STATES [No. 146]; CHEW HING, *Appellant*, *v.* UNITED STATES [No. 147]; LEE YUE, *Appellant*, *v.* UNITED STATES [No. 148]; CHIN CHEW FONG, etc., *Appellant*, *v.* UNITED STATES [No. 149]; CHEUNG PANG, *Appellant*, *v.* UNITED STATES [No. 150].

(See S. C. Reporter's ed. 609.)

Appeals from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Oliver Dibble for appellants.

The Attorney General for appellee.

October 10, 1905. *Dismissed*, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellee.

GIUSEPPE MARMO, *Appellant* *v.* WILLIAM C. NICOLL, Sheriff of the County of Essex, N. J. [No. 428.]

(See S. C. Reporter's ed. 610.)

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. Charles F. Wilson for appellee.

No one opposed.

October 10, 1905. Docketed and *Dismissed* with costs, on motion of *Mr. Charles F. Wilson* for the appellee.

NEW YORK LIFE INSURANCE COMPANY, *Plaintiff in Error*, *v.* ANNIE E. ENGLISH. [No. 41.]

(See S. C. Reporter's ed. 610.)

In Error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas.

See same case below, 79 S. W. 616.

Messrs. George W. Hubbell, Jas. H. McIntosh, and *Frederic D. McKenney* for plaintiff in error.

Messrs. John Wharton Clark & Winchester Kelso for defendant in error.

October 10, 1905. *Dismissed* with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error.

TACOMA MILL COMPANY, *Petitioner*, *v.* BLACK HILLS & NORTHWESTERN RAILWAY COMPANY *et al.* [No. 76.]

(See S. C. Reporter's ed. 610.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 63 C. C. A. 544, 129 Fed. 312.

Messrs. James M. Ashton, E. C. Hughes, and *Frederic D. McKenney* for petitioner.

Mr. James B. Howe for respondents.

October 10, 1905. *Dismissed*, per stipulation, on motion of *Mr. Frederic D. McKenney* for the petitioner.

WABASH RAILROAD COMPANY, *Plaintiff in Error*, *v.* W. H. SUMMERS. [No. 93.]

(See S. C. Reporter's ed. 610.)

In Error to the Kansas City Court of Appeals, State of Missouri.

Mr. W. H. Blodgett for plaintiff in error.

No appearance for defendant in error.

October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

C. M. BARNES, MAYOR, etc., *et al., Appellants, v.* C. W. TURNER *et al.* [No. 109.]
(See S. C. Reporter's ed. 611.)
Appeal from the Supreme Court of the Territory of Oklahoma.
Messrs. Henry E. Asp and *L. E. Payson* for appellants.
No appearance for appellees.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the appellants.

NATIONAL ACCIDENT SOCIETY, *Plaintiff in Error, v.* WILLIAM BRUCE MARTIN, Judge, etc. [No. 120]
(See S. C. Reporter's ed. 611.)
In Error to the Supreme Court of Appeals of the State of Virginia.
Mr. James E. Heath for plaintiff in error.
No appearance for defendant in error.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

GALEN E GREEN, *Plaintiff in Error, v.* DAVID STEWART. [No. 132.]
(See S. C. Reporter's ed. 611.)
In Error to the Court of Appeals of the District of Columbia.
Mr. John Ridout for plaintiff in error.
Mr. Charles W. Clagett for defendant in error.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

PABLO UBARRI *et al., Plaintiffs in Error, v.* PEDRO C. CORREA Y RODRIGUEZ *et al.* [No. 136.]
(See S. C. Reporter's ed. 611.)
In Error to the District Court of the United States for the District of Porto Rico.
Mr. N. B. K. Pettingill for plaintiffs in error.
No appearance for defendants in error.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiffs in error.

CHICAGO & ERIE RAILROAD COMPANY, *Plaintiff in Error, v.* J. W. JACOBY, Administrator, etc. [No. 143.]
(See S. C. Reporter's ed. 612.)
In Error to the Supreme Court of the State of Ohio.
Mr. John H. Doyle for plaintiff in error.
No appearance for defendant in error.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

WABASH RAILROAD COMPANY, *Plaintiff in Error, v.* JOHN SLOOP. [No. 189.]
(See S. C. Reporter's ed. 612.)
In Error to the Kansas City Court of Appeals, State of Missouri.
Mr. W. H. Blodgett for plaintiff in error.
No appearance for defendant in error.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

WILLIAM C. JUTTE, *Plaintiff in Error, v.* MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY. [No. 205.]
(See S. C. Reporter's ed. 612.)
In Error to the Supreme Court of the State of Pennsylvania.
Messrs. Wm. B. Rodgers and *Henry A. Davis* for plaintiff in error.
No appearance for defendant in error.
October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

JERRY E. DONOVAN, *Plaintiff in Error, v.* MICHAEL T. BERRY. [No. 364.]
(See S. C. Reporter's ed. 612.)
In Error to the Superior Court of the State of Massachusetts.
See same case below, 188 Mass. 353, 74 N. E. 603.
Mr. Arthur D. Hill for plaintiff in error.
Mr. John J. Winn for defendant in error.
October 10, 1905. *Dismissed* with costs, per stipulation.

UNITED STATES, *Appellant, v.* MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY *et al.* [No. 2.]
(See S. C. Reporter's ed. 612.)
Appeal from the Circuit Court of the United States for the District of Kansas.
The Attorney General for appellant.
No appearance for appellees.
October 10, 1905. *Dismissed,* on motion of *Mr. Solicitor General Hoyt* for the appellant.

ERIE RAILROAD COMPANY, *Plaintiff in Error, v.* GEORGE H. MINOR. [No. 4.]
(See S. C. Reporter's ed. 613.)
In Error to the Supreme Court of the State of New York.
See same case below in Appellate Division, 73 App. Div. 621, 76 N. Y. Supp. 513; in Court of Appeals, 171 N. Y. 566, 64 N. E. 454.
Mr. Adelbert Moot for plaintiff in error.
Mr. Charles B. Wheeler for defendant in error.
October 10, 1905. *Dismissed* with costs, pursuant to the Nineteenth Rule.

CHARLES E DAWSON *et al., Plaintiffs in Error, v.* THOMAS E. WAGGAMAN, Collector, etc. [No. 23.]

(See S. C. Reporter's ed. 613.)

In Error to the Court of Appeals of the District of Columbia.

Mr. D. W. Baker for plaintiffs in error.

Mr. Irving Williamson for defendant in error.

October 11, 1905. *Dismissed* with costs, on authority of counsel for plaintiffs in error.

THOMAS E. DAVIS, *Plaintiff in Error, v.* JACOB LIVING *et al.* [No. 8.]

(See S. C. Reporter's ed. 613.)

In Error to the Supreme Court of Appeals of the State of West Virginia.

Mr. Maynard F. Stiles for plaintiff in error.

No appearance for defendants in error.

October 11, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

UNITED STATES OF AMERICA *v.* A. C. McELROY MANUFACTURING COMPANY. [No. 28.]

(See S. C. Reporter's ed. 613.)

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

The Attorney General for United States of America.

Mr. F. B. Bracken for the manufacturing company.

October 16, 1905. *Dismissed,* on motion of *Mr. Solicitor Gencral Hoyt* for the United States.

PREFERRED TONTINE MERCANTILE COMPANY *et al., Plaintiffs in Error, v.* STATE OF MISSOURI *ex rel.* LUTHER S. HICKMAN, Supervisor, etc. [No. 135.]

(See S. C. Reporter's ed. 613.)

In Error to the Supreme Court of the State of Missouri.

See same case below, 184 Mo. 160, 82 S. W. 1075.

Mr. James H. Harkless for plaintiffs in error.

No appearance for defendant in error.

October 27, 1905. *Dismissed* with costs, on motion of counsel for the plaintiffs in error.

UNITED STATES *v.* LEE SI KUM [No. 139]; UNITED STATES *v.* MAH QUONG KAY [No. 140].

(See S. C. Reporter's ed. 614.)

On Certificates from the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General for the United States.

No appearance for other side.

October 30, 1905. *Dismissed,* on motion of *Mr. Solicitor General Hoyt* for the United States.

HENRY LOCKHART *et al., Appellants, v.* H. C. LEEDS *et al.* [No. 45.]

(See S. C. Reporter's ed. 614.)

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. J. H. McGowan for appellants.

Mr. W. B. Childers for appellees.

November 1, 1905. *Dismissed* with costs, on motion of counsel for the appellants.

CUMULATIVE CREDIT COMPANY, *Appellant, v.* MOTLEY H. FLINT. [No. 47.]

(See S. C. Reporter's ed. 614.)

Appeal from the Circuit Court of the United States for the Southern District of California.

Mr. John B. Larner for appellant.

No appearance for appellee.

November 2, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

PAUL DEROBERT *v.* NEVADA N. STRANAHAN. [No. 48.]

(See S. C. Reporter's ed. 614.)

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

Mr. John A. Garver for Derobert.

The Attorney General for Stranahan.

November 7, 1905. *Stricken from the docket* for want of prosecution.

JOSÉ ANTONIO FERNANDEZ *et al., Plaintiffs in Error, v.* SALVADOR LUGO. [No. 59.]

(See S. C. Reporter's ed. 614.)

In Error to the District Court of the United States for the District of Porto Rico.

Mr. James S. Harlem for plaintiffs in error.

Mr. C. C. Lancaster for defendant in error.

November 8, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

HARRY F. HARRIS, *Plaintiff in Error, v.* GEORGE F. ELLIOTT *et al.* [No. 60.]
(See S. C. Reporter's ed. 615.)
In Error to the Court of Appeals of the District of Columbia.
See same case below, 24 App. D. C. 11.
Messrs. D. W. Baker and *Frank J. Hogan* for plaintiff in error.
The Attorney General for defendants in error.
November 8, 1905. *Dismissed* with costs, on motion of *Mr. Frank J. Hogan* for the plaintiff in error.

HOBART S. BIRD, *Appellant, v.* JOSÉ BERRIOS, Warden, etc. [No. 457.]
(See S. C. Reporter's ed. 615.)
Appeal from the Supreme Court of Porto Rico.
Mr. Gilbert E. Roe for appellant.
No appearance for appellee.
November 8, 1905. *Dismissed* with costs, on motion of counsel for appellant.

RUDOLPH F. THEURER, Executor, etc., *et al., Plaintiffs in Error, v.* UNITED STATES. [No. 498.]
(See S. C. Reporter's ed. 615.)
In Error to the Circuit Court of the United States for the District of Louisiana.
The Attorney General for defendant in error.
No opposition.
December 4, 1905. Docketed and *dismissed*, on motion of *Mr. Solicitor General Hoyt* for the defendant in error, and cause remanded to the Circuit Court of the United States for the Eastern District of Louisiana.

LUCIAN H. ALEXANDER, *Plaintiff in Error, v.* CITY OF TACOMA *et al.* [No. 499.]
(See S. C. Reporter's ed. 615.)
In Error to the Supreme Court of the State of Washington.
Mr. David A. Gourick for defendants in error.
No opposition.
December 4, 1905. Docketed and *dismissed* with costs, on motion of *Mr. David A. Gourick* for the defendants in error.

ANN FRANCIS, *Plaintiff in Error, v.* PETER J. FRANCIS *et al.* [No. 113.]
(See S. C. Reporter's ed. 616.)
In Error to the Supreme Court of the State of Michigan.
Mr. Henry M. Duffield for plaintiff in error.
No appearance for defendants in error.
December 6, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

LA COMPAÑIA DE LOS FERROCARRILES DE PUERTO RICO, *Plaintiff in Error, v.* JOSÉ CASUELA GEIGEL. [No. 280.]
(See S. C. Reporter's ed. 615.)
In Error to the District Court of the United States for the District of Porto Rico.
Messrs. Frederic D. McKenney, Francis H. Dexter, J. Spalding Flannery for plaintiff in error.
Mrs. Ellen Spencer Mussey for defendant in error.
December 6, 1905. *Dismissed* with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error.

J. T. WIYGUL & SONS, *Plaintiffs in Error, v.* KANSAS CITY, MEMPHIS, & BIRMINGHAM RAILROAD COMPANY. [No. 121.]
(See S. C. Reporter's ed. 616.)
In Error to the Supreme Court of the State of Mississippi.
Mr. Fred Beall for plaintiffs in error.
Messrs. L. F. Parker, A. B. Browne, and *Alex. Britton* for defendant in error.
December 7, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

JOHN H. MITCHELL, *Plaintiff in Error, v.* UNITED STATES. [No. 409.]
(See S. C. Reporter's ed. 616.)
In Error to the Circuit Court of the United States for the District of Oregon.
Mr. John M. Thurston for plaintiff in error.
The Attorney General for defendant in error.
December 11, 1905. Upon suggestion of death of plaintiff in error, case abated, and writ of error *dismissed*, on motion of *Mr. John M. Thurston* for the plaintiff in error.

CHARLES A. DE ARNAUD, *Plaintiff in Error, v.* FRED. C. AINSWORTH. [No. 128.]
(See S. C. Reporter's ed. 616.)
In Error to the Court of Appeals of the District of Columbia.
Mr. F. P. B. Sands for plaintiff in error.
No appearance for defendant in error.
December 11, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

WILLIAM F. TRYBER, *Appellant, v.* McGREGOR CREAMERY ASSOCIATION *et al.* [No. 129.]
(See S. C. Reporter's ed. 617.)
Appeal from the Circuit Court of the United States for the Western District of Texas.
Mr. W. J. Moroney for appellant.
No appearance for appellees.
December 11, 1905. *Dismissed* with costs, pursuant to the Tenth Rule.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1905.

Vol. 200

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OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1905.

[1]*UNITED STATES *ex rel.* RALPH W. DRURY and John Dowd, *Appts.*,
v.
EDWARD LEWIS, Warden of the Common Jail of Allegheny County, Pennsylvania.

(See S. C. Reporter's ed. 1-8.)

Habeas corpus—Federal interference with state administration of criminal law.—Relief by habeas corpus is properly refused in a Federal circuit court to persons in the military service of the United States, held in the custody of state authorities to answer to a charge of homicide which is asserted by them to have been committed in the discharge of their duty, under the Federal Constitution and laws, to apprehend the deceased for a larceny of property from a Federal arsenal, where there is conflicting evidence on the question whether or not the deceased had surrendered before the fatal shot was fired.

[No. 126.]

Argued December 12, 1905. Decided January 2, 1906.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania to review an order denying relief by habeas corpus to persons in the military service of the United States, held in the custody of the state authorities to answer to a charge of homicide. *Affirmed.*

See same case below, 129 Fed. 823.

Statement by Mr. Chief Justice **Fuller:**

Ralph W. Drury and John Dowd were indicted in the court of oyer and terminer for the county of Allegheny, Pennsylvania, on two counts,—the first charging them with murder, and the second with manslaughter, in the homicide of one William H. Crowley, September 10, 1903. They were admitted to bail in the sum of $5,000 each, and having been subsequently surrendered, obtained a writ of habeas corpus from the circuit court of the United States for the western district of Pennsylvania. The case on the hearing was thus stated by Acheson, J., holding the circuit court:

"On September 10th, 1903, Ralph W. Drury was a commissioned officer of the United States Army, of the rank of second lieutenant, and had under his command a detachment of twenty enlisted men, of whom John Dowd was one, stationed at Allegheny arsenal, in the city of Pittsburg, in Allegheny county, Pennsylvania, this arsenal being a subpost of Ft. Niagara, New York. From time to time before September 10th, 1903, some copper down spouts and eve troughs had been stripped from some of the buildings on the arsenal grounds and the material stolen, and other depredations, such as the breaking of window lights, had been committed on the arsenal property. Lieut. Col. Robertson, the commanding officer at Ft. Niagara, on the occasion of an inspection of Allegheny arsenal, in July, 1903, had directed Lieut. Drury to use his best endeavors to stop the depredations, and to that end ordered him to establish a patrol of the guards day and night upon the arsenal grounds, and to apprehend and arrest any person or persons committing depredations on the arsenal property. Shortly before 10 o'clock on the morning of September 10th, 1903, having received word that some persons were stealing copper from one of the buildings on the arsenal grounds, Lieut. Drury took John Dowd, then on guard duty, and

NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

another private soldier (each of the latter being armed with a rifle and ammunition), [3]and, passing out of *the arsenal grounds through the gate on Butler street, the three proceeded by way of Butler street and Almond alley towards the Allegheny Valley Railroad. Drury informed the two men of the reported stealing of copper, and instructed them to continue down Almond alley and arrest any person coming from the arsenal. Drury himself left Almond alley at the corner of Willow street, and went by Willow street to Fortieth street (which runs along, but outside of, the arsenal wall), and proceeded down Fortieth street to its foot, where were congregated three or four half-grown boys or young men, among whom was William H. Crowley, aged about nineteen or twenty years. These persons fled in different directions when they saw Lieut. Drury approaching. Crowley ran from the foot of Fortieth street away from the arsenal property in the direction of Forty-first street, keeping on or near the Allegheny Valley Railroad. When he was about 100 yards from the arsenal wall, Crowley was shot by Dowd, who aimed and fired his rifle at Crowley. At the time of the shooting, Drury, Dowd, and Crowley were all off the ground belonging to the United States. Each one of the three then stood either upon a street of the city, on the Allegheny Valley Railroad, or on private property. The rifle ball struck Crowley's left thigh, inflicting a mortal wound, from which he died on the evening of the same day,—September 10th, 1903.

"Thus far the facts are not open to dispute under the testimony. But as to the circumstances attending the shooting of Crowley, the evidence is conflicting, and leads to opposite conclusions of fact as one or other version of the affair given by the witnesses is accepted. Dowd testifies, and the petitioners have produced other evidence tending to show, that as Crowley fled, he was called on several times by Dowd, who followed him, to halt, with warning that, unless he halted, Dowd would fire; that Crowley did not halt, but continued his flight, and, to prevent his escape behind or through a lumber pile, Dowd fired, and that Drury did not order Dowd to fire, and was not connected with the shooting save [4]by the fact that he ordered the *arrest of any person coming from the arsenal. On the other hand, two witnesses who were present (Mrs. Long and Miss Terwillerger) testify that before the shot was fired Crowley stopped, turned around, and facing the pursuing soldier (Dowd), threw up his hand, said, 'Don't shoot, I will come back,' or 'I will give up,' and just then Lieut. Drury said 'Fire' and Dowd fired the shot that killed Crowley. The testimony of at least one other witness tends to corroborate the account of the transaction given by the two named women, as above recited. It is not for me to say whether or not the witnesses who have testified thus on the part of the commonwealth are mistaken.

"In view of all the evidence herein, should this court interfere to prevent the trial of the petitioners upon the indictment in the state court,—take the petitioners out of the custody of the authorities of the state, and discharge them finally, without trial by any civil court in the regular administration of justice? This is the question which confronts me." 129 Fed. 823.

The court entered an order discharging the writ, and remanding petitioners to the custody of the warden of the jail of Allegheny county, and from that order this appeal was allowed and prosecuted.

Assistant to the Attorney General **Purdy** argued the cause and filed a brief for appellants:

The commonwealth of Pennsylvania is without jurisdiction to prosecute the petitioners on the charge of murder, for the reason that the homicide was committed by the petitioners while in the discharge of a duty imposed upon them by the Constitution and laws of the United States.

Re Neagle (*Cunningham* v. *Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

United States officers, and other persons held in custody by state authority for doing acts which they are authorized or required to do by the Constitution and laws of the United States, are entitled to be released from such custody; and the writ of habeas corpus is the appropriate remedy for that purpose.

Ibid.; Re Waite, 81 Fed. 359; *Ohio* v. *Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

The petitioners upon this appeal are entitled to have this court examine the evidence and determine the facts in this case, and to decide whether or not these petitioners are entitled to be discharged from the custody of the warden.

Storti v. *Massachusetts*, 183 U. S. 138, 143, 46 L. ed. 120, 124, 22 Sup. Ct. Rep. 72; *Re Neagle, supra.*

In the absence of any specific law upon the subject, the petitioners were charged with the duty of arresting persons guilty of stealing government property under their custody.

Re Neagle, supra.

At the time of the commission of the homicide there existed a specific law of the

United States under which these petitioners were acting in making the arrest.

Army Regulations, § 771, p. 107.

Regulations lawfully prescribed by one of the executive departments of the government have the force and effect of law.

Campbell v. *Waite*, 31 C. C. A. 403, 59 U. S. App. 734, 88 Fed. 102.

If the laws of the United States imposed upon these petitioners the duty to arrest Crowley for the felony which he had committed, they were justified in making use of whatever force was necessary for the purpose of performing such duty, even to the extent of firing upon Crowley, if in no other way he could be apprehended.

Bl. Com. bk. 4, p. 292; 2 Hale, P. C. pp. 88, 89; Fost. C. L. p. 271; *Rex* v. *Howarth*, 1 Moody, C. C. 207; *Reg.* v. *Murphy*, 3 Crawford & D. C. C. 20; 1 East, P. C. p. 298; 1 Hale, P. C. p. 481; *Rex* v. *Finnerty*, 1 Crawford & D. C. C. 167; 1 Hawk. P. C. p. 881; 1 Russell, Crimes, p. 666; *Queen* v. *Dadson*, 2 Denison, C. C. 35; *Conraddy* v. *People*, 5 Park. Crim. Rep. 234; *Com.* v. *Long*, 17 Pa. Super. Ct. 641; *Brish* v. *Carter*, 98 Md. 445, 57 Atl. 210; *State ex rel. Olson* v. *Leindecker*, 91 Minn. 277, 97 N. W. 972; *Brooks* v. *State*, 114 Ga. 6, 39 S. E. 877; *People* v. *Glennon*, 37 Misc. 1, 74 N. Y. Supp. 794; *Kirk* v. *Garrett*, 84 Md. 383, 35 Atl. 1089; *People* v. *Hoehstim*, 36 Misc. 562, 73 N. Y. Supp. 626; *Wakely* v. *Hart*, 6 Binn. 316; *Brooks* v. *Com.* 61 Pa. 352, 100 Am. Dec. 645; *United States ex rel. Flynn* v. *Fuellhart*, 106 Fed. 911; 3 Wharton, Crim. Law, § 2928.

Even though this court should decide that Dowd used more force in attempting to make the arrest than he was warranted in using under the law, nevertheless, since he was engaged in performing a duty imposed upon him by a law of the United States, the state courts of Pennsylvania are without jurisdiction to call him to account for the excessive use of force in performing a duty which the Federal laws commanded.

Ex parte Jenkins, 2 Wall. Jr. 543, Fed. Cas. No. 7,259; *Re Waite*, 81 Fed. 359.

No counsel for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In *Baker* v. *Grice*, 169 U. S. 284, 290, 42 L. ed. 748, 750, 18 Sup. Ct. Rep. 323, an appeal from the final order of the circuit court of the United States for the northern district of Texas, in habeas corpus, it was said:

"The court below had jurisdiction to issue the writ, and to decide the questions which were argued before it. *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while circuit courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency; and that instead of discharging, they will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from *this court. [7] The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *Re Loney* (*Thomas* v. *Loney*) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584, and *Re Neagle* (*Cunningham* v. *Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court."

The rule thus declared is well settled, and, in our judgment, it was properly applied in this case. Crowley was a citizen of Pennsylvania, not in the service of the United States, and was killed in or near a street of the city of Pittsburg, and not on property belonging to the United States or over which the United States had jurisdiction.

The homicide occurred within the territorial jurisdiction of the court of oyer and terminer, which, as Judge Acheson observed, was the only civil court which could have jurisdiction to try petitioners for the alleged unlawful killing, and the indictment presented a case cognizable by that court.

The general jurisdiction, in time of peace,

of the civil courts of a state over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the state, is, of course, not denied.

But it is contended on behalf of the government that the state court was absolutely without jurisdiction to try petitioners for the killing of Crowley, because the homi-
[8] cide was committed *by them "while in the lawful performance of a duty and obligation imposed upon them by the Constitution and laws of the United States." The argument is that Crowley had been guilty of the crime of larceny, and could have been indicted and prosecuted on the charge of felony in the district court of the United States, under § 5439 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3675), or under § 5391 (U. S. Comp. Stat. 1901, p. 3651), the United States having jurisdiction over the Allegheny arsenal property, and the Pennsylvania laws making what Crowley is alleged to have done a felony. Hence that it was the duty of petitioners to arrest Crowley, and to surrender him to the Federal authorities for prosecution. And it is insisted that the fact is "established that Crowley met his death while attempting to escape arrest." But there was a conflict of evidence as to whether Crowley had or had not surrendered; and it is conceded that if he had, it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law, and the state court had jurisdiction.

The circuit court was not called on to determine the guilt or innocence of the accused. That was for the state court if it had jurisdiction, and this the state court had, even though it was petitioner's duty to pursue and arrest Crowley (assuming that he had stolen pieces of copper), if the question of Crowley being a fleeing felon was open to dispute on the evidence; that is, if that were the gist of the case, it was for the state court to pass upon it, and its doing so could not be collaterally attacked. The assertion that Crowley was resisting arrest, and in flight when shot, was matter of defense, and *Ex parte Crouch*, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96, is in point.

We have repeatedly held that the acts of Congress in relation to habeas corpus do not imperatively require the circuit courts to wrest petitioners from the custody of state officers in advance of trial in the state courts, and that those courts may decline to discharge, in the proper exercise of discretion. We think that discretion was properly exercised in this case.

Final order affirmed.

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*GEORGE F. ALBRIGHT, *Appt.*, [9]

v.

TERRITORY OF NEW MEXICO *ex rel.* JESUS M. SANDOVAL.

(See S. C. Reporter's ed. 9–12.)

Appeal—from territorial supreme court—money value of matter in dispute.—The liability to a fine on a judgment of ouster in quo warranto proceedings, or the possible effect of such judgment in subsequent litigation over the emoluments of the office, does not make the matter in dispute in the quo warranto proceedings after the term of office has expired measureable by some sum or value in money, and thus bring the judgment within the scope of the provisions of the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), for appeals from the territorial supreme courts to the Supreme Court of the United States.

[No. 229.]

Submitted November 27, 1905. Decided January 2, 1906.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment affirming, with slight modifications, a judgment of ouster in quo warranto proceedings, entered by the District Court of Bernalillo County, in that territory, pursuant to the mandate of the territorial Supreme Court on a former appeal. *Dismissed* for lack of jurisdiction.

See same case below (N. M.), 79 Pac. 719; on former appeal, 78 Pac. 204.

The facts are stated in the opinion.

Mr. **William B. Childers** submitted the cause for appellant.

Mr. **Neill B. Field** submitted the cause for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a proceeding in quo warranto, brought in the district court of Bernalillo county, New Mexico, July 20, 1903, by the territory on the relation of Jesus M. Sandoval against George F. Albright, it being alleged that Sandoval was duly elected to the office of assessor of Bernalillo county for the term of two years from the first day of January, 1903; that he duly qualified and entered on the discharge of the duties of the office; and that he had never resigned, va-

NOTE.—*As to review by the United States Supreme Court of territorial decisions*—see note to Miners' Bank v. Iowa, 13 L. ed U. S. 867.

As to amount necessary to give United States Supreme Court jurisdiction—see notes to Schunk v. Moline, M. & S. Co. 37 L. ed. U. S. 256; and Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

cated, or abandoned the office, and ever since his election and qualification had continued to discharge the duties thereof. It was fur-
[10] ther alleged that on *March 23, 1903, respondent, Albright, without authority of law, unlawfully usurped the office, and took possession of the assessor's room in the courthouse, and of the books and papers, and other insignia of office, claiming office by virtue of a pretended appointment by the board of county commissioners of Bernalillo county, made under the authority of an act of the legislative assembly of the territory of New Mexico, entitled "An Act to Create the County of Sandoval," approved March 10, 1903, as amended by an act entitled "An Act to Amend Section 3 of an Act Entitled 'An Act to Create the County of Sandoval,'" approved March 12, 1903.

Judgment was rendered by the district court in favor of Albright, August 3, 1903, and carried to the supreme court of the territory, which reversed the judgment, and remanded the cause with directions to the court below to reinstate it and proceed in accordance with the views expressed in its opinion. 78 Pac. 204. The mandate was filed below October 19, 1904, and on the 19th of November the district court entered judgment "that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the county of Bernalillo and territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of, the office of assessor of the county of Bernalillo aforesaid. and that he forthwith deliver up to the relator the records, books, papers, and furniture, and all other things appertaining to the office of assessor of the county of Bernalillo and territory of New Mexico, as the lawful custodian thereof," and for costs.

The case was again carried to the supreme court and heard upon a motion to dismiss and on the merits, and February 24, 1904, the court denied the motion to dismiss, modified the judgment of the district court by striking out the words "and that he forthwith deliver up to the relator the records, books, papers, furniture, and all other things
[11] appertaining to the office of assessor *of the county of Bernalillo and territory of New Mexico, as the lawful custodian thereof," and affirmed the judgment as so modified. 79 Pac. 719. On the same day an appeal was allowed to this court, a supersedeas bond given, which was approved March 9, 1905, and the record was filed here April 17. The case comes before us on a motion to dismiss.

The ground assigned for the motion is the expiration of the term of the office of assessor of the county of Bernalillo, and the consequent lack of power to grant appellant any effectual relief. But the same motion has already been considered and denied by the supreme court of the territory, and its renewal here amounts to no more than an assignment of error to the action of that court in this regard, to be passed on and disposed of as such, if otherwise we have jurisdiction of the case. If we have not, the appeal must be dismissed, even though for reasons not put forward in support of the motion. The opinion of the supreme court fully discussed the authorities on the subject of the right to have a review of the judgment on appeal after the expiration of the term of office involved in the proceeding in quo warranto. The court refused to dismiss the writ, holding that the statute (9 Anne, chap. 20, § 5), providing that, in addition to judgment of ouster, fine and costs may be imposed, was a part of the common law of the territory, and also that the judgment might affect the rights of the parties in another litigation in relation to the emoluments of the office.

The appeal to this court was taken under the statute of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572). *Shute* v. *Keyser*, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 960.

Both sections of that act apply to cases where there is a matter in dispute measureable by some sum or value in money, although the amount is not restricted under the 2d section. *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; *Farnsworth* v. *Montana*, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. Rep. 253. In proceedings in quo warranto, such as those in this case, the alleged usurpation is the matter in dispute, and the liability to a fine on judgment of ouster does not make that matter measureable by some sum or value in money. As in criminal cases, *the fine is, "in the eye [12] of the law, a punishment for the offense committed, and not the particular object of the suit." *United States* v. *More*, 3 Cranch, 159, 174, 2 L. ed. 397, 402. Moreover, appellant could hardly be allowed to invoke our jurisdiction on the ground that, if his appeal were sustained, he might be fined on a new judgment.

The term of office had expired before the rendition of judgment by the territorial supreme court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even

though the judgment might be conclusive in such subsequent action. *New England Mortg. Secur. Co.* v. *Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64.

Appeal dismissed.

CALVIN R. NUTT, Julia W. Nutt, and Lilly N. Ward, *Plffs. in Err.*,

v.

S. PRENTISS KNUT and John K. Nutt, Administrator *de bonis non c. t. a.* of the Estate of Haller Nutt, Deceased.

(See S. C. Reporter's ed. 12-22.)

1. **Error to state court—Federal question.**—A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, providing for writs of error from the Supreme Court of the United States to the state courts, to assert a right and immunity under such statutes, although they may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.

2. **Claims—against United States—assignment before allowance.**—So far as the contract for the prosecution of a claim against the United States makes the payment of the compensation for services rendered thereunder a lien upon the claim and upon any draft, money, or evidence of indebtedness which may be issued thereon, it is repugnant to U. S. Rev. Stat., § 3477, U. S. Comp. Stat. 1901, p. 2320, annulling assignments of such claims or of any part or interest therein, made in advance of the allowance of the claim.

3. **Claims—against United States—compensation for prosecution—effect of unlawful assignment.**—The illegality, under U. S. Rev. Stat. § 3477, U. S. Comp. Stat. 1901, p. 2320, of a clause in a contract for the prosecution of a claim against the United States, making the payment of compensation for the services rendered thereunder a lien upon the claim and upon any draft, money, or evidence of indebtedness that may be issued thereon, does not invalidate so much of the contract as provides for the payment for such services of a sum equal to one third of the amount allowed on the claim.

[No. 78.]

Argued November 29, 1905. Decided January 2, 1906.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancery Court of Adams County, in that state, enforcing a claim for compensation for services in prosecuting a claim against the United States. *Affirmed.*

See same case below, 84 Miss. 465, 36 So. 689; on first appeal, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686.

The facts are stated in the opinion.

Mr. **A. S. Worthington** argued the cause and filed a brief for plaintiffs in error:

The decision of the state court that the contract with Denver was not void under the laws of the United States raised a Federal question, and this court has jurisdiction by writ of error to review such decision.

Udell v. *Davidson*, 7 How. 769, 12 L. ed. 907; *Walworth* v. *Kneeland*, 15 How. 348, 14 L. ed. 724; *Daniels* v. *Tearney*, 102 U. S. 415, 26 L. ed. 187; *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *Price* v. *Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

The contract upon which this defendant recovered judgment is absolutely void under § 3477 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2320).

Trist v. *Child* (*Burke* v. *Child*) 21 Wall. 441, 22 L. ed. 623; *Spofford* v. *Kirk*, 97 U. S. 484, 24 L. ed. 1032; *Hager* v. *Swayne*, 149 U. S. 242, 37 L. ed. 719, 13 Sup. Ct. Rep. 841; *Ball* v. *Halsell*, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; *Owens* v. *Wilkinson*, 20 App. D. C. 51; *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 17 L. ed. 868.

NOTE.—*On the general subject of writs of error from United States Supreme Court to state courts*—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L.R.A. 329.

As to what claims constitute valid demands against a state—see Northwestern & P. H. Bank v. State, 42 L.R.A. 33.

Without regard to § 3477, this decree should be reversed because the services rendered by Knut were, in part at least, such that the public policy of the United States will not permit compensation to be recovered for them.

Trist v. *Child* (*Burke* v. *Child*) 21 Wall. 452, 22 L. ed. 625; *McMullen* v. *Hoffman*, 174 U. S. 653, 43 L. ed. 1123, 19 Sup. Ct. Rep. 839; *Owens* v. *Wilkinson*, *supra*.

Mr. **Frederic D. McKenney** argued the cause, and, with *Messrs. T. C. Catchings* and *John Spalding Flannery*, filed a brief for defendants in error:

The record shows that there were other parties to the judgments of the state supreme court, jointly interested therein with the plaintiffs in error, who have not joined in the writ of error, nor been eliminated from the cause by an order of severance, nor have they been served with notice of the proceedings in error.

Meagher v. *Minnesota Thresher Mfg. Co.* 145 U. S. 608, 611, 36 L. ed. 834, 835, 12 Sup. Ct. Rep. 876; *Feibelman* v. *Packard*, 108 U. S. 14, 27 L. ed. 634, 1 Sup. Ct. Rep. 138; *Estis* v. *Trabue*, 128 U. S. 225, 32 L. ed. 437, 9 Sup. Ct. Rep. 58; *Mason* v. *United States*, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; *Hardee* v. *Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39.

In order to enable this court to review the judgment of the state supreme court, the intention to raise a Federal question must clearly appear from express averments, and not by inferences to be drawn from the record; and the claim of title or immunity under the Federal law must have been expressly asserted at the first opportunity occurring in the course of the progress of the cause. In the case at bar such opportunity clearly occurred at the time of the filing of the response to the petition.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 655, 41 L. ed. 1149, 1152, 17 Sup. Ct. Rep. 709; *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer* v. *Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34.

A contract legal upon its face and at its inception does not become illegal because, in its execution, one of the parties thereto may have done something contrary to the policies of the law.

Barry v. *Capen*, 151 Mass. 99, 6 L.R.A. 808, 23 N. E. 735; *Jernegan* v. *Osborn*, 155 Mass. 207, 29 N. E. 520.

If the state court in fact committed error in deciding a contract within the express terms of the prohibition of the Federal law to be valid, not even that fact would confer upon this court jurisdiction to review and reverse the judgment complained of.

Leyson v. *Davis*, 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500; *Allen* v. *Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

The sole purpose of the statute was to protect the government, and not the parties to the assignment.

Goodman v. *Niblack*, 102 U. S. 556, 26 L. ed. 229.

On a writ of error to review the judgment of a state court, nothing is open for reexamination but questions of law arising upon the face of the record. The facts found by the state court will furnish the basis for the decision of this court.

Quimby v. *Boyd*, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Thayer* v. *Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Adams* v. *Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512.

Messrs. T. C. Catchings and *O. W. Catchings* also filed a brief for defendants in error:

No Federal question is presented.

Walworth v. *Kneeland*, 15 How. 348, 14 L. ed. 724; *Aldrich* v. *Ætna Ins. Co.* 8 Wall. 491, 19 L. ed. 473; *Dubuque & S. C. R. Co.* v. *Richmond*, 15 Wall. 3, 21 L. ed. 118; *Conde* v. *York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234.

The plaintiffs in error were not parties to the judgment rendered by the supreme court of Mississippi, and therefore are not entitled to invoke the jurisdiction of this court to review that judgment.

Payne v. *Niles*, 20 How. 221, 15 L. ed. 896; *Guion* v. *Liverpool, L. & G. Ins. Co.* 109 U. S. 173, 27 L. ed. 895, 3 Sup. Ct. Rep. 108.

The fact that they were allowed to appeal from the decree of the chancery court of Adams county, Mississippi, to the supreme court of Mississippi, cannot affect the question as to their right to bring the cause here by writ of error.

Bayard v. *Lombard*, 9 How. 551, 13 L. ed. 254.

The contract between General Denver and Mrs. Julia A. Nutt, executrix, through which the defendants in error claim, was not an assignment or transfer of an interest in the claim of the estate of Haller Nutt against the United States.

Taylor v. *Bemiss*, 110 U. S. 43, 28 L. ed 64, 3 Sup. Ct. Rep. 441; *Wright* v. *Tebbitts*, 91 U. S. 252, 23 L. ed. 320.

A contract for the professional services of an attorney would not be within the con-

demnation of U. S. Rev. Stat. § 3477, U. S. Comp. Stat. 1901, p. 2320, even though it might, in terms, attempt to convey an interest in the claim for the purpose of compensating him for the professional services to be rendered.

Stanton v. *Embrey*, 93 U. S. 548, 23 L. ed. 983.

There can be no doubt, we think, under the ruling in *Price* v. *Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434, that General Denver, or the defendant in error, as his assignee, might have enforced this lien by a bill in any court of equity having jurisdiction to have a receiver appointed, and to compel Mrs. Nutt to deliver the draft to the receiver, and to indorse it so that he could collect the money. This would have been the means by which he would have enforced his lien upon the contract.

In *Sanborn* v. *Maxwell*, 18 App. D. C. 245, the court of appeals for the District of Columbia appointed a receiver, and enforced such a lien in just such a case.

If the court should be of opinion, however, that so much of the contract as stipulates for this lien is violative of § 3477, U. S. Rev. Stat., the stipulation that General Denver should receive a sum equal to 33⅓ per cent of the amount which might be allowed cannot be at all affected thereby, inasmuch as the two stipulations are independent of each other and clearly severable.

Gelpcke v. *Dubuque*, 1 Wall. 222, 17 L. ed. 520; *Rand* v. *Mather*, 11 Cush. 1, 59 Am. Dec. 131; *Leavitt* v. *Palmer*, 3 N. Y. 19, 51 Am. Dec. 333; *Treadwell* v. *Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Casady* v. *Woodbury County*, 13 Iowa, 117.

Unless the court should be of the opinion that, by its terms, the contract was clearly an assignment or transfer of an interest in the claim of the estate of Haller Nutt against the United States, it must hold, in accordance with well-established principles, that it was not such an assignment or transfer. That is to say, if there be any doubt as to whether the contract was legal or illegal, the doubt must be resolved in favor of its legality.

Hobbs v. *McLean*, 117 U. S. 576, 29 L. ed. 944, 6 Sup. Ct. Rep. 870; *Clay* v. *Allen*, 63 Miss. 426; *Merrill* v. *Melchior*, 30 Miss. 516; *Wilkins* v. *Riley*, 47 Miss. 313.

The object of § 3477, U. S. Rev. Stat. was to protect the government, and not the claimant, and to prevent frauds upon the Treasury. When a claim has been adjudged, and the money paid to the claimant, the purpose of the statute has been fully accomplished, and the government has no concern as to the disposition of the money. When the money has been paid by the government the statute ceases to have any operation.

Price v. *Forrest*, *suprd*; *Bailey* v. *United States*, 109 U. S. 432, 27 L. ed. 988, 3 Sup. Ct. Rep. 272; *Hobbs* v. *McLean*, *supra*; *Freedman's Sav. & T. Co.* v. *Shepherd*, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250; *Jernegan* v. *Osborn*, 155 Mass. 207, 29 N. E. 520; *York* v. *Conde*, 147 N. Y. 486, 42 N. E. 193.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought in the chancery court of Adams county, Mississippi, the plaintiff being S. Prentiss Knut, a defendant in error, and the defendants being the administrator, heirs, and devisees of Haller Nutt, deceased.

It was based upon a written contract between the late James W. Denver and the (then) executrix of Haller Nutt, deceased, as follows: "That the party of the first part (Denver) agrees to take exclusive charge and control of a certain claim which the party of the second part (executrix of Nutt's estate) holds against the government of the United States, for the use of property and for property of which the said Haller Nutt and his estate was deprived by the acts of officers, soldiers, and employees of the United States in Louisiana and Mississippi, in the years 1863, 1864, and 1865, amounting to one million of dollars, more or less, and to prosecute the same before any of the courts of the United States, and upon appeal to the Supreme Court of the United States, or before any of the departments of government, or before the Congress of the United States, or before any officer or commission or convention specially authorized to take cognizance of said claim, or through any diplomatic negotiations as may be deemed by him for the best interests of the party of the second part. And in consideration therefor the party of the second part agrees to pay the party of the first part a sum equal to 33⅓ per cent of the amount which may be allowed on said claim, the payment of which is hereby made a lien upon said claim and upon any draft, money, or evidence of indebtedness which may be issued thereon. This agreement *not to be affected by any [14] services performed by the claimant, or by any other agents or attorneys employed by him. All expenses of printing, costs of court, and commission fees for taking testimony, are to be charged to the party of the second part, and the party of the second part agrees to execute from time to time such powers of attorney as may be convenient or necessary for the successful prosecution and collection of said claim.

No revocation of any authority conferred on the party of the first part by this agreement, or any power of attorney relating to the business covered by the same, to be valid."

On the same day the executrix of Nutt executed to Denver a power of attorney, constituting the latter her attorney "irrevocable," for her and in her name and stead "to prosecute a certain claim against the government of the United States, for property used and for property of which said Haller Nutt and his estate was deprived by United States officers, soldiers, and employees in Louisiana and Mississippi, amounting to $1,000,000, more or less, before any court of the United States, or before any of the departments of the government, or before the Congress of the United States, or before any officer or commission or convention specially authorized to take cognizance of said claim, or through any diplomatic negotiations, to collect the same; and from time to time to furnish any further evidence necessary, or that may be demanded, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, and to receipt and sign all vouchers and bonds of indemnity or appeal, and to indorse all drafts and vouchers in my name, either by or without indicating it is done by procuration, which may be requisite in the prosecution or collection of said claim, hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do, or cause to be done by virtue hereof."

[15] *The petition shows, and it is not disputed, that the plaintiff succeeded to all the rights, whatever they were, of Denver under the above contract, and that, as the result of his labors, Congress at different times appropriated, on account of the Nutt claim, the sums of $35,556.17 and $89,999.88. 23 Stat. at L. 586, chap. 237, 32 Stat. at L. 212, chap. 887. Prior to the bringing of the present suit the plaintiff had received his "due share" of the first appropriation, but has not received his full part of the last one. He therefore sought payment, in accordance with the contract, for the balance due him on account of the said sum of $89,999.88, appropriated to and received by the Nutt estate.

The plaintiff subsequently amended his petition, and asked that, in the event of his not being entitled to compensation under the Denver contract, he have judgment for such sum as his services were reasonably worth, which he alleged to be $30,000.

Some of the defendants by their answers put the plaintiff upon proof of his case, but submitted to the court the question of the reasonableness of his claim for fees.

Three of the defendants, while not denying that plaintiff had been recognized by the executrix and subsequent administrators of Nutt's estate as the attorney of record against the United States government, yet denied any legal liability of the estate by reason of such recognition. They averred that "the original contract and power of attorney, as assignee of which petitioner claims to recover from the present administrator 33 1/3 per cent of said sum of $89,999.88, were contrary to good morals and public policy, were null and void, so far as they undertook to vest a right to a contingent fee in said Denver, and conferred upon said Denver no rights for the recovery of any fee against this estate which a court would recognize and enforce. And respondents further charge that said petitioner, as assignee of said Denver, occupies no better position than his assignor had, and that as such assignee he has no standing in this court for the enforcement of said void contract, or for the enforcement of any claim whatever for professional services rendered by him, or alleged to have been rendered by him, in behalf of said *estate, in connection [16] with said claim against the United States government."

Upon the final hearing of the case in the court of original jurisdiction the chancellor rendered a decree holding that the Denver contract was "violative of the United States statute laws, and being further of the opinion that complainant, in the prosecution of said claim under said contract before the Congress of the United States, in procuring and attempting to procure appropriations for the payment thereof, did procure personal solicitations to be made of members of Congress of the United States in behalf of said claim, and, for the reasons stated, is not entitled to the relief prayed for in his petition, doth order, adjudge, and decree that complainant's petition be and the same is hereby dismissed at his cost, for which let execution issue."

Upon appeal to the supreme court of Mississippi the judgment was reversed, and that court, proceeding to render such decree as, in its opinion, should have been rendered, adjudged that the plaintiff was entitled "to his prayer for 33 1/3 per centum of the amount collected by the administrator ($89,993.83), in full for any advances made by him and all services," less any payments made. 83 Miss. 365, 102 Am. St. Rep. 452. 35 So. 686. The cause was remanded for an

account to be taken and for an order directing the administrator to pay to Knut any balance of that per cent unpaid. The accounting was had in the inferior state court, Knut being charged with $10,000 paid on June 10th, 1902, and allowed interest. The result was a decree that the plaintiff have and receive from the administrator of Haller Nutt's estate the sum of $22,143.30, with 6 per cent interest. That decree, upon appeal, was affirmed by the supreme court of Mississippi.

The first question is one of the jurisdiction of this court. The present plaintiffs in error based their defense in part upon § 3477 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2320),† which declares absolutely null and void certain transfers and assignments of claims against the United States. They insisted that the contract sued on was in violation of that statute; and that they and the estate of Nutt were protected by its provisions against any judgment whatever in favor of the plaintiff. In every substantial sense, therefore, they asserted a right and immunity under a statute of the United States, and such right and immunity was denied to them by the supreme court of Mississippi. That court ex-
[19] pressly *adjudged that the contract was not, on its face, in violation of the statutes of the United States, and could legally be the basis of a valid claim against the Nutt estate. The case, so far as our jurisdiction is concerned, is therefore within § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), which authorizes this court to re-examine the final judgment of the highest court of a state, "where any title, right, privilege, or immunity" is claimed under a statute of the United States, and the decision is against such title, right, privilege, or immunity specially set up or claimed. A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 72, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496; *Dubuque & S. C. R. Co.* v. *Richmond*, 15 Wall. 3, 21 L. ed. 118; *Swope* v. *Leffingwell*, 105 U. S. 3, 26 L. ed. 939; *Anderson* v. *Carkins*, 135 U. S. 483, 486, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905; *McNulta* v. *Lochridge*, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; *Metropolitan Nat. Bank* v. *Claggett*, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 546, 41 L. ed. 817, 820, 17 Sup. Ct. Rep. 433; *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831. We perceive no sufficient reason to modify the views expressed in those cases as to our jurisdiction. It is true there are some cases which, it is contended, justify a contrary view. We will not now stop to examine those cases narrowly, and to declare wherein they may be in conflict with the cases above cited. Suffice it to say that, upon a careful reconsideration of the whole subject, and after reviewing all the cases bearing upon the precise question of jurisdiction now before us, we reaffirm the views expressed in the above-cited cases, as demanded by the statutes regulating the jurisdiction of this court.

We now come to the merits of the case as affected by § 3477 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2320). That section, as we have seen, declares null and void all transfers and assignments of a *claim upon the United States, or of any part [20] or share thereof, or any interest therein, whether absolute or conditional, and whatever may be the consideration thereof, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, unless they are freely made and executed after the allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. This statute has been the subject of examination in many cases. *Spofford* v. *Kirk*, 97 U. S. 484, 24 L. ed. 1032; *United States* v. *Gillis*, 95 U. S. 407, 24 L. ed. 503; *Erwin* v. *United*

†"§ 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

States, 97 U. S. 392, 24 L. ed. 1065; *Goodman* v. *Niblack*, 102 U. S. 556, 26 L. ed. 229; *Ball* v. *Halsell*, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; *Freedman's Sav. & T. Co.* v. *Shepherd*, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250; *Hobbs* v. *McLean*, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; *St. Paul & D. R. Co.* v. *United States*, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366; *Bailey* v. *United States*, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 270; *Price* v. *Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

If regard be had to the words as well as to the meaning of the statute, as declared in former cases, it would seem clear that the contract in question was, in some important particulars, null and void upon its face. We have in mind that clause making the payment of the attorney's compensation a *lien* upon the claim asserted against the government, and upon any draft, money, or evidence of indebtedness issued thereon. In giving that lien from the outset, before the allowance of the claim, and before any services had been rendered by the attorney, the contract, in effect, gave him an interest or share in the claim itself and in any evidence of indebtedness issued by the government on account of it. In effect or by its operation it transferred or assigned to the attorney, in advance of the allowance of the claim, such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid anyone who was a stranger to the original transaction to come between the claimant and the government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of
[21] the government. We are of opinion *that the state court erred in holding the contract, on its face, to be consistent with the statute.

It does not follow, however, that, for this error, the judgment must be reversed. There is a provision in the contract of 1882 which can stand alone, and which was not in violation of the statute; namely, the one evidencing an agreement on the part of Nutt's executrix to pay to the attorney for his services a sum equal to 33 1/3 per cent of the amount allowed on the claim. *Wylie* v. *Coxe*, 15 How. 415, 14 L. ed. 753; *Wright* v. *Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Taylor* v. *Bemiss*, 110 U. S. 43, 28 L. ed. 64, 3 Sup. Ct. Rep. 441. Such an agreement did not give the attorney any interest or share in the claim itself, nor any interest in the particular money paid over to the claimant by the government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions. The decree below may then be regarded as only giving effect to the agreement as to the basis upon which the attorney's compensation was to be calculated. It did not assume to give him any lien upon the claim, or any priority in the distribution of the money received by Nutt's personal representative from the United States, nor upon any other money in his hands. Indeed, no lien is asserted by the plaintiff in his pleadings. While the original petition asserted his right to be paid in accordance with the contract, the plaintiff claimed, if he could not be paid under the contract, that he be compensated according to the reasonable value of his services.

Much was said in argument as to the nature of the services rendered by the plaintiff,—the charge being that his services were of the kind called *lobby* services, for which, consistently with public policy and public morals, no recovery could be had in any court. *Trist* v. *Child* (*Burke* v. *Child*) 21 Wall. 441, 22 L. ed. 623; *McMullen* v. *Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839. *We have seen that the state [22]
court of original jurisdiction was of opinion the suit was for lobbying services, and on that ground denied all relief. But the supreme court of Mississippi held that the record did not establish such a case, and we accept that view of the evidence in the cause.

Finding in the record no error of law as to any question which may be properly reviewed by this court, *the judgment of the state court is affirmed.*

The CHIEF JUSTICE and Mr. Justice **White** concur in the result.

KNOXVILLE WATER COMPANY, *Appt.*,
v.
MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, *et al.*

(See S. C. Reporter's ed. 22–38.)

1. Courts—jurisdiction of Federal circuit court—case arising under Federal Constitution.— A case arising under the Constitution of the United States, of

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v.

which a Federal circuit court has original jurisdiction without regard to the citizenship of the parties, is made by a bill filed by a water company to restrain the municipal construction of a waterworks system on the ground that it had a contract with the municipality, giving it exclusive privileges, the obligations of which, it insists, would be impaired by the establishment of municipal waterworks, under the authority of subsequent legislation.

2. **Constitutional law—impairment of contract obligations—municipal construction of waterworks.**—The obligation of an agreement by a municipality to give a water company an exclusive franchise for thirty years as against "any other person or corporation" is not impaired by the municipal establishment of its own independent system of waterworks, under subsequent legislative authority.

3. **Municipal corporations—grants of special privileges—powers not devested by implication.**—A municipal grant of a waterworks franchise is not to be construed by implication to devest the municipality of its power to construct an independent waterworks system of its own.

[No. 123.]

Argued December 11, 12, 1905. Decided January 2, 1906.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment sustaining a demurrer to, and dismissing, a bill to enjoin the municipal construction of a waterworks system on the ground that the complainant had a contract with the municipality, giving it exclusive privileges, the obligation of which, it insists, will be impaired by such action on the part of the municipality. *Affirmed.*

The facts are stated in the opinion.

Mr. **Charles T. Cates, Jr.,** argued the cause, and, with *Messrs. R. E. L. Mountcastle* and *Samuel G. Shields*, filed a brief for appellant:

A contract entered into within the authority of a municipal corporation shall receive the same construction as though it had been entered into between individuals. The purpose of the contract was not to govern the inhabitants of the city, but to obtain a private benefit for both the city and its inhabitants,—that is, the purpose was within the business and proprietary powers of the city, as distinguished from its governmental and legislative functions.

Illinois Trust & Sav. Bank v. *Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Cunningham* v. *Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *Western Sav. Fund Soc.* v. *Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669; *Brumm* v. *Pottsville Water Co.* 9 Sadler (Pa.) 483, 22 W. N. C. 137, 12 Atl. 855.

Courts may place themselves in the situation of the parties who made the contract and view the circumstances as they viewed them, so as to judge of the meaning of the words, and of the correct application of the language to the thing described.

Goddard v. *Foster*, 17 Wall. 123, 143, 21 L. ed. 589, 595; *Guarantee Co. of N. A.* v. *Mechanics Sav. Bank & T. Co.* 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766.

Although a contract may, in terms, bind but one party, yet the law will imply corresponding and correlative obligations, when that is necessary to carry out the intention of the parties and prevent the contract from being ineffectual.

Churchward v. *Queen*, L. R. 1 Q. B. 173; *Barton* v. *McLean*, 5 Hill, 256; *Manistee Iron Works Co.* v. *Shores Lumber Co.* 92 Wis. 21, 65 N. W. 863; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 8 Wall. 288, 19 L. ed. 353.

The law implies duties and obligations in a contract other than those which are expressed, and the implied duties and obligations are as much a part of the contract as those expressed. Or, to express it differently, what is implied in a statute, pleading, or contract is as much a part of it as what is expressed.

United States v. *Babbit*, 1 Black, 55, 17 L. ed. 94; *Rhode Island* v. *Massachusetts*, 12 Pet. 723, 9 L. ed. 1260; *Union Depot Co.* v. *Chicago, K. & N. R. Co.* 113 Mo. 213, 20 S. W. 792; Parsons, Contr. 8th ed. 515.

There is no more reason to permit a municipal corporation to repudiate its solemn obligations, entered into for value, than there is to permit an individual to do so. Good faith and fair dealings should be exacted of the one equally with the other.

Los Angeles City Water Co. v. *Los Angeles*, 103 Fed. 71[1].

This case is ruled by the decision of this court in *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; and Bailey v. Mosher, 11 C. C. A. 308.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A 12.

On exclusive character of waterworks franchise—see note to *Re* Barre Water Co. 9 L.R.A. 195.

Vicksburg Waterworks Co. v. *Vicksburg*, 185 U. S. 65–82, 46 L. ed. 808–816, 22 Sup. Ct. Rep. 585.

While the action of municipal corporations is to be held strictly within the powers expressly or by necessary implication conferred upon them, yet, within these limits, they are to be favored by the courts. Powers expressly granted, or neccssarily implied, are not to be defeated or impaired by a stringent construction.

Dill. Mun. Corp. 4th ed. § 91, note 2; *Smith* v. *Madison*, 7 Ind. 86; *Memphis* v. *Adams*, 9 Heisk. 518, 24 Am. Rep. 331; *Indianapolis* v. *Indianapolis Gaslight & Coke Co.* 66 Ind. 407.

The rights conferred by said contract upon appellant are entirely inconsistent with a reserved purpose, on the part of the city authorities of Knoxville, to render the investment of appellant absolutely worthless as soon as it might be completed, by the erection of waterworks of their own.

Troy Water Co. v. *Troy*, 200 Pa. 453, 50 Atl. 259; *White* v. *Meadville*, 177 Pa. 643, 34 L.R.A. 567, 35 Atl. 693.

Is not the city estopped to deny the exclusive character of appellant's rights, even in the streets of the city, for the limited period of thirty years?

2 Dill. Mun. Corp. 4th ed. §§ 460, 675; *Dennis* v. *Rainey*, 8 Baxt. 501; *Memphis* v. *Looney*, 9 Baxt. 130; *Sims* v. *Chattanooga*, 2 Lea, 695; *London & N. Y. Land Co.* v. *Jellico*, 103 Tenn. 320, 52 S. W. 995; *Memphis Gaslight Co.* v. *Memphis*, 93 Tenn. 612, 30 S. W. 25.

These are no longer open questions, but have been adjudicated in favor of the contention here made by appellant.

Knoxville v. *Knoxville Water Co.* 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075, 189 U. S. 434, 435, 47 L. ed. 887, 890, 23 Sup. Ct. Rep. 531.

The contracts relied upon by appellant are protected by the Constitution of the United States.

Walla Walla v. *Walla Walla Water Co. supra; Los Angeles* v. *Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

Mr. **John W. Green** argued the cause, and, with *Mr. John W. Culton*, filed a brief for appellees:

The contract which complainant claims has been impaired does not, either in terms or by implication, purport to be made by legislative authority or sanction. A municipal ordinance not passed under supposed legislative authority cannot be regarded as a law of the state, within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts.

Hamilton Gaslight & Coke Co. v. *Hamilton*, 146 U. S. 266, 36 L. ed. 967, 13 Sup. Ct. Rep. 90.

Before this court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.

New Orleans v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

The presumption is against the creation of an exclusive franchise; and, where the grant itself does not in terms confer conclusive rights, none will be implied.

Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Skaneateles Waterworks Co.* v. *Skaneateles*, 184 U. S. 354, 363, 46 L. ed. 585, 591, 22 Sup. Ct. Rep. 400; *Bienville Water Supply Co.* v. *Mobile*, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; *Joplin* v. *Southwest Missouri Light Co.* 191 U. S. 150, 156, 157, 48 L. ed. 127, 129, 130, 24 Sup. Ct. Rep. 43; *Helena Waterworks Co.* v. *Helena*, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Cooley, Const. Lim. 4th ed. pp. 493–495; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit R. Co.* 24 Fed. 306; *Clarksville & R. Turnp. Co.* v. *Montgomery County*, 100 Tenn. 417, 58 L.R.A. 155, 45 S. W. 345; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 545, 9 L. ed. 823.

The public is favored by the courts where questions of this character arise.

Stein v. *Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 263, 36 L. ed. 967, 13 Sup. Ct. Rep. 90.

Persons dealing with public corporations are charged with notice of their right to contract upon the subject-matter, and in the manner contemplated. If there is no legal authority for the contract, that authority cannot be created through the application of any doctrine or principle of estoppel, acceptance, or ratification. The contract cannot be enforced.

1 Abbott, Mun. Corp. §§ 249, 280.

In *Nashville* v. *Hagan*, 9 Baxt. 495, the supreme court of Tennessee held that the city of Nashville was not liable for the price of certain material, bought and used by it for the improvement of its waterworks system, because the contract therefor was made

without authority, and because there was no general law or ordinance authorizing the execution of said contract.

If a contract which a municipal corporation had no power to make in the first instance should be held good upon the doctrine of estoppel or acquiescence, a new power other than the legislature would then accomplish by indirection that which the law expressly declares cannot be accomplished by direction.

Westerly Waterworks Co. v. *Westerly*, 80 Fed. 611.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought by the Knoxville Water Company, a corporation of Tennessee, against the city of Knoxville, a municipal corporation of the same state, and [26]against certain individual *citizens of Tennessee, constituting the waterworks commission of that city.

Are the rights which the plaintiff sought to protect secured by the Constitution of the United States in any such sense as to make the case—the parties all being citizens of Tennessee—one arising under that instrument, and therefore one of which the circuit court could take original cognizance? An answer to these questions, it would seem, requires for their intelligent solution a somewhat extended statement of the facts.

The water company, by its charter granted in 1877, was authorized to establish waterworks of sufficient capacity to furnish the corporate authorities and inhabitants of Knoxville with water. To that end it was empowered to lay down pipes through the streets, lanes, and alleys of the city; bringing into the city a sufficent supply of water by means of pipes or tanks, or in any other way; construct reservoirs; supply with water the inhabitants of the city and its environs, and all who may be along the lines of the company's pipes; erect hydrants or fire plugs; and contract with the inhabitants and with the corporate authorities of the city or any incorporated companies for the use of water, charging such price for the same as might be agreed upon between the company and the parties.

Prior to 1882,—taking the allegations of the bill to be true, since the case went off in the circuit court upon demurrer to the bill,—the city of Knoxville determined to establish a system of waterworks, and to that end it purchased certain real estate. But that scheme having been abandoned, or having been ascertained to be unwise and impracticable at that time, the city advertised for bids and proposals by responsible parties for the erection of waterworks, which, after being built, it was to have the option of purchasing at a time to be agreed upon.

The advertisement brought two competitive propositions, one by the city water company and the other by the present plaintiff. The proposition of the plaintiff was accepted, and thereupon the city and the plaintiff, on the 1st day of July, 1882, *entered into an agreement or contract which[27] is the foundation of this suit.

By that agreement the water company stipulated (omitting many minor details): That it would erect and establish on the land acquired by the city a system of waterworks, with reservoir and all necessary mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents sufficient to supply the city with water to be taken from the Tennessee river at the site purchased by the city for that purpose, —the waterworks and fixtures throughout to be of first-class materials, capable of furnishing 2,000,000 gallons of water every twenty-four hours, and affording an uninterrupted daily supply to the city of such quantity as might be required, not exceeding the amount above specified, and the reservoir to be built on a specified site, and to have a capacity of 3,200,000 gallons of water. The company was to furnish water free of charge (except the rental of hydrants) from hydrants for the sprinkling of streets and flushing of gutters and sewers along, on, or under such streets as were curbed, guttered, or sewered; also, free of charge, water for all purposes of the fire department and for supplying the city hall buildings, office, and prison. It was to purchase at the price of $7,800 the property then already acquired by the city for the purpose of erecting waterworks, including lands, plans, specifications, drawings, maps, etc., and to pay therefor within thirty days from the execution of the agreement, and before the construction of said works. It engaged to supply private consumers with water at a rate not to exceed 5 cents per hundred gallons, the cost of introducing from the mains, and the cost of meter when used, to be borne by such private parties. The work of construction was to be commenced within thirty days from the execution of the agreement, and the works to be completed, ready for use, within twelve months thereafter. The company was to maintain the waterworks stipulated to be built by it in such condition as would enable it to comply with its undertakings for the period of thirty years from January 1st, 1883, unless the city should become the owner of the same *within that[28] period. At its own expense it was to establish with the waterworks a system of tele-

graphic fire alarms of such quality and efficiency as those in general use in cities, consisting of two alarm boxes in each of the (then) eight wards of the city, with proper telegraphic connections with a central station.

In consideration of the promises and undertakings by the water company, as set out in the above agreement, the city covenanted and agreed, among other things, "not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, A. D. 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement;" also, "to pay to said company for rent of the seventy-five hydrants hereinbefore stipulated to be erected $50 each per annum, payable in quarterly instalments on the last day of each quarter, beginning on the day upon which the city shall commence receiving a supply of water from said works, and for any additional hydrants erected for the use of the city it will pay in the same manner at the rate of not more than $50 each per annum. . . ." Recognizing the benefit and advantage accruing to it and to its citizens from the construction of the waterworks and the erection of hydrants, the city also covenanted and agreed with the water company "to pay, in addition to the annual rent of $50, as hereinbefore provided, and as an additional annual rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the state and the ordinances and resolutions of the city, would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity, and value as that owned by the said water company within the corporate limits of the city of Knoxville: Provided, that the said additional
[29] annual rental shall only *be paid for the term of five years next following 1st of August, 1894, and no longer."

It was further mutually agreed and understood between the parties that at the expiration of fifteen years from the time fixed for the completion of the waterworks, the city should have the right, upon giving one year's notice of such purpose and intention, to purchase from the company the waterworks provided for, and all the property, rights, franchises, and privileges thereto belonging; by negotiations, if the terms could in that way be agreed upon, or if not, then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the waterworks plant, franchises, rights, privileges, etc., could be purchased by the city upon the same terms and conditions, and in the same way, at the expiration of each and every year thereafter. But in no case was such right of purchase to exist or be exercised unless due notice thereof was given one year before the expiration of the period aforesaid or either of them. If the parties differed as to price, the matter, the agreement provided, was to be determined by appraisers designated in a particular way, and whose award should be final and conclusive. It was further stipulated that the water company should not transfer, set over, or assign the agreement for the construction of the waterworks to any company, corporation, or individual whatsoever.

By an ordinance adopted October 20th, 1899, the city consented to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and made certain changes both in the contract between the latter company and the town of West Knoxville and in the above agreement of 1882. It is not necessary to set out these changes.

We come now to the act of the Tennessee legislature of February 2d, 1903, passed avowedly for the purpose of enabling the city to exercise the option it had under the agreement of 1882 and the ordinance of 1899 to purchase and acquire the plant and property of the water company, and maintain it for the benefit of its people. To that end the act authorized the city
*to issue bonds to an amount sufficient for [30]
that purpose, upon the agreed valuation of the parties, or, in default of same, upon a valuation to be ascertained and fixed by appraisers, and to such additional amount as would be necessary in making additions to the plant, including real estate required for such additions. It was, however, provided that bonds should not be issued unless approved by the assent of two thirds of the qualified voters of the city, expressed at an election duly held to ascertain their wishes. The execution of the provisions of the act was committed to a waterworks commission, to be created by the city council, and to have the power to make all contracts for the maintenance and extension of the plant.

Subsequently, the legislature passed the act of April 3d, 1903, (also amending the above act of February 2d, 1903), whereby the city was authorized to acquire, own, and operate a system of waterworks, either by purchase or construction, and for that

purpose power was given to issue interest-bearing coupon bonds to an amount not exceeding $750,000, under the restrictions named in the act. The act created a waterworks commission of five members, to be elected by the city council, and to have the entire supervision, under prescribed restrictions, of the purchase or construction, operation and maintenance, of any system of waterworks established under the sanction of the act. The act embodied, among others, a provision authorizing and directing the commissioners to obtain from the water company a written proposition for the sale of its plant, franchises, etc., to the city of Knoxville, giving the price and terms of payment, together with the opinion of competent, disinterested experts as to the cost and present value of the plant; the commission to secure plans, specifications, and estimates of the cost of the construction of a new system of waterworks, and to report all matters to the city council for its consideration, but not to close any contract for the purchase or construction of waterworks until it had been duly authorized to do so by the city council after the proposition shall have been ratified by a vote of the people.

[31] *If the city determined to construct, equip, and maintain its own system of waterworks, then, for the purpose of securing sites for pumping stations and other necessary purposes, including the laying of mains and water pipes, and sites for reservoirs and filtering galleries, extensions, improvements and alterations, it was given the right of condemnation of grounds within and without its corporate limits.

There is no need to refer to other provisions of the agreement of 1882. But it may be said in this connection that an election was held on the 2d day of July, 1903; and the city council—having express authority to declare the result of the election—declared, by ordinance, that 1,818 votes had been cast in favor of, and only 239 votes against, an issue of bonds for the construction by the city of a system of waterworks. It may be also stated, in this connection, that after the passage of the two acts of 1903, and before the above election, some correspondence ensued between the water commission and the water company in reference to the purchase of the latter's plant. But the parties failed to agree as to the mode of ascertaining the value of the company's plant, and negotiations ceased. It is not important to inquire which side, if either, was to blame in this matter. Suffice it to say that the city council, on or about May 20th, 1904, conceived and was about to enter a plan of establishing a system of city waterworks wholly independent of, and in competition with, that maintained by the water company.

The present suit was brought upon the theory that the legislative enactments of 1903 were laws impairing the obligations of the contract of 1882 between the water company and the city, as well as upon the theory that the maintenance by the city of a system of waterworks in competition with those of the water company would inevitably destroy the value of the latter's property, and be a taking, under the sanction of the state, of the company's property for public use without compensation, in violation of the due process of law enjoined by the 14th Amendment.

*The substantial relief asked was a per- [32] petual injunction restraining the city, its agents or officers, and the waterworks commission, from entering into any contract for the construction of a separate, independent, and competing plant, and from issuing any bonds for such a purpose.

Upon the question of the jurisdiction of the circuit court to take cognizance of this case, without regard to the citizenship of the parties, but little need be said. The water company, as we have seen, insists that the agreement of 1882 constituted a contract, whereby it acquired, for a given period, an exclusive right, by means of pipes laid in the public ways and a system of works established for that purpose, to supply water for the use of the city and its inhabitants. It also insists, as just stated, that the obligation of this contract will be impaired if the city, proceeding under the acts of the legislature and under the ordinances in question, establishes and maintains an independent, separate system of waterworks in competition with those of the water company. These questions having been aptly raised by the company's bill, the case is plainly one arising under the Constitution of the United States.

The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional rights of the water company, establish and maintain, a separate system of waterworks of its own. If the city made no such contract, that will be an end of the case; for, in the absence of a contract protected by the Constitution of the United States, the circuit court could not take cognizance of the dispute between the parties, all citizens of Tennessee; and it could not be said that any taking of private property for public use could arise merely from the construction and maintenance by the city of a waterworks plant.

The principles which must control in

determining the scope and obligations of the agreement of 1882 have been clearly outlined in our decisions. We may assume, for purposes of the present discussion, but without deciding, that the city of Knox-
[33] ville *was invested by the legislature with full authority, or that, under its general municipal powers, it could bind itself by contract, to give to a single corporation or company the *exclusive* right, for a specified period, to supply water for the use of itself and its inhabitants. It will yet be conceded that whatever authority it possessed in this matter was granted solely for the public good, and that in every substantial, legal sense the agreement with the water company is to be deemed a public grant, entitling that company to exercise certain public functions that appertain to the city as a municipal corporation.

Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544, 547, 548, 9 L. ed. 773, 822, 824, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications or presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract must operate against the corporation, and in favor of the public, and the corporation can claim nothing but what is clearly given by the act; that it can never be assumed that the government intended to diminish its powers of accomplishing the ends of its creation; and that those who insist that the government has surrendered any of its powers, or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded. "Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public." Such were the words of this court in *St. Clair County Turnp. Co.* v. *Illinois*, 96 U. S. 63, 68, 24 L. ed. 651, 652. The universal rule in doubtful cases—this court said in *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 26, 32 L. ed. 837, 842, 9 Sup. Ct. Rep. 409—is that "the construction shall be against the grantee, and in favor of the government." As late as *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 562, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689, 691, this court said: "The
[34] doctrine is firmly established that only *that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. † Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. ‡ This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' *Slidell* v. *Grandjean*, 111 U. S. 412, 438, 28 L. ed. 321, 330, 4 Sup. Ct. Rep. 475." We have never departed from or modified these principles, but have reaffirmed them in many cases. §

It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If, by contract or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings.

Turning, now, to the agreement of 1882, we fail to find in it any words necessarily importing an obligation on the part of the city not to establish and maintain waterworks of its own during the term of the water company. It is said that the *com-
[35] pany could not possibly have believed that the city would establish waterworks to be operated in competition with its system, for such competition would be ruinous to the water company, as its projectors, on a

†Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 380, 17 L. ed. 147, 153; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666, 24 L. ed. 1036, 1038; Hannibal & St. J. R. Co. v. Missouri River Packet Co. 125 U. S. 260, 271, 31 L. ed. 731, 735, 8 Sup. Ct. Rep. 874; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 49, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478; Stein v. Bienville Water Supply Co. 141 U. S. 67, 80, 35 L. ed. 622, 627, 11 Sup. Ct. Rep. 892; State v. Pacific Guano Co. 22 S. C. 50, 83, 86.

‡Holyoke Water Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 33; The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 75, 18 L. ed. 137, 143.

§ United States v. Arredondo, 6 Pet. 691, 738, 8 L. ed. 547, 564; Mills v. St. Clair County, 8 How. 581, 12 L. ed. 1206; Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. 81, 14 L. ed. 60; Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 88, 16 L. ed. 500, 509; Newton v. Mahoning County, 100 U. S. 561, 25 L. ed. 712.

moment's reflection, could have perceived when the agreement of 1882 was made. On the other hand, the city may, with much reason, say that, having once thought of having its own waterworks, the failure to insert in that agreement a provision precluding it, in all circumstances, and during a long period, from having its own separate system, shows that it was not its purpose to so restrict the exercise of its powers, but to remain absolutely free to act as changed circumstances or the public exigencies might demand. The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1st, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed, of constructing its own system of waterworks. And it may be that it did not, in 1882, intend or expect ever again to think favorably of such a scheme. It may also be that the water company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the water company, it refrained from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the water company should be exclusive as against all other persons or corporations. We are
[36] therefore *constrained by the words of the agreement to hold that the city did not assume, by any contract protected by the Constitution of the United States, to restrict its right to have a system of waterworks, independent altogether of the system established and maintained by the water company. If this interpretation of the contract will bring hardship and loss to the water company, and to those having an interest in its property and bonds, the result (omitting now any consideration of the question of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do.

While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis* v. *Whitney*, 13 Wall. 68, 70, 20 L. ed. 513, 514: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, *susceptible of two constructions, must re- [37]
ceive the one most favorable to the public." *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 268, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; *Skaneateles Waterworks Co.* v. *Skaneateles*, 184 U. S. 354, 363, 46 L. ed. 585, 590, 22 Sup. Ct. Rep. 400.

So in *Joplin* v. *Southwest Missouri Light Co.* 191 U. S. 150, 156, 48 L. ed. 127, 129, 24 Sup. Ct. Rep. 43, which involved the question whether a city could establish its own electric plant in competition with that of a private corporation, the court said: "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat,

against the granting of exclusive rights, and against limitations upon the powers of government."

Again, in the recent case of *Helena Waterworks Co.* v. *Helena*, 195 U. S. 383, 392, 49 L. ed. 245, 250, 25 Sup. Ct. Rep. 40, where a city established its own system of waterworks in competition with that of a private company, the court, observing that the city had not specifically bound itself not to construct its own plant, said: "Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract." To the same effect, as to the principle involved, are *Washington & C. Turnp. Co.* v. *Maryland*, 3 Wall. 210, 213, 18 L. ed. 180, 182; *Stein* v. *Bienville Water Supply Co.* 141 U. S. 67, 81, 35 L. ed. 622, 628, 11 Sup. Ct. Rep. 892; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

It is, we think, important that the courts [38] should adhere firmly *to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have devested itself of its powers.

As, then, the city of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case. *The judgment of that court dismissing the bill must be affirmed.*

It is so ordered.

Mr. Justice **Brown**, Mr. Justice **White**, Mr. Justice **Peckham**, and Mr Justice **Holmes** dissented.

OWENSBORO WATERWORKS COMPANY, of Owensboro, Kentucky, *Appt.*,

v.

CITY OF OWENSBORO.

(See S. C. Reporter's ed. 38–47.)

1. Courts—jurisdiction of Federal circuit court—case arising under Federal Constitution.—A suit to enjoin the diversion or intended diversion by a municipality of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, but which were not applied to that object, on the theory that such failure of duty on the part of the municipality may ultimately cause increased taxation, and thereby deprive the taxpayers of their property without the due process of law guaranteed by U. S. Const., 14th Amend., if the full amount originally intended to be applied to the particular object named by the legislature is to be collected,—is not one arising under the Constitution of the United States, of which a Federal circuit court has original jurisdiction without regard to the citizenship of the parties.

2. Constitutional law—due process of law—acts of municipality in excess of its powers.—The acts of a municipal corporation cannot be said to be wanting in the due process of law guaranteed by U. S. Const., 14th Amend., if such acts, when done or ratified by the state, would not be inconsistent with that Amendment.

[No. 145.]

Submitted December 13, 1905. Decided January 2, 1906.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree dismissing, for want of jurisdiction, the bill in a suit to enjoin the diversion, by a municipal corporation, of funds which, under legislative sanction, it had collected from taxpayers for a specific public object. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John D. Atchison** and **William T. Ellis** submitted the cause for appellant. *Messrs. Little & Slack* were on the brief.

Mr. **Charles S. Walker** submitted the cause for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in this suit, the Owensboro Waterworks Company, is a private corporation of Kentucky, while the defendant, the city of Owensboro, is a municipal corporation of the same commonwealth.

The bill was dismissed for want of juris-

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

As to what constitutes due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

diction in the court below to hear and determine the cause, the circuit court being of opinion that the suit was not one arising under the Constitution or laws of the United States, and the matter in dispute not of sufficient value to give that court jurisdiction.

The case made by the bill was this:

On the 10th day of October, 1900, the common council of Owensboro adopted an ordinance authorizing the borrowing of money, upon the city's bonds, for the purpose of erecting a system of waterworks for supplying the city of Owensboro and its inhabitants with water. The ordinance provided for a submission to the voters of the question of issuing city bonds to the amount of $200,000, with which to raise money for the purpose just stated.

The election was held and the proposition was carried, more than two thirds of those voting approving the proposed issue of bonds.

By an ordinance of December 3d, 1900, bonds to the amount of $200,000 were directed to be issued, and $14,666.66 was [40] appropriated *out of the revenues and public moneys of the city for the payment of the semiannual interest on the bonds, and the creation of a fund for the ultimate payment of the principal thereof, such fund to be designated as the Owensboro water bond account.

By an ordinance approved March 11th, 1901, $14,666.66 was appropriated and set apart out of the revenues and funds of the city, to be raised by taxation or otherwise, each year, until the bonds were paid, for the purpose of paying the interest on the bonds semiannually, and for creating a sinking fund for the payment of the principal of the bonds. And, for the purpose of providing a fund for that purpose, it was ordained, the bill alleged, that there should be, and that there was thereby, levied upon all the taxable property of said city subject by law to taxation for municipal purposes, a direct annual tax for the year 1901, and for each succeeding year up to and including the year 1931, sufficient to raise the said sum of $14,666.66, to be collected annually with other municipal taxes, licenses, revenues, and public dues, and continuing from year to year until the ultimate payment of the bonds; and it was also, by the ordinance, ordained that no part of said funds should ever be used for, or appropriated to, any other purpose or use, except the payment of the principal and interest of the bonds; further, that provision to meet the requirements of said section be made in the annual budget and appropriation ordinance.

Pursuant to the ordinance of December 3d, 1900, the city executed 200 bonds of $1,000 each, bearing 4½ per cent interest per annum from their date,—January 1st, 1901,—payable semiannually, and transferable at delivery, and at the date of the bringing of this suit all of those bonds were, the bill alleged, in the possession or under the control of the city, "ready and about to be immediately sold and delivered to purchasers, with the exception of 7 bonds which the said mayor and council have already sold, and have received therefor the sum of $7,000."

In each of the years 1901, 1902, and 1903, the city, proceeding under ordinances adopted by the common council, levied an *ad valorem tax of $2 on each $100 worth [41] of property in the city subject to taxation, part of such tax—$14,666.66—to be appropriated annually for the payment of interest on the water bonds and for the creation of a sinking fund for the ultimate payment of the principal. A similar tax was also levied for 1904, of which $14,666.66 was appropriated to pay interest and create a sinking fund,—$8,000 to be paid on interest, and $6,666.66 to go into the sinking fund. So that under the levies made in 1901, 1902, and 1903, $44,000 had been collected for interest and the sinking fund, and $14,666.66 was to be collected for 1904.

Of the 200 bonds actually signed, 193 remain in the hands of the city, its officers and agents, and after applying the sum of $44,000, collected under the levies of 1901, 1902, and 1903, and the $14,666.66, to be collected under the levy of 1904, there will remain only $149,000 to be raised by the sale of bonds. Nevertheless, the city, by its agents and officers, claims to have authority, and proposes immediately to sell and dispose of, and, unless restrained, will sell and dispose of, the entire 193 bonds, amounting to $193,000. If that be done, then the city will have collected and realized $244,000 on account of the erection of the waterworks; whereas it was only authorized to raise $200,000 for that purpose. Of the $44,000 collected by the city, $20,000 has been expended for land on which the proposed water plant was to be erected, while $24,000 has been illegally expended for purposes other than those for which it was collected.

The bill further alleges that for each of the years 1901, 1902, and 1903, taxes were levied on the taxable property of plaintiff and other taxpayers of the city; that capitation, license, and franchiset axes were also assessed, levied, and collected by it; that all the taxes so levied were collected each year, from all sources, and for all purposes, were expended and exhausted each year, and none so collected, in either

of said years, are now on hand; that no part of the $44,000 collected is on hand. nor has said city any means of replacing
[42] same, except by levying *and collecting taxes from the taxpayers of said city for that purpose, and this it had no legal authority to do; that by the payment of the $44,000 the city paid and extinguished that amount of bonds, and bonds to that amount should be surrendered by said city and cancelled, and that by law complainant and other taxpayers have the right to have said bonds so surrendered and cancelled.

The bill proceeds: "Your orator says said bonds are negotiable by delivery, and are on the footing of commercial obligations, and if said 193 bonds, or any of them, shall be sold and transferred for value, to innocent bona fide purchasers, then complainant and all other taxpayers of said city would be compelled to pay the full amount of all of said 200 bonds, and the full amount of all interest accrued, or to accrue thereon. It says defendant and its officers and agents purpose, and are now endeavoring, to immediately sell and transfer said 193 bonds, and coupons attached, to some person for value, and are doing this without giving such persons any notice or information of the facts herein stated, or of any facts pertaining to the collection or disposition of any part of said $44,000, and purpose to continue said efforts without giving to any person, to whom said bonds may be offered, any notice or information pertaining thereto, and said prospective purchasers have no notice, knowledge, or information of any of said facts, so far as complainant is advised or believes, and, unless restrained and prevented, defendant and its officers and agents will immediately sell said bonds and coupons to some person or persons, for value, who have no notice or information in regard to said transaction, and will do so without giving such persons any notice or information as to said facts, and thus complainant and its property, and said other taxpayers and their property, will be burthened with the payment of said entire 200 bonds and interest, and, by the means aforesaid, and without due process of law, deprived of the right to have credit on said debt for said $44,000 heretofore paid by them, and be compelled to pay said 200 bonds and all interest accrued and to accrue thereon.

[43] *"Your orator says that by article 14 of the Amendments to the Constitution of the United States it is provided that no state shall 'deprive any person of life, liberty, or property, without due process of law;' but your orator says that if more than 149 of said bonds shall be sold to innocent purchasers, without notice, which defendant city is about to do, that it and the taxpayers for whom it sues, will be forced to pay such excess, both principal and interest, without opportunity to plead, or to be heard as to matters herein alleged, and so deprived of their property without due process of law, and the amount in controversy here exceeds $2,000."

The relief prayed was that the defendant, its officers and agents, be perpetually enjoined and restrained from selling or disposing of any of the bonds in excess of 149 in number, and, before selling them, to detach and destroy all coupons for interest that have heretofore matured or that may mature before the date when the bonds may be sold, and be ordered and compelled to cancel and surrender all of the bonds, and all coupons pertaining thereto, in excess of 149, and that the bonds and coupons be destroyed, and if the $14,666.66 levied May 16th, 1904, should be collected before the sale was made of the bonds, that said sum be applied to the extinguishment of the debt and interest, and the bonds and interest coupons be destroyed, and not sold, as prayed for in regard to the money heretofore collected; also that defendant be enjoined and restrained from levying and collecting from complainant and all the other taxpayers of the city, or their property, any taxes in excess of a sufficient amount to create a sinking fund with which to pay the 149 bonds, when sold, and the 7 bonds, already sold, and to pay the interest to accrue thereon upon the 7 bonds heretofore sold, and to accrue upon the 149 bonds, after they were sold.

The plaintiff further prayed that the sum of $44,000, paid by the taxpayers of the city, be adjudged to have satisfied that amount of the bonds, and that it have such further or other relief in the premises as the nature of the case required.

The bill presents the case of the diversion, or the intended diversion, by a municipal corporation, of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, which funds were not applied to the object for which they were raised, and which failure of duty on the part of the corporation so to apply them may ultimately cause increased taxation if the full amount originally intended to be applied to the particular object named by the legislature is to be collected.

*We share with the court below the diffi- [45]
culty in understanding how such a case can be regarded as one arising under the Constitution of the United States. It certainly must be one of that character in order to sustain the jurisdiction of the

circuit court,—the parties all being citizens of Kentucky.

In support of their contention that the present suit arises under the Constitution of the United States, and is within the original cognizance of the circuit court, without regard to the citizenship of the parties, the learned counsel for the appellant cites certain cases in this court which hold that the prohibitions of the 14th Amendment "refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities,"—and consequently, "whoever, by virtue of public position under a state government, deprives another of any right protected under that Amendment against deprivation by the state, violates the constitutional inhibition; and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." *Ex parte Virginia*, 100 U. S. 339, 346, 347, 25 L. ed. 676, 679, 680; *Neal* v. *Delaware*, 103 U. S. 370, 397, 26 L. ed. 567, 574; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gibson* v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581.

These were all cases in which the right sought to be protected was held to have been granted or secured by the Constitution of the United States, but yet was violated by some agency or instrumentality proceeding under the sanction or authority of the state. But no right involved in the present case has its origin in, or is secured by, the Constitution of the United States. It is not contended that the legislative enactments, by the authority of which the city intends to establish and maintain a system of waterworks, are inconsistent either with the Constitution of Kentucky or the Constitution of the United States. The plaintiff, however, complains that the defendant city has not properly discharged its duties under the laws of the state. For the purposes of the present discussion, let this be taken as true; still, maladministration of its local affairs by a city's con-
[46] stituted *authorities cannot rightfully concern the national government, unless it involves the infringement of some Federal right. If the city authorities have received funds from taxation which ought strictly to have been applied to take up or cancel the bonds of the city, but have been used for other municipal purposes, and if, by reason of such misapplication of those funds, taxation may ultimately come upon the people for an amount beyond what the legislature originally intended,—if nothing more can be said,—the remedy must be found in the courts and tribunals of the state, and not in the Federal courts of original jurisdiction, where the controversy is wholly, as it is here, between citizens of the same state. When a Federal court acquires jurisdiction of a controversy by reason of the diverse citizenship of the parties, then it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the state court. But, as between citizens of the same state, the Federal court may not interfere to compel municipal corporations or other like state instrumentalities to keep within the limits of the power conferred upon them by the state, unless such interference is necessary for the protection of a Federal right. There has been no actual invasion here of any right secured by the Constitution of the United States; nothing more, taking the allegations of the bill to be true, than a failure of a municipal corporation to properly discharge the duties which, under the laws of the state, it owes to its people and taxpayers. And there is here no deprivation of property without due process of law within the meaning of the 14th Amendment, even if it be apprehended that the defendant city may, at some future time, impose a tax in violation of its duty under the laws of the state.

The utmost that can be said of the present case, as disclosed by the bill, is that the municipal authorities of Owensboro have done some things outside or in excess of any power the city possessed. But this does not of itself show that they acted without the due process of law enjoined by the 14th *Amendment; for, if [47]
what is complained of had been done directly by the state or by its express authority, or if the legislature could legally ratify that which the city has done, as it undoubtedly might do, no one would contend that there had been a violation of the due process clause of the amendment. It cannot be that the acts of a municipal corporation are wanting in the due process of law ordained by the 14th Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that Amendment. Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the states. The 14th Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their

instrumentalities as are violative of rights secured by the Constitution of the United States. A different view would give to the 14th Amendment a far wider scope than was contemplated at the time of its adoption, or than would be consonant with the authority of the several states to regulate and administer the rights of their peoples, in conformity with their own laws, subject always, but only, to the supreme law of the land.

We are of opinion that this suit is not one arising under the Constitution of the United States, and, therefore, the parties being all citizens of Kentucky, it is not one of which the circuit court could take original cognizance.

Affirmed.

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[48]*PEORIA GAS & ELECTRIC COMPANY, *Appt.*

v.

CITY OF PEORIA, *Appellee.*

(See S. C. Reporter's ed. 48-57.)

Contracts—combination to fix gas rates—effect of, on right to relief against municipal establishment of confiscatory rates.—An agreement between rival gas companies to fix the price for gas, in violation of the Illinois antitrust act of June 11, 1891 (Ill. Laws 1891, p. 206), does not, after they cease to act under it, defeat their right to invoke the due process of law clause of the Federal Constitution to prevent the enforcement of a municipal ordinance which, by establishing unremunerative rates, has the effect of taking private property for public use without just compensation.

[No. 33.]

Argued October 30, 1905. Decided January 2, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a judgment dismissing a bill to restrain the enforcement of a municipal ordinance fixing gas rates. *Reversed.*

Statement by Mr. Justice **Brewer:**

This was a bill filed in the circuit court of the United States for the northern district of Illinois by the Peoria Gas & Electric Company to restrain the enforcement of an ordinance passed by the defendant, fixing the price of gas. A decree was entered in the circuit court dismissing the bill, and the case was brought directly here, as involving a constitutional question.

The facts are these: Prior to 1899 for a period of many years the Peoria Gaslight & Coke Company had manufactured and furnished gas to the city of Peoria and its citizens. The business had been profitable and the stock was valuable. In 1899 the plaintiff company was organized to construct gas works in Peoria, and that city, by ordinance, granted to it a franchise permitting it to construct and operate a gas plant and lay mains along certain streets, etc. It is charged that in order to obtain *this fran- [49] chise the promoters of the plaintiff company represented that it was to be a Peoria company and enterprise, and that it would furnish gas at a cheaper rate than the old company; that in fact it was a scheme of certain Chicago capitalists, who, as soon as the ordinance was passed and the plant constructed, appeared as owners of substantially the entire stock. After the new company was organized and its plant constructed, the two companies became competitors, the competition being so sharp that in the early summer of 1900 the new company lowered its price to 30 cents per thousand cubic feet for both light and fuel gas. On July 31, 1900, after a conference between the managers of the two companies, both raised the rate to $1.15 net for light and 75 cents net for fuel gas, to take effect August 1, 1900. The announcements of this raise in the rates were published in the Peoria papers on the same day, each announcement being in precisely the same language. On September 4, 1900, the city passed an ordinance providing that the maximum price for gas should be 75 cents per thousand cubic feet, and that the gas to be furnished should not be less than eighteen candle power.

On September 18, 1900, the plaintiff filed this bill of complaint, setting forth its organization, the ordinance under which it was given authority to occupy certain streets and that of September 4, 1900; alleged that the latter ordinance was invalid, as establishing a rate which was not remunerative,

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NOTE.—*On contracts in restraint of trade*—see notes to Leslie v. Lorillard, 1 L.R.A. 456; People v. North River Sugar Ref. Co. 2 L.R.A. 33; Bowman v. Phillips, 3 L.R.A. 632; Richardson v. Buhl, 6 L.R.A. 457; People *ex rel.* Peabody v. Chicago Gas Trust Co. 8 L.R.A. 500; National Benefit Co. v. Union Hospital Co. 11 L.R.A. 437; Western Wooden Ware Asso. v. Starkie, 11 L.R.A. 503; Lovejoy v. Michels, 13 L.R.A. 770; People v. North River Sugar Ref. Co. 9 L.R.A. 39: Oregon Steam Nav. Co. v. Winsor, 22 L. ed. U. S. 315; Fowle v. Park, 33 L. ed. U. S. 67; United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008; Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 9 C. C. A. 666; and Cravens v. Carter-Crume Co. 34 C. C. A. 486.

On illegal trusts under modern antitrust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

and in effect confiscatory, and was thus taking private property for public use without just compensation, and depriving the plaintiff of its property without due process of law. The city answered, narrating the circumstances attending the organization of the plaintiff and the passage of the ordinance authorizing it to occupy the street and supply the city with gas, with the representation made at the time, and claimed an estoppel by reason thereof; showing also the rates which had been the result of competition, the raise in price by the two companies, charged that this was by agreement between the companies, alleged that the ordinance of September 4 was passed in good [50] faith and to *prevent extortion by the companies, and also that the rate fixed was reasonable. While the answer alleged that the fixing of the rates from the 1st of August was by agreement between the two corporations, it did not, in terms, plead that the agreement was in violation of any particular statute.

By consent a special commissioner was appointed to take the proofs and report the same, with his findings and conclusions thereon. He took an enormous amount of testimony, the printed record in this court amounting to 1,780 pages. From it he found and reported that the rate prescribed by the ordinance of September 4 did not furnish compensation, was confiscatory in its effect, and therefore unreasonable. Exceptions were taken by both sides to different portions of his findings and conclusions of law. On a hearing before the circuit court the question of the reasonableness of the rates prescribed was ignored, the court found that the increase in rates on August 1, 1900, was the result of an illegal combination between the two gas companies, and in violation of the Illinois antitrust law of 1891, that, therefore, the plaintiff was not entitled to any relief against the ordinance of September 4, and entered a decree dismissing the bill.

The antitrust act of Illinois, approved June 11, 1891 (Laws 1891, p. 206), forbids the entering into any "pool, trust, agreement, combination, confederation, or understanding . . . to regulate or fix the price of any article of merchandise or commodity," and punishes the same by fine. Sections 5 and 6 are as follows:

"5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"6. Any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment."

Subsequently and in 1893 another act was passed, which was *held by this court in [51] *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, to constitute class legislation, and to be void. An amendment in 1897 to the act of 1891 was subject to the same objection. The supreme court of Illinois has since held that the act of 1891 was not repealed by the act of 1893 or the amendment of 1897, and is still in force. *People ex rel. Akin* v. *Butler Street Foundry & Iron Co.* 201 Ill. 236, 257, 66 N. E. 349; *Chicago, W. & V. Coal Co.* v. *People*, 214 Ill. 421, 454, 73 N. E. 770.

Messrs. **E. C. Ritsher** and **William T. Abbott** argued the cause, and, with *Mr. W. T. Irwin*, filed a brief for appellant.

Mr. **Winslow Evans** argued the cause and filed a brief for appellee.

Messrs. James Hamilton Lewis, Henry M. Ashton, and *David K. Tone* filed a brief on behalf of the city of Chicago, party to another pending case involving the question of the power of cities in Illinois to fix the price of gas.

Mr. William D. Guthrie filed a brief on behalf of Darius O. Mills, party to another pending case involving the question of power of cities in Illinois to fix the price of gas.

Mr. Justice **Brewer** delivered the opinion of the court:

This case was tried on one theory and decided on another. While that does not always and necessarily constitute error, yet, under the circumstances, as disclosed by the record, we *are of opinion that injus- [55] tice has probably resulted, and that there should be a reversal of the decree, and a further examination in the circuit court. As stated in the findings of the commissioner, the bill proceeds upon the theory that the ordinance of September 4, 1900, impaired the rights of contract theretofore existing between the parties, that its enforcement would constitute the taking of private property for public use without just compensation, that the penalties prescribed for a violation of the ordinance were exorbitant and not sanctioned by the laws of the state of Illinois, while the answer justified the provisions of the ordinance by the statements and representations made by the stockholders in the company to the city council at the time the plaintiff's franchise was sought, and alleged that the rate therein fixed was reasonable. On these questions the stress of the controversy was rested. The court entirely ignored them, and placed

its decision on the single ground that the two companies had, by agreement, attempted to fix their prices, and therefore came within the scope of the Illinois antitrust law,—an act which had not been in terms referred to either in the pleadings or the report of the master.

There was no positive evidence, and no finding by the commissioner, of an agreement between the two companies, and while, from their action, an inference might be drawn that they had entered into some agreement in respect to rates on August 1, 1900, neither its terms, scope, nor duration were shown. It also appears from the testimony that that rate was continued by the old company only until January 1, 1901, when an even rate of $1 per thousand was established, and that this latter rate was, on September 1, 1901, also established by the new company,—the plaintiff herein. Whether this action of the new company in adopting the rate which had been kept in force by the old company since January 1, 1901, was the result of agreement, or an independent act on its part, is not shown. It appears further that in October, 1901, the plaintiff entered into a contract with the old company to supply it with gas for the use of its customers, and that, the latter
[56] company desisting *temporarily from manufacture, this contract continued in force until August 19, 1902; but this was found by the commissioner to have been a purely private business arrangement between the companies, and without relation to the charges made by either to its customers. Doubtless it, together with the evidence of changes in holding of stock, tended to show at least a cessation of competition between the two companies, if not of a unity of control or agreement between them.

We shall assume that there was testimony from which the court justly found that the rates announced on August 1 were fixed by an agreement between the two companies. We shall also assume, though without deciding, that while that agreement was in force and the parties were acting under it, neither could recover for the gas that it furnished, nor could this plaintiff question the validity of the ordinance of September 4. But although the stringent provisions of the Illinois antitrust law may apply to the case of an agreement between two gas companies, fixing the price of gas, and even if, while the parties are proceeding under it, any party receiving gas may avoid payment therefor on that ground, and the city likewise be upheld in an ordinance establishing maximum rates which are not remunerative, yet the making of such an agreement does not subject the companies to a perpetual penalty. Parties making an agreement, unlawful by the antitrust act, may, while the agreement is in force, be subject to its penalties; but, whenever they cease to act under it, the penalties also cease. The punishment adheres to the offense, and stops when the offense itself stops. Now it is in evidence that the prices were changed by the old company on the 1st of January, 1901 (five months after the alleged agreement for a uniform rate), and that for months thereafter each company was charging a different rate; but the decree was one of absolute dismissal,—an adjudication that the ordinance of September 4 was valid,— an adjudication which became *res judicata* for all future litigation; and this in the face of the finding by the commissioner, undisturbed by the court, that the rates established by it are not remunerative, *and thus work a gradual [57]
confiscation of the property belonging to the plaintiff.

We think that under the circumstances the decree should be reversed and the case remanded with instructions either to refer it to a commissioner for further findings, with leave to take additional testimony, if that be deemed necessary, showing the terms and duration of the alleged agreement between the two companies and how far it was acted upon by them, or that the court should itself undertake this investigation and make like findings.

The decree of the Circuit Court is reversed.

GUARDIAN TRUST & DEPOSIT COMPANY and Guarantee Trust & Deposit Company, *Petitioners*,

v.

B. J. FISHER, A. M. Scales, Assignee of A. A. Hinkle; A. M. Scales, Assignee of Hodgin, Pegram, & Co., and Helen G. Brown.

(See S. C. Reporter's ed. 57–70.)

1. Mortgage—priority as between corporate mortgage and judgments for torts.— Judgments against a water company in actions to recover the value of property alleged to have been destroyed by fire, as a result of the failure of the company to exercise reasonable care to furnish an adequate supply of water, are judgments for torts, within the meaning of N. C. Code, 1883, § 1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation.

2. Mortgage—priority as between corporate mortgage and judgments for tort.— A judgment in tort, recovered against

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NOTE.—*On priority as between mortgage and judgment*—see notes to Manchester Locomotive Works v. Truesdale, 9 L.R.A. 140, and Vaughn v. Schmaisle, 10 L.R.A. 411.

the corporate purchaser of a waterworks system encumbered with a mortgage executed by the original corporate owner, is entitled to priority over the lien of such mortgage, under N. C. Code, 1883, §1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation, since to hold that only the interest in the property acquired by the purchasing corporation was responsible for damages caused by its negligence would defeat the purpose of the statute to make corporate property security against torts committed by the owner.

[No. 75.]

Argued November 28, 1905. Decided January 2, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, bringing up for review a case pending in that court on appeal from a decree of the Circuit Court for the Western District of North Carolina, to the effect that certain judgment creditors of a corporation were entitled to priority over the lien of a corporate mortgage. Decree of the Circuit Court *affirmed.*

See same case below, 115 Fed. 184.

Statement by Mr. Justice **Brewer:**

Section 1255 of the Code of North Carolina of 1883 reads:

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earning of such incorporations from execution for the satisfaction of any judgment obtained in courts of the state against such incorporation, for labor performed [nor for material furnished such incorporation], nor for torts committed by such incorporation, its agents or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This was subsequently amended by leaving out the matter inclosed in brackets.

In 1887 a corporation was organized under the laws of North Carolina, which soon after secured the passage of an ordinance by the city of Greensboro, giving to it the exclusive right to the use of the streets, sidewalks, and public grounds for the purpose of constructing, operating, and maintaining a complete system of waterworks, A later ordinance provided that "said water company shall be responsible for all damage sustained by the city, or any individual or
[59] individuals, *for any injury sustained from the negligence of the said company, either in the construction or operation of their plant."

The corporation constructed the waterworks and also executed a mortgage or deed of trust, conveying its entire property and plant to secure the payment of fifty thousand dollars of bonds. A subsequent mortgage or deed of trust was foreclosed and the title to the property passed to a new corporation, subject to the lien of the first mortgage. After its purchase the new corporation executed a further mortgage or deed of trust. Subsequently two fires occurred, destroying property belonging to the respondents. Actions were commenced in the superior court of Guilford county by the owners of the property destroyed against the new corporation, and judgments recovered, the judgment entries each reciting that the recovery was "for the injury and damage done him by the negligence of the defendant." 128 N. C. 375, 38 S. E. 912. Proceedings having been commenced in the circuit court of the United States to foreclose the existing mortgages, a decree was entered and a sale made. Thereupon the judgment creditors intervened, insisting that, in the distribution of the proceeds, they were entitled to priority over the mortgage liens by virtue of the statute above referred to. The circuit court decided in their favor. 115 Fed. 184. Its judgment was taken on appeal to the court of appeals, from which court the case was brought here on certiorari.

Messrs. **John Peirce Bruns** and **Archibald H. Taylor** argued the cause, and, with *Mr. W. P. Bynum, Jr.*, filed a brief for petitioners:

The Federal cases uniformly and consistently hold that judgments in state courts against corporations of which the United States courts, for sufficient cause, have taken jurisdiction for the purpose of selling their property and distributing the proceeds and ascertaining all liens in their due order, etc., have no validity against mortgagees of such corporations who have properly invoked or obtained the jurisdiction of the United States court, unless such United States court, on examination of the facts upon which such judgments were obtained, itself, and for itself, pronounces such judgment valid, and awards and enforces such claim.

Brooks v. *Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 292, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370; *Central Trust Co.* v. *Condon*, 14 C. C. A. 314, 31 U. S. App. 387, 67 Fed. 103; *Louisville Trust Co.* v. *Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; *Central Trust Co.* v. *Bridges*, 6 C. C. A. 539, 16 U. S. App. 115, 57 Fed. 753; *Central Trust Co.* v. *Hennen*, 33 C. C. A. 189, 61 U. S. App. 714, 90 Fed.

595; *Hassall* v. *Wilcox*, 130 U. S. 503, 32 L. ed. 1005, 9 Sup. Ct. Rep. 590.

And, in deciding the question as to the validity or nature of the cause of action upon which the judgments were recovered in the state court by the interveners, respondents here, neither the court below, nor any United States court, could accept the decision of the state court of North Carolina in these proceedings, because the questions are questions of general jurisprudence which a United States court must decide for itself.

Curtis, Jurisprudence, 234; *Burgess* v. *Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Swift* v. *Tyson*, 16 Pet. 18, 10 L. ed. 871; *Rowan* v. *Runnels*, 5 How. 134, 12 L. ed. 85; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Venice* v. *Murdock*, 92 U. S. 494, 23 L. ed. 583; *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 26 L. ed. 61; *United States* v. *Peters*, 5 Cranch, 115, 3 L. ed. 53; *Pease* v. *Peck*, 18 How. 600, 15 L. ed. 521; *Folsom* v. *Township Ninety Six*, 159 U. S. 626, 627, 40 L. ed. 283, 16 Sup. Ct. Rep. 174.

The simple and single question presented by this record, then, in the light of the foregoing authorities, is, What was the decision obligatory upon the United States court below, and this court, after these fires had taken place, and prior to the decision of the case arising out of one of them, in *Gorrell* v. *Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720? Certainly there could have been none other than that this defendant water company was not liable for losses caused by these fires, either in contract or in tort. If this be true, *Gorrell* v. *Greensboro Water Supply Co.* and *Fisher* v. *Greensboro Water Supply Co.* 128 N. C. 375, 38 S. E. 912, decided after the rights of all parties had accrued, cannot change the law of the United States courts.

Lake Shore & M. S. R. Co. v. *Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 92, 37 L. ed. 93, 13 Sup. Ct. Rep. 267.

Even if this were a judgment for a tort committed by the Greensboro Water Supply Company, there is nothing for such judgments to operate upon, except such title as the Greensboro Water Supply Company received when the property was sold to it, subject to the lien of the Guarantee Trust & Safe Deposit Company, the first mortgagee herein mentioned.

Julian v. *Central Trust Co.* 53 C. C. A. 438, 115 Fed. 956, 193 U. S. 103–109, 48 L. ed. 635–638, 24 Sup. Ct. Rep. 399.

A question as to the liability of a railway company, determined in a suit to which the company was a party, is not *res judicata* against a mortgage bondholder of the company, when no one claiming under the mortgage was a party.

Bancroft v. *Wicomico County*, 121 Fed. 875, Affirmed in 135 Fed. 977.

The doctrine of the United States courts, and of all the state courts, with one exception, and of the English courts, in respect to the causes of action asserted by these interveners, the respondents here, against the defendant, the Greensboro Water Company, supplying water under ordinance or contract to the city, is that such company is not liable, for its failure to furnish an adequate and proper supply to a citizen not having a direct contract with the company itself, for damage to his property, whether the suit be founded on contract or tort.

Boston Safe Deposit & T. Co. v. *Salem Water Co.* 94 Fed. 240; *Atkinson* v. *New Castle Waterworks Co.* L. R. 2 Exch. Div. 445; *Davis* v. *Clinton Waterworks Co.* 54 Iowa, 60, 37 Am. Rep. 185, 6 N. W. 126; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 651, 29 L. ed. 517, 6 Sup. Ct. Rep. 252; *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Becker* v. *Keokuk Waterworks Co.* 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Britton* v. *Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; *Hayes* v. *Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Nickerson* v. *Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Eaton* v. *Fairbury Waterworks Co.* 37 Neb. 546, 21 L.R.A. 653, 40 Am. St. Rep. 510, 56 N. W. 201; *Beck* v. *Kittanning Waterworks Co.* 8 Sadler (Pa.) 237, 11 Atl. 300; *Stone* v. *Uniontown Water Co.* 4 Pa. Dist. R. 431; *Phœnix Ins. Co.* v. *Trenton Water Co.* 42 Mo. App. 118; *Howsmon* v. *Trenton Water Co.* 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; *Fitch* v. *Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Foster* v. *Lookout Water Co.* 3 Lea, 42; *Ferris* v. *Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Fowler* v. *Athens City Waterworks Co.* 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Mott* v. *Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L.R.A. 375, 30 Am. St. Rep. 267, 28 Pac. 989; *Bush* v. *Artesian Hot & Cold Water Co.* 4 Idaho, 618, 95 Am. St. Rep. 161, 43 Pac. 69; *Wainwright* v. *Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987; *House* v. *Houston Waterworks Co.* 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; *Akron*

Waterworks Co. v. *Brownless*, 10 Ohio C. C. 620; *Wheeler* v. *Cincinnati*, 19 Ohio, 19, 2 Am. Rep. 368; *Tainter* v. *Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Vanhorn* v. *Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *Howard* v. *San Francisco*, 51 Cal. 52; *Black* v. *Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Mendel* v. *Wheeling*, 28 W. Va. 262, 57 Am. Rep. 664; 2 Dill. Mun. Corp. 4th ed. ¶ 976, note; *Allen & C. Mfg. Co.* v. *Shreveport Waterworks Co.* 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 525, 37 So. 980; *Blunk* v. *Dennison Water Supply Co.* 71 Ohio St. 250, 73 N. E. 210; *Nichol* v. *Huntington Water Co.* 53 W. Va. 348, 44 S. E. 292; *Wilkinson* v. *Light, Heat, & Water Co.* 78 Miss. 401, 28 So. 877.

Torts, and contracts and the breaches thereof, and the distinction between them, and definitions thereof, are certainly part of the system of general jurisprudence of this land, and, as such, must be defined and determined by this court and the United States courts below it, independently of state courts and their changing or novel decisions, the product of their respective local influences. Therefore, the wrongs complained of by the respondents in their causes of action, set out in their judgments upon which they intervene herein, are not wrongs independent of contract, are not wrongs that can be defined as such, without the allegation of the particular stipulations of the contract, and so are not torts, within the generally understood meaning of that word, which is plainly the meaning attached to it in § 1255 of the Code of North Carolina. Nor are the actions maintainable lawfully upon the theory that the wrongs are torts rather than breaches of contract.

Bouvier, Law Dict. *Torts*, 1124; *Atlantic & P. R. Co.* v. *Laird*, 164 U. S. 399, 41 L. ed. 487, 17 Sup. Ct. Rep. 120; *Wright* v. *Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256; *Fowler* v. *Athens City Waterworks Co.* 83 Ga. 222, 20 Am. St. Rep. 313, 9 S. E. 673; *Boston Safe Deposit & T. Co.* v. *Salem Water Co.* 94 Fed. 240; *Hodges* v. *Wilmington & W. R. Co.* 105 N. C. 171, 10 S. E. 917.

This court has itself determined this question, that a water company owes no duty or obligation to the city, citizens, or taxpayers of a community, to furnish water at all, much less of any adequate pressure or quantity, except such as may be imposed upon it by contract lawfully entered into.

Skaneateles Waterworks Co. v. *Skaneateles*, 184 U. S. 362, 46 L. ed. 590, 22 Sup. Ct. Rep. 400.

The case of *Coy* v. *Indianapolis Gas Co.* 146 Ind. 655, 36 L.R.A. 535, 36 N. E. 17, was relied on by respondents below, and seemed to impress the judge of the United States circuit court as showing that such a company owed public duties outside of the contract, the breach of which might be considered a tort. But this same supreme court of Indiana said that a water supply company owes no such duty, and a breach of the ordinance containing the contract between it and the city cannot be made the subject of an action of tort or of any action whatever.

Fitch v. *Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982.

Unless the breach of the terms of the contract is also the breach of a legal duty independent of the contract, it cannot be a tort, whatever be the form of the action employed. The legal duty must be a duty imposed by law, either common or statutory.

Cooley, Torts, 2d ed. 104; Addison, Torts, 6th ed. pt. 1, § 14, p. 20; 1 Jaggard, Torts, p. 6, note 15; 1 Chitty, Pl. 16th Am. ed. p. 152; *Langford* v. *United States*, 101 U. S. 346, 25 L. ed. 1012; *Gibbons* v. *United States*, 8 Wall. 276, 19 L. ed. 454; *McCahan* v. *Hirst*, 7 Watts, 178.

The judgment against a company in the position of the new company could not be used to disturb the property of the grantee of the old company, and, if the tort be looked upon as the commission of the old company, and a judgment obtained against the old company, no execution could be issued thereon against the new company, which had received the property prior to the happening of the so-called tort.

Fidelity Ins. Trust & S. D. Co. v. *Norfolk & W. R. Co.* 90 Fed. 175; *Julian* v. *Central Trust Co.* 115 Fed. 957, Affirmed in 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399.

Mr. **Aubrey L. Brooks** argued the cause and filed a brief for respondents:

The judgments here presented are not only decisive of the matters about which they purport to speak, but have the sanction and approval of the highest court of the state of North Carolina, and, as such, are entitled to full faith and credit when presented to the United States court for payment.

Mills v. *Duryee*, 7 Cranch, 484, 3 L. ed. 413; *Hampton* v. *McConnel*, 3 Wheat. 234, 4 L. ed. 378; *Crapo* v. *Kelly*, 16 Wall. 610, 21 L. ed. 430; *Christmas* v. *Russell*, 5 Wall. 302, 18 L. ed. 478; *Hanley* v. *Donoghue*, 110 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *M'Elmoyle* v. *Cohen*, 13 Pet. 312–324, 10 L. ed. 177–183; *Thompson* v. *Whitman*, 18 Wall. 457, 21 L. ed. 897; *Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Bryar* v. *Campbell*, 177 U. S. 649, 44 L. ed. 926, 20 Sup. Ct. Rep. 794; *Harris* v. *Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625; *Mayhew* v. *Thatcher*, 6 Wheat. 129, 5 L. ed. 223; *Bank of State of Alabama*

v. *Dalton*, 9 How. 528, 13 L. ed. 244; *Public Works* v. *Columbia College*, 17 Wall. 521, 21 L. ed. 687; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; *Kansas City, Ft. S. & M. R. Co.* v. *Morgan*, 21 C. C. A. 478, note, 47 U. S. App. 1, 76 Fed. 429; *Central Trust Co.* v. *Charlotte, C. & A. R. Co.* 65 Fed. 257; *Huntington* v. *Attrill*, 146 U. S. 685, 686, 36 L. ed. 1134, 13 Sup. Ct. Rep. 224.

When a new form is given to an old corporation, or the same is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same incorporators, in the same territory, it will be presumed or held to be a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and is not, in law and in effect, a new and distinct creation of corporate capacity or liability.

Broughton v. *Pensacola*, 93 U. S. 266, 269, 23 L. ed. 896, 897.

The effect of merger or reorganization was to create a novation so far as the creditors of the old company were concerned, and to substitute the new one as debtor for it.

2 Cook, Stock & Stockholders, § 669, note 3; 1 Spelling, Corp. § 93; *Friedenwald Co.* v. *Asheville Tobacco Works*, 117 N. C. 544, 23 S. E. 490.

The purpose of the legislature was, by this enactment, to afford protection for judgments of the nature and class herein contended for.

Pocahontas Coal Co. v. *Henderson Electric Light & P. Co.* 118 N. C. 236, 24 S. E. 22; Potter's Dwarr. Stat. p. 128.

Upon foreclosure of a railroad mortgage, a judgment for personal injury will take precedence over the mortgage in the distribution of the proceeds of sale.

Finance Co. v. *Charleston, C. & C. R. Co.* 61 Fed. 369.

When sale under execution, or otherwise, is made of mortgaged property, the property still remains subject to the old mortgage in the hands of the new debtor, and, if the beneficiary in the old mortgage dislikes his new debtor, he has ample redress, to wit, foreclosure; but, if he prefers to continue the indebtedness with the new debtor, he must bear whatever burden the law imposes upon the property.

Providence Inst. for Savings v. *Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612; *Wilmington & W. R. Co.* v. *Burnett*, 123 N. C. 214, 31 S. E. 602; *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 634, 24 L. ed. 861; *Connecticut Mut. L. Ins. Co.* v. *Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 300, 33 L. ed. 907, 10 Sup. Ct. Rep. 546.

The rights of tort judgment creditors to the protection given by the North Carolina statute have been frequently passed upon by the supreme court of that state in recent decisions, and in every instance the statute has been upheld and the relief therein afforded granted.

Pocahontas Coal Co. v. *Henderson Electric Light & P. Co. supra; Langston* v. *Greenville Land & Improv. Co.* 120 N. C. 132, 26 S. E. 644; *Wilmington & W. R. Co.* v. *Burnett, supra.*

No agreement made by the bondholders, whereby property is undertaken to be removed from the operation of the statute, is valid in law.

East Tennessee, V. & G. R. Co. v. *Frazier*, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; *Howe* v. *Harper*, 127 N. C. 356, 37 S. E. 505.

Any contract or understanding made or had by and between the bondholders of the Greensboro Water Company and the Greensboro Water Supply Company, or with the Guardian Trust & Safe Deposit Company, whereby the statutory effect of the intervener's judgments would be impaired by the lessening of the legal means of their enforcement, would be invalid, inasmuch as it would impair the obligation of the contract, and such an arrangement would be void in law.

Wolff v. *New Orleans* (*United States ex rel. Wolff* v. *New Orleans*) 103 U. S. 358, 367, 26 L. ed. 395, 399; Cooley, Const. Lim. 4th ed. 241; Angell & A. Priv. Corp. 7th ed. §§ 332, 333; *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 528–534, 25 L. ed. 699, 702–704; *Swain* v. *Seamens*, 9 Wall. 274, 19 L. ed. 560.

The bondholders having participated in the reorganization of the old Greensboro Water Company and merged it into a corporation known as the Greensboro Water Supply Company, and having agreed to the mortgage of July 1st, 1896 (wherein provision is made for the payment of the interest on said bonds), the mortgage of July 1st, 1896, is, in contemplation of law, a new mortgage and a waiver of the mortgage of May 10, 1888.

Cook, Corp. Law, 3d ed. § 793.

In jurisdictions where all forms of action have been abolished the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right.

Keener, Quasi Contracts, 160.

The defendant water company is a quasi public corporation, subject to the same rules of law as railroad, telegraph, and gas companies, and likewise liable to the

public in the same manner to perform all duties imposed by the law upon such corporations.

Griffin v. *Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319.

Failure to do so is a breach of duty and at the same time a violation of the contract, for which it can be sued in tort or contract.

Young v. *Western U. Teleg. Co.* 107 N. C. 384, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; Chitty, Pl. 11th Am. ed. 133, 383; *Robinson* v. *Threadgill*, 35 N. C. (13 Ired. L.) 41; *Williamson* v. *Dickens*, 27 N. C. (5 Ired. L.) 260; *Bond* v. *Hilton*, 44 N. C. (Busbee, L.) 308, 59 Am. Dec. 552; *Solomon* v. *Bates*, 118 N. C. 315, 54 Am. St. Rep. 725, 24 S. E. 478; *Fisher* v. *Greensboro Water Supply Co.* 128 N. C. 375, 38 S. E. 912; *Atlantic & P. R. Co.* v. *Laird*, 164 U. S. 399, 41 L. ed. 487, 17 Sup. Ct. Rep. 120.

The water company clearly owed a duty, independent of the contract, to perform the obligations which, by its charter and franchise, it had undertaken to do.

Walla Walla v. *Walla Walla Water Co.* 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Dill. Mun. Corp. 3d ed. § 691; *Haugen* v. *Albina Light & Water Co.* 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244.

The complaints filed in the respondents' suits in the state courts allege facts sufficient to sustain an action in tort, even independent of the contract.

Addison, Torts, Wood's ed. §§ 27, 28, 1288; Webb's Pollock, Torts, 20, 69, 70; Bigelow, Torts, p. 11; *Coy* v. *Indianapolis Gas Co.* 146 Ind. 655, 36 L.R.A. 535, 46 N. E. 17; 2 Addison, Contr. 1119; *Cincinnati, H. & I. R. Co.* v. *Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911.

Mr. Justice **Brewer** delivered the opinion of the court:

It is contended that neither the plaintiff in the pending suit nor the bondholders whom it represents were parties or privies to the actions in the state court; that therefore the judgments of the latter court were not conclusive in the foreclosure proceeding as to the nature of the causes of action; that whether they were for torts or breaches of contracts is for the determination of the Federal court, and further, that when the property passed from the old to the new water company, it passed subject to the fifty-thousand dollar mortgage, and that under this statute, if applicable at all, only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence. On the other hand, it is contended that the statute deals with judgments,—not claims for damages caused by negligence; that the decision of the state court as to the nature of the cause of action is as much a part of the judgment as the determination of the amount to be recovered; that a judgment which in terms is for damages caused by negligence, if entered by a court having jurisdiction, is made by the statute superior to any mortgage; that, by the mortgage, the mortgagee and the bondholders it represents agree to accept such judgment as conclusive, and to subordinate their mortgage to its lien; that to hold that the transfer of property encumbered by a mortgage from one company to another puts that mortgage outside the statute practically destroys its beneficial intent; that such has been the holding of the supreme court of the state, and is a holding which the Federal courts will follow.

*We shall assume, without deciding, that [65] the nature of the causes of action upon which the state judgments were rendered is open for consideration in the Federal court in the foreclosure proceeding. The statute subordinates the mortgage to judgments for torts. Now, what is the judgment? It is a determination that, upon the facts stated, the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that, upon those facts, the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or, if not conclusive, at least prima facie evidence. In this foreclosure proceeding the record of the proceedings in the state courts was introduced in evidence. Taking the *Fisher Case*, for illustration, the complaint set out fully the contract made between the city of Greensboro and the water company, and the proceedings by which the title to the property passed from the one company to the other; alleged the destruction by fire of the plaintiff's property, and that he was free from all negligence in the matter. It added:

"The plaintiff alleges, . . . that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the city of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations, and responsibilities which it assumed when it undertook to supply water to the city of Greensboro and its inhabitants for a stipu-

lated price, which was paid to it by the said city."

It then set forth as matters of negligence on the part of the water company the "carelessly, wilfully, and negligently failing to keep a sufficient quantity of water in its storage water tank in the said city of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied;" also a fail-
[66] ure "to keep its pumping engine *ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned;" and closed with this averment: "That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor."

The answer consisted mainly of denials in separate paragraphs of the averments in corresponding paragraphs of the complaint, specifically denying the validity of the contracts between the city and the original water company. Questions were submitted to the jury and answers returned, establishing the making of the contracts, the attempt on the part of the company to perform its stipulations, its failure to do so successfully, and also that the plaintiff was injured by the negligence of the defendant.

Upon this record the supreme court of North Carolina ruled that the action was one in tort, saying:

"We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff *so declared*. He stated the facts out of which the legal obligation arose, fully, and also the obligation itself, and the breach of it, and the damage resulting from that
[67] breach. 1 Chitty, Pl. 155; *5 Thomp. Corp. § 6340." 128 N. C. 375, 379, 38 S. E. 912.

From the conclusion thus reached we are not inclined to dissent, and for these reasons: One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested, and for negligence in which he is liable in damages to such other parties. A company is chartered to construct and operate a railroad. Proceeding thereunder it constructs and operates its road. Nothing may be said in the charter in reference to the manner in which the road shall be operated or the particular acts which it must do. Yet, without any such specification, it is under an implied obligation to exercise reasonable care in both construction and operation. If, from undue speed, failure to give proper warnings, or other like acts or omissions, individuals are injured, they may recover for such injuries, and their actions to recover sound in tort. Doubtless in the same transaction there may be negligence and breach of contract. If a railroad company contracts to carry a passenger, there is an implied obligation that he will be carried with reasonable care for his safety. A failure to exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence,—an action sounding in tort. But where there is no contract, and the injuries result from a failure of the corporation to exercise reasonable care in the discharge of the duties of its public calling, actions to recover therefor are strictly and solely actions *ex delicto*. Pollock, in his treatise, groups torts into three classes, in the last of which he specifies "breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings." Webb's Pollock, Torts, p. 7. This, it is said, implies the existence of some absolute duty not arising from personal contract with the other party to the action.

*And here we are met with the contention [68]
that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover dam-

ages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. "The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby." *Osborne* v. *Morgan*, 130 Mass. 102, 104, 39 Am. Rep. 437. See also *Emmons* v. *Alvord*, 177 Mass. 466, 470, 59 [69] N. E. 126. An individual may be *under no obligation to do a particular thing, and his failure to act creates no liability; but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation, in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment, he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. Holmes, Common Law, p. 278. Even if the water company was under no contract obligations to construct waterworks in the city or to supply the citizens with water, yet, having undertaken to do so, it comes under an implied obligation to use reasonable care; and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort, and not for breach of contract.

With reference to the contention that only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence,—a contention which, if sustained, would result in giving priority to the fifty-thousand dollar mortgage,—the argument is that by the statute "mortgages of incorporate companies . . . shall not have power to exempt the property or earnings of such incorporations . . . for torts committed by such incorporation;" that the torts were committed by the second water company; that its purchase was of the property of the first company, subject to the fifty-thousand dollar mortgage, and therefore over that property thus encumbered, and that only, were the judgments given priority. There is, doubtless, force in this contention. But this is not a penal statute, to be construed strictly, but remedial in its nature, and to be construed liberally, to carry into effect the intention of the legislature and provide the adequate remedy which it intended. *The [70] obvious purpose was to make the corporate property situate in the state security against torts committed by its owner, and it would materially impair, if not wholly destroy, the statute, and thus set at naught that purpose, if the corporation constructing the plant could place a mortgage thereon for its entire value, and then, by sale, to a new corporation, enable the purchaser to use that property discharged of all substantial responsibility. In reference to a kindred question arising under the same statute, the supreme court of North Carolina said in *Wilmington & W. R. Co.* v. *Burnett*, 123 N. C. 210, 214, 31 S. E. 602, that under such construction "this statute would be a false light held out to such claimants to induce them to furnish material and labor,—thinking they had a security, when in fact they had none."

It is more reasonable to hold that the statute imposes upon the investment made by a corporate company in its plant a responsibility for torts committed by it or any subsequent corporate owner, and that that responsibility cannot be avoided by any mortgage or other encumbrance voluntarily placed upon the property. Security to the individual citizen is to go hand in hand with the franchise and privilege granted by the state. We see no other question requiring notice, and *the decree of the Circuit Court is affirmed.*

Mr. Justice **White**, Mr. Justice **Peckham**, and Mr. Justice **McKenna** dissented.

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*C. E. HOWARD, *Appt.*, [71]

v.

E. B. PERRIN.

(See S. C. Reporter's ed. 71-75.)

1. Evidence—documentary—public records.—A certified copy of the records of the

General Land Office, including the certificate of local land officers that, on the records of their office, there were no homestead, pre-emption, or other valid claims to certain lands within the place limits of the grant to the Atlantic & Pacific Railroad Company, made by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278), and that the land had not been returned or denominated as swamp or mineral land,—is competent evidence, under U. S. Rev. Stat. § 891, U. S. Comp. Stat. 1901, p. 672, on the question of the title of one claiming as grantee from the railroad company.

2. **Public lands—railroad land grants—selection or approval.**— The title to land within the place limits of the grant to the Atlantic & Pacific Railroad Company, made by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278), passed on the completion of the road, without any selection or approval by the Secretary of the Interior, unless the land was within the excepted classes.

3. **Limitation of actions—adverse possession.**—The two years limitation prescribed by Ariz. Rev. Stat. 1887, ¶ 2301, reenacted as Ariz. Rev. Stat. 1901, ¶ 2941, for suits to recover real property from one claiming by possession only, in which defendant is not required to show title or color of title as against plaintiff who shows no better right, is not applicable to an action by one claiming the title as grantee of the railroad company to land within the place limits of the grant made by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad Company.

4. **Waters—appropriation—percolating waters.**—Percolating water, oozing through the soil beneath the surface in an undefined and unknown channel, is not within the provisions of Ariz. Rev. Stat. 1887, ¶¶ 3199, § 1, 3201, § 3, for the appropriation of water from rivers, creeks, or streams of running water.

[No. 110.]

Submitted December 6, 1905. Decided January 2, 1906.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment affirming a judgment of the District Court of Coconino County, in that territory, in favor of plaintiff in an action to recover possession of real property. *Affirmed.*

See same case below (Ariz.), 76 Pac. 460.

Statement by Mr. Justice **Brewer:**

This action was commenced on July 13, 1898, in the district court of Coconino county, Arizona, to recover possession of a quarter section of land, together with damages for its detention. The defendant, in addition to the denials in his answer of plaintiff's title, filed a cross complaint, praying a decree in his favor on account of certain alleged water rights. A trial resulted in a judgment for plaintiff, which was affirmed by the supreme court of the territory, to review which judgment this appeal was taken. A statement of facts was prepared by the supreme court, which statement was in substance that the land was within the place limits and a part of the land granted to the Atlantic & Pacific Railroad Company by act of Congress, approved July 27, 1866 (14 Stat. at L. 292, chap. 278); that the grant was accepted by the company, a map of definite location duly filed *and approved, and the railroad completed [72] and accepted in the year 1884; that in April, 1894, the lands along this part of the road were surveyed and this tract found to be the northwest ¼ of section 15, township 25 north, range 3 west, of Gila and Salt river meridian; that the survey was accepted and approved by the Surveyor General, and also by the Commissioner of the General Land Office; that on June 27, 1896, this tract, together with others, was duly and regularly selected by the railroad company as a portion of the lands to which it was entitled under the act of Congress; that on July 27, 1896, the filing of the list of such selections was allowed by the register and receiver of the United States land office at Prescott, Arizona, by them approved, the land certified to be public lands of the United States within the place limits of the grant, and free from all other claims; that thereupon such list so certified was forwarded to the Land Department at Washington, and has since remained on file in that office; that the cost of the survey and all fees allowed by law had been paid; that the land is nonmineral in character, neither swamp land nor claimed as such, nor within any reservation, and that there is no valid claim against it on file or of record in the land office of the district in which it is situated; and that on January 13, 1897, the railroad company conveyed the land to the plaintiff. The statement of fact further shows that the only water upon the land is percolating water, oozing through the soil beneath the surface, in an undefined and unknown channel; that in 1889 the defendant's grantor entered upon the land, then unoccupied and unsurveyed, sank a well, and by running tunnels therefrom collected water in an arroyo, and conveyed the same by pipes to troughs and a reservoir for watering stock; that in 1892 the defendant's grantor conveyed the

NOTE.—*On land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On rights in subterranean waters—see note to Southern P. R. Co. v. Dufour, 19 L.R.A. 92.

On correlative rights in percolating waters—see note to Katz v. Walkinshaw, 64 L.R.A. 236.

land to him by quitclaim deed, and that on July 16, 1895, he posted on the dwelling house on the premises a notice in accordance with the territorial act of 1886 (Arizona Laws, 1893, p. 135), that he had appropriated all the water in a certain defined underground channel, and recorded a copy of such notice in the public records;
[73] that the *defendant and his grantor had been in the exclusive, open, and notorious possession, with the knowledge of plaintiff, of the land, improvements, and water ever since the year 1889, claiming by right of possession only; that they had never diverted any water from the land, or used, or caused the same to be used, elsewhere by any person.

Mr. **Everett E. Ellinwood** submitted the cause for appellant:

It was not the intention of Congress to admit incompetent evidence under guise of a certificate.

United States v. *Jones*, 8 Pet. 395, 8 L. ed. 986; *United States* v. *Forsythe*, 6 McLean, 584, Fed. Cas. No. 15,133; *United States* v. *Buford*, 3 Pet. 12, 7 L. ed. 585; *Hoyt* v. *United States*, 10 How. 109, 13 L. ed. 348; *Bruce* v. *United States*, 17 How. 437, 15 L. ed. 129; *United States* v. *Case*, 49 Fed. 270.

The burden was on the plaintiff to show, not only that the land was within the general limits of the grant, but also that it was not a portion of lands excepted from the grant.

Corinne Mill Canal & Stock Co. v. *Johnson*, 156 U. S. 574, 39 L. ed. 537, 15 Sup. Ct. Rep. 409.

Whether the Atlantic & Pacific Railroad Company was entitled to the land in question—that is, whether it was of the character of lands granted—is a question that can only be determined by the Land Department.

Steel v. *St. Louis Smelting & Ref. Co.* 106 U. S. 450, 27 L. ed. 227, 13 Sup. Ct. Rep. 389; *Heath* v. *Wallace*, 138 U. S. 573, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692.

It in no way appears in the record that the Secretary of the Interior, or the Commissioner of the General Land Office has ever approved the selection, or decided that the lands were of the character granted, or come to any conclusion in regard to it.

The fact that the railroad company duly listed said lands, and that the register and receiver allowed and approved the filing thereof, and certified the same to the Commissioner of the General Land Office, cannot give appellee equitable title.

Barden v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The courts will take judicial notice of the rules and regulations made by that department.

Caha v. *United States*, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513.

The words "suits to recover possession" have a known legal meaning, and it must be assumed that the expression is used in its legal sense.

Hamilton v. *Rathbone*, 175 U. S. 421, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; *Gardner* v. *Collins*, 2 Pet. 93, 7 L. ed. 359.

The supreme court of California, in *Katz* v. *Walkinshaw*, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, laid down the doctrine that, since the common-law rule that an owner of land was the absolute owner of percolating waters beneath the surface of his land could not be equitably applied to the state of California by reason of its peculiar physical conditions, such rule was not adopted in such state as a part of the English common law.

The natural and physical conditions of the territory of Arizona, and the necessities of its people, being distinctly and in every particular similar to those of California, of which the court will undoubtedly take judicial notice, it follows that the reasoning of the court in the case of *Katz* v. *Walkinshaw* may be applied with almost binding force to the facts of the case at bar.

Mr. **Edward M. Doe** submitted the cause for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The statement of facts discloses a title in the plaintiff (now appellee) sufficient to sustain the judgment for the recovery of possession, although no patent had been issued. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

The certified copy of the records and papers in the General Land Office was competent evidence. Rev. Stat. § 891, U. S. Comp. Stat. 1901, p. 672. This section determines the question of competency, but not of materiality. Some of the letters, between the officials of the railroad company may not have been material, but there was nothing in them prejudicial. The certificate of the local land officers was competent to show that on the records of their office were no homestead, pre-emption, or other valid claims, and that the land had not been returned or denominated as swamp or mineral land. It is true there was no positive evidence that there were no minerals in the land, and, of course, nothing to show affirmatively that a mine might not be discovered prior to the issue of the patent, but

the same could have been said of the showing in *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158. While the question of mineral was not discussed at that time, and was first fully considered in *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, it appears from the opinion of the majority in the latter case that there [74] was no intention to disturb the former *ruling. Neither is there anything in *Corinne Mill, Canal, & Stock Co.* v. *Johnson*, 156 U. S. 574, 39 L. ed. 537, 15 Sup. Ct. Rep. 409, to the contrary. In that case a judgment of the supreme court of Utah against a grantee of the railroad company was affirmed, but it was affirmed on the ground that the record did not purport to contain all the evidence, and, under those circumstances, we could not assume that there was not evidence to fully sustain the judgment of the territorial court, or that it was not in fact based upon an adjudication by the Land Department of the presence of mineral.

It must also be noticed that this land was within the place limits of the Atlantic & Pacific Company, and that, therefore, on the completion of the road, and without any selection or approval thereof by the Secretary of the Interior, the title passed unless the tract was within the excepted classes, and there was no testimony tending to show that it was. On the contrary, the testimony pointed in the other direction.

It is further claimed by appellant that he was protected by a statute of limitations of the territory, paragraph 2301, Arizona Rev. Stat. 1887, re-enacted as ¶ 2941, Arizona Rev. Stat. 1901, which reads:

"(2941) Sec. 7. In all cases when the party in possession claims real property by right of possession only, suits to recover the possession from him shall be brought in two years after the right of action accrues, and not afterwards, and in such case the defendant is not required to show title or color of title from and under the sovereignty of the soil, as provided in the preceding section, as against the plaintiff who shows no better right."

But this applies only in cases of mere possessory rights, and is without force after the passing of the full legal or equitable title from the government. Such was the construction placed on the statute by the supreme court of Arizona, and is undoubtedly correct. The language is clear. The claim of the defendant is a "right of possession only," and the limitation applies solely against a "plaintiff who shows no better right." To hold that the section [75] gives to a mere occupation of public *land a title by prescription against one subsequently acquired from the United States would limit the full control of the government over its landed property, and qualify or destroy the effect of its patent or grant. *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166, does not conflict with this, for there a possession sufficient for the running of the statute of limitations was held after the full equitable title had passed from the government; and when such title has passed the land comes under the dominion of the state, and is subject to its laws. But in this case the possession had not been long enough to create under the Arizona laws a defense to a title, legal or equitable; and the sole reliance was upon this section, which only applies to contests between possessory rights.

The remaining question arises under the cross complaint of the appellant, who claims a prior appropriation of all the water flowing in a subterranean stream which had been reached by digging a well, relying on these provisions of the Arizona Revised Statutes of 1887:

"(3199) Sec. 1. All rivers, creeks, and streams of running water in the territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided."

"(3201) Sec. 3. All the inhabitants of this territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water."

We need not stop to inquire whether these sections apply to subterranean streams, because the finding of fact, which is sustained by the testimony, is "that the only water upon said land is percolating water, oozing through the soil beneath the surface in an undefined and unknown channel." Of course this excludes the idea of a "river, creek, or stream of running water."

We see no error in the record, and *the judgment of the Supreme Court of Arizona is affirmed.*

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*FRED H. KOLZE, Administrator, etc., *et al.*, *Appts.* [76]

v.

CHARLOTTE E. HOADLEY.

(See S. C. Reporter's ed. 76–86.)

Courts—jurisdiction of Federal circuit court—suits by assignees.—The relief sought by way of foreclosure of certain trust

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NOTE.—*As to diverse citizenship as ground of Federal jurisdiction*—see notes to Shipp v. Williams, 10 C. C. A. 247; Mason v. Dullagham,

deeds stamps the suit as one to recover the contents of a chose in action, which can only be maintained in the Federal circuit court under the act of August 13, 1888 (25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, where the assignor could have sued in that court if no assignment had been made, although the bill also prays for a cancelation of a release of the trust deeds to the grantor, as in fraud of the rights of the complainant, who held the deeds and the notes secured thereby as collateral security for a loan to the trustee.

[No. 91.]

Submitted December 5, 1905. Decided January 2, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree of foreclosure. *Reversed* and remanded with instructions to dismiss the bill for want of jurisdiction.

Statement by Mr. Justice **Brown:**

This was an appeal from a decree of the circuit court in favor of the plaintiff, Charlotte E. Hoadley, a citizen of Massachusetts, against Abraham L. Day and other defendants, among whom were Fred H. Kolze, administrator of the estate of Friederich Kolze, deceased, Lina Kolze, his widow, Louisa Kolze, his daughter, and Charles E. Stade, trustee, all citizens of Illinois, foreclosing three trust deeds given
[77] by Day to secure *promissory notes in the aggregate amount of $5,400. The appeal was granted solely upon the question of jurisdiction.

The point involved requires a statement of facts at some length. They are substantially as follows:

Friederich Kolze sold and conveyed certain real estate to Day by warranty deed dated and acknowledged November 15, 1897, for a stated consideration of $45,000,—namely, $1,000 in cash and the remainder in notes secured by trust deeds. To secure such notes, Day executed three trust deeds to one Stade as trustee, conveying the real estate in question, which were dated November 17, and acknowledged and recorded November 24, 1897. Kolze thereupon intrusted the notes and trust deeds to Stade, a nephew, in whom he seemed to have great confidence, the notes being executed by Day to his own order, and by him indorsed in blank.

On February 17, 1898, Stade took the notes and trust deeds securing the same, and pledged them to Charlotte E. Hoadley as collateral security to his own notes, upon which Hoadley then advanced, or secured to be advanced, a large sum of money.

By deed dated and acknowledged November 23, 1897, but not delivered or recorded until June 30, 1898, Day reconveyed the premises to Kolze, and by deed of release, dated and acknowledged October 27, 1898, and recorded October 29, 1898, Stade, as trustee, fraudulently released said three trust deeds to Kolze, reciting a consideration of $1 and other valuable considerations, and further reciting that the notes secured thereby had been canceled.

By deed dated October 29, 1898, Kolze, now deceased, and the appellant Lina Kolze, his wife, conveyed said premises to Louisa Kolze, their daughter, upon an expressed consideration of $12,000, although the grantee was not a bona fide purchaser, and said conveyance was made to her to hold for the benefit of the family.

For the ostensible purpose of securing the payment of the purchase money, said Louisa Kolze executed a trust deed to *secure her promissory note of $10,000, to [78] Percy V. Castle, as trustee. This deed was dated October 27, 1898, acknowledged October 28, 1898, and recorded October 29, 1898, the appellant Fred H. Kolze, as administrator of the estate of his father, being the owner of said notes and trust deeds, subject, as was alleged, to the rights of the plaintiff, Hoadley.

Subsequently, on or about April 21, 1899, the notes and trust deeds of Day, upon default by Stade in the payment of his note, were sold in accordance with the terms of the collateral note, and were bought in by, and became the property of, the appellee, Hoadley.

The bill prayed that the release deed executed by Stade to Friederich Kolze be declared fraudulent and void as against the notes and trust deeds executed by Day and now owned by the plaintiff; that the rights of all the defendants be declared subject to those of the plaintiff under the notes and deeds held by her; that a receiver be appointed and an account had, and the defendants be decreed to pay whatever was due under the notes and trust deeds, and, in default thereof, that the premises be sold and the defendants be held liable for any deficiency upon such sale, and that

27 C. C. A. 296; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; and M'Donald v. Smalley, 7 L. ed. U. S. 287.

On Federal jurisdiction of suits by assignee of chose in action—see notes to Goldsmith v. Holmes, 1 L.R.A. 817; Republic Iron Min. Co. v. Jones, 2 L.R.A. 746; and American Freehold Land & Mortg. Co. v. Thomas, 12 L. R. A. 681.

they all be foreclosed of their right of redemption.

The defendants moved to dismiss the amended bill for want of a proper allegation of diversity of citizenship, which was overruled; and thereupon defendants interposed a plea to the jurisdiction upon the ground that the defendants were all citizens of the state of Illinois; that the suit was brought by plaintiff as the assignee of one William P. Smith, to whom the notes had been hypothecated by Stade to secure his (Stade's) note, and also to secure Smith for the faithful performance by Stade of a certain contract of employment; that upon the failure of Stade to pay his note and carry out his contract, said mortgage notes and trust deeds signed by Day were sold on or about April 21, 1899, and were bought in by and became the property of the plaintiff; that Stade and Smith, "the successive assignors" of the appellee, were
[79] citizens of the *state of Illinois, the same state of which Day, the maker of the notes, was also a resident, and that by reason of the fact that said suit could not have been prosecuted in a Federal court if no transfer or assignment had been made, the circuit court had no jurisdiction of the case.

This plea was held to be insufficient, and the defendants, failing to answer, were defaulted, and a decree thereafter entered to the effect that Stade, as trustee, had fraudulently released the trust deeds; that the trust deeds were valid as liens upon the premises; that the rights of Louisa Kolze, subsequent grantee under the warranty deed, as well as the deed of Kolze, were subject and subsequent to the rights of the plaintiff as the owner of the notes and deeds signed by Day; that the property be sold and the defendants foreclosed of their equity of redemption.

Thereupon defendants appealed to this court solely upon the question of jurisdiction.

Mr. **John T. Richards** submitted the cause for appellants:

The circuit court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees, except over —(1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; (3) suits upon choses in action payable to bearer and made by a corporation.

Newgass v. *New Orleans*, 33 Fed. 196; 1 Foster, Fed. Pr. 3d ed. p. 82; *New Orleans* v. *Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329.

The phrase "suits to recover the contents of a chose in action" includes suits to foreclose mortgages.

Black, Mortg. p. 567, 1 Foster, Fed. Pr. p. 83.

Hence, when the mortgagor and mortgagee are citizens of same state, an assignee of the mortgagee, though a citizen of another state, cannot maintain a bill for foreclosure in the Federal courts.

Black, Mortg. p. 567; *Sheldon* v. *Sill*, 8 How. 441, 12 L. ed. 1147; *Shoecraft* v. *Bloxham*, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. Rep. 686; *Blacklock* v. *Small*, 127 U. S. 96, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096; *Hill* v. *Winne*, 1 Biss. 275, Fed. Cas. No. 6,503.

Where Federal jurisdiction is dependent upon the citizenship of the plaintiff's assignor at the time of the commencement of the suit, the citizenship of the latter must affirmatively appear somewhere in the record.

Robertson v. *Cease*, 97 U. S. 649, 24 L. ed. 1059; *Anderson* v. *Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449; *North American Transp. & T. Co.* v. *Morrison*, 178 U. S. 267, 44 L. ed. 1064, 20 Sup. Ct. Rep. 869.

The defect is ground for a motion to dismiss at any stage of the proceedings.

Florida C. & P. Co. v. *Bell*, 176 U. S. 327, 44 L. ed. 490, 20 Sup. Ct. Rep. 399; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 574, 44 L. ed. 278, 20 Sup. Ct. Rep. 222; *Municipal Invest. Co.* v. *Gardiner*, 62 Fed. 954.

But the court should, of its own motion, dismiss the suit whenever it discovers the defect.

North American Transp. Co. v. *Morrison*, *supra*.

Dismissal may be ordered upon motion of the defendant, or by the court, of its own motion.

Wetmore v. *Rymer*, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 374, 34 L. ed. 363, 368, 10 Sup. Ct. Rep. 1004; *Mexican C. R. Co.* v. *Pinkney*, 149 U. S. 200, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; *Lake County* v. *Dudley*, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. Rep. 398.

The duty to dismiss is peremptory whenever it is properly made to appear that the court has no jurisdiction.

Lake County v. *Dudley*, *supra*; *Morris* v. *Gilmer*, 129 U. S. 315, 325, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; *Anderson* v. *Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

It is the duty of the Supreme Court, on appeal, to see that the jurisdiction of the

circuit court has in no respect been imposed upon.

Morris v. *Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004.

Mr. **Herman W. Stillman** submitted the cause for appellee:

The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal courts. In construing the statute in question, the courts will look to the spirit of the act, and will consider the real relation of the parties; and, if it appears from all the circumstances that the assignment could not have been colorable for the purpose of conferring jurisdiction, then, the reason of the restriction being gone, the jurisdiction of the United States courts will attach.

Holmes v. *Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288; *Farmington* v. *Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Chase* v. *Sheldon Roller-Mills Co.* 56 Fed. 625.

The restriction against suits by assignees of promissory notes or choses in action in United States courts, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made, has reference to diverse citizenship only. No disqualification of the assignor, other than want of diverse citizenship, will prevent suit by the assignee.

Chase v. *Sheldon Roller-Mills Co. supra; Bowden* v. *Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752.

The language of the act, above quoted, implies, in order that the denial of jurisdiction at the suit of an assignee shall apply, that, but for the assignment, a claim would exist on the part of the assignor against the original debtor. When a claim would not exist on the part of the assignor had no assignment been made, the reason of the act will be wanting, and jurisdiction will attach.

Holmes v. *Goldsmith, supra; Wachusett Nat. Bank* v. *Sioux City Stove Works*, 56 Fed. 321; *Chase* v. *Sheldon Roller-Mills Co. supra.*

Jurisdiction depends upon the status of the parties at the commencement of the suit.

Emsheimer v. *New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770.

The circuit court of the United States has jurisdiction of a suit brought by the indorsee of a promissory note against his immediate indorser, whether a suit would lie by the indorser against the mortgagor or not, upon the ground that the indorsee does not claim through an assignment, but upon a new contract between himself and the indorser.

Young v. *Bryan*, 6 Wheat. 146, 5 L. ed. 228; *Superior* v. *Ripley*, 138 U. S. 93, 34 L. ed. 914, 11 Sup. Ct. Rep. 288.

If the presence of Day, an unnecessary party to the foreclosure, prevented the exercise of jurisdiction, which is not conceded, the impediment was removed by his dismissal.

Conolly v. *Taylor*, 2 Pet. 556, 7 L. ed. 518.

Under the circumstances of this case, the principal relief sought was the setting aside of the release deed. Having jurisdiction for that purpose, the court properly retained it for complete relief.

Ober v. *Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Deshler* v. *Dodge*, 16 How. 622, 14 L. ed. 1084.

Mr. Justice **Brown** delivered the opinion of the court:

The sole question presented by the record in this case is whether this is a suit to recover the contents of a chose in action in favor of an assignee, which could not have been prosecuted if no assignment or transfer had been made.

By § 1 of the act of August 13, 1888 [25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508], it is provided that no circuit nor district court shall "have cognizance of any suit . . . to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, . . . unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." This language is taken from the original judiciary act of 1789 [1 Stat. at L. 73, chap. 20, § 11, U. S. Comp. Stat. 1901, p. 508], and has been in force, except for a few years, since the foundation of the government.

In construing this clause the decisions of this court have settled the following propositions:

1. That a suit to recover the *contents* of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. *Sere* v. *Pitot*, 6 Cranch, 332, 3 L. ed. 240; *Deshler* v. *Dodge*, 16 How. 622, 631, 14 L. ed. 1084, 1088; *Bushnell* v. *Kennedy*, 9 Wall. 387, 19 L. ed. 736; *Shoecraft* v. *Bloxham*, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. Rep. 686.

*In *Corbin* v. *Black Hawk County*, 105 U. S. 659, 26 L. ed. 1136, a suit to compel the specific performance of a contract was held to be within the statute, Mr. Justice Blatchford observing (page 665, L. ed. [83]

1138): "The contents of a contract, as a chose in action, in the sense of § 629 (U. S. Comp. Stat. 1901, p. 503), are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents."

2. That a suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill. *Sheldon* v. *Sill*, 8 How. 441, 12 L. ed. 1147; *Blacklock* v. *Small*, 127 U. S. 96, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096.

3. That the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made. *Turner* v. *Bank of North America*, 4 Dall. 8, 1 L. ed. 718; *Mollan* v. *Torrance*, 9 Wheat. 537, 6 L. ed. 154; *Bradley* v. *Rhines* (*Bradley* v. *Hunt*) 8 Wall. 393, 19 L. ed. 467; *Anderson* v. *Watt*, 138 U. S. 694, 702, 34 L. ed. 1078, 1081, 11 Sup. Ct. Rep. 449; *Robertson* v. *Cease*, 97 U. S. 649, 24 L. ed. 1057; *Brock* v. *Northwestern Fuel Co.* 130 U. S. 341, 32 L. ed. 905, 9 Sup. Ct. Rep. 552.

4. That a suit may be maintained between the immediate parties to a promissory note as indorser and indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract. In such case the original contract may be considered to ascertain the amount of the damages. *Young* v. *Bryan*, 6 Wheat. 146, 5 L. ed. 228; *Bank of United States* v. *Moss*, 6 How. 31, 12 L. ed. 331; *Superior* v. *Ripley*, 138 U. S. 93, 34 L. ed. 914, 11 Sup. Ct. Rep. 288; *Mollan* v. *Torrance*, 9 Wheat. 537, 6 L. ed. 154; *Marine & River Phosphate Min. & Mfg. Co.* v. *Bradley*. 105 U. S. 175, 26 L. ed. 1034.

This is primarily a suit to foreclose certain mortgages. Instead of setting up the mortgages, their maturity and nonpayment, and their assignment to plaintiff, leaving to the defendants to plead the release by Stade of October, 1898, as an extinguishment of the mortgages, she has chosen to set forth the entire facts, to attack the [84]release as fraudulent as against *her, and to insist that the original notes and trust deeds are valid in her hands, and to pray for a foreclosure of the same.

The gravamen of the suit and the object to be obtained are unaffected by the form of her bill. The suit is still, in substance, a suit to foreclose the trust deeds, and to remove the release as a cloud upon her title to them.

It may be that an action for fraud might have lain against the parties implicated, regardless of the citizenship of the parties from whom the plaintiff traced her title, or possibly a bill in equity to cancel the release deed of Stade and remove a cloud from the title. But where a bill is filed to foreclose a mortgage, and it appears by the bill itself that the mortgage has been fraudulently released to the mortgagor by a deed of which plaintiff had no notice, and the fraud is a mere incident, the bill is still one to recover the contents of a mortgage, within the meaning of the act, and will not lie in a Federal court unless the plaintiff's assignor might have maintained the bill if no assignment or transfer had been made. It would advantage the plaintiff nothing to obtain a cancelation of the release without also foreclosing the mortgage in the same or a subsequent suit, while a right to foreclose the mortgage could not be established without incidentally avoiding the release.

In this aspect of the case it would seem to me immaterial whether the plaintiff derived her title directly from Stade, to whom she had advanced money and afterwards purchased the notes and trust deeds as alleged in the bill, or through William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor, since both Stade and Smith were citizens of the state of Illinois, and the inhibition of the statute would apply in either case.

The case of *Blacklock* v. *Small*, 127 U. S. 97, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096, is similar, and, we think, practically decisive of the one under consideration. A suit was brought in the circuit court for South Carolina by two daughters of John F. Blacklock, who were citizens of Georgia, against certain defendants, who were citizens of South Carolina. It seems that Blacklock had sold a house and lot in *Charleston to the defendant Small, who had[85] given back a bond and mortgage to secure a portion of the purchase money; that Blacklock subsequently assigned the bond to Alexander Robinson in trust, for his (Blacklock's) children; that Small pretended to pay the bond by making payment to Robinson in Confederate treasury notes; that upon receipt thereof, Robinson satisfied the mortgage and delivered up the bond to Small; that Robinson, in receiving such payment, violated his duty, and was guilty of a breach of trust; that Small, in attempting to pay the debt in illegal currency, with full notice of the trust, had not paid the debt; that the satisfaction of the mortgage was void; that its lien

was still subsisting, and that Small was still liable for the amount due upon the bond. It was held that, as the suit was one against Small, founded upon contract, namely, his bond and mortgage in favor of plaintiffs, who claimed only under the assignment made by their father, John F. Blacklock, to the defendant Robinson, such suit would not lie, inasmuch as plaintiffs' assignor, John F. Blacklock, was a citizen of South Carolina and of the same state as Small. In answer to this it was insisted that the suit should not be considered as one founded upon the contract of Small, but as one for the delivery of the bond and mortgage by Small to the plaintiffs, founded on their wrongful detention, and that the foreclosure and sale of the premises prayed for was merely ancillary and incidental. The contention was held to be unsound, Mr. Justice Blatchford saying that the bill was clearly one for a decree for the amount of the bond and a sale of the mortgaged premises. In other words, the foreclosure and sale were treated as the main objects of the bill, and the breach of trust of Small as a mere incident. The cases of *Deshler* v. *Dodge*, 16 How. 622, 14 L. ed. 1084, and *Bushnell* v. *Kennedy*, 9 Wall. 387, 19 L. ed. 736, were cited and distinguished.

By analogy to *Blacklock* v. *Small*, we think the gravamen of this case must be treated as the foreclosure of the trust deeds in question, and the prayer for a cancelation of the release given by Stade to Friederich Kolze as a mere clearing of the way [86]*to a decree establishing the title of the plaintiff to the notes and trust deeds. As the plaintiff is thus compelled to trace her title through Stade or Smith, who are both citizens of Illinois, and neither of whom could have prosecuted this suit, she is affected by the same incompetency.

The case of *Holmes* v. *Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288, on which the plaintiff relies, is not in point. That was an action by a nonresident against the maker of a note, who had signed it entirely for the benefit of the payee, who was really the party for whose use it was made. The maker and payee were citizens of the same state. The plaintiff, a bona fide holder, had paid full value for it to the payee, who had indorsed it to him. It was held the court had jurisdiction; that evidence showing the real relation of the parties was admissible, and that the jurisdiction of the circuit court "was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers."

The decree of the Circuit Court is therefore reversed, and the case remanded to that court, with instructions to dismiss the bill.

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*GEORGE O. CAMPBELL, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, Heirs-at-Law of Cornelia E. Campbell, Deceased, *Plffs. in Err.*, [87]

v.

STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 87–95.)

1. **Error to state court—questions reviewable—statutory construction.**—The Federal Supreme Court cannot, independently of the Federal questions involved, reverse a judgment of the highest court of a state on the ground that a state statute enacted after the judgment under review was rendered had the effect of depriving the state of the power to enforce such judgment.

2. **Error to state court—Federal question—moot case.**—The enactment by a state of a new inheritance tax law after a decision of the highest court of the state sustaining the previous legislation on that subject as against the contention that it denied the equal protection of the laws guaranteed by U. S. Const., 14th Amend., does not convert such Federal question into a moot question, so as to preclude a review in the Su-

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NOTE.—*As to taxes on succession and collateral inheritances*—see notes to *Re* Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; *Re* Romaine, 12 L.R.A. 401; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

Error to state courts in cases presenting merely abstract or moot questions.

The question relied upon to sustain a writ of error from the Supreme Court of the United States to a state court must not be a merely abstract or moot one. Kimball v. Kimball, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620.

Thus, where the question involved was the impairment of the obligation of a contract by certain assessments for taxation, and it appeared that the taxes had been paid under a compromise agreement, the Supreme Court of the United States refused to entertain jurisdiction. Little v. Bowers, *supra*.

Compliance by a foreign corporation with a judgment of the highest state court ousting it from doing business in the state until it should satisfy the requirements which the state laws exact of foreign corporations precludes any review of such judgment in the Federal Supreme Court, although, in another similar suit pending in the state courts, such judgment is pleaded as decisive of all or some of the issues. American Book Co. v. Kansas,

preme Court of the United States, unless it is obvious that such new legislation relieved the plaintiffs in error from their obligations under the earlier law.

3. Constitutional law—equal protection of the laws—validity of state inheritance tax.—Brothers and sisters of a decedent may be subjected to the burden of the inheritance tax imposed by Cal. Stat. 1893, p. 193, as amended by Cal. Stat. 1899, p. 10, without denying them the equal protection of the laws guaranteed by U. S. Const., 14th Amend., although such legislation does not impose any tax on such strangers to the blood as the wife or widow of a son or the husband of a daughter of the decedent.

[No. 70.]

Argued November 27, 28, 1905. Decided January 2, 1906.

IN ERROR to the Supreme Court of the State of California to review a decree affirming an order of the Superior Court of the City and County of San Francisco, in that state, for the payment of an inheritance tax by brothers and sisters of a decedent. *Affirmed.*

See same case below, 143 Cal. 627, 77 Pac. 674.

The facts are stated in the opinion.

Mr. **Charles H. Garoutte** argued the cause, and, with *Messrs. William N. Goodwin* and *Curtis H. Lindley,* filed a brief for plaintiffs in error:

The basis of classification is blood relationship.

Don Passos, Inheritance Tax Law, p. 5; *Minot* v. *Winthrop,* 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512.

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193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 397.

The assertion that a state statute violates the Federal Constitution presents but a moot question, which confers no jurisdiction on the Supreme Court of the United States to review a judgment of a state court, where, in the case presented, the statute is not so applied as to deny a right claimed under such Constitution. Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

A decision by a state court, which denied the validity of an order for the issue of bonds by an irrigation district, rendered on a petition in a proceeding substantially *ex parte* before issue of the bonds, although a resident of the district appeared in answer and claimed a right under the Federal Constitution, will not sustain a writ of error from the United States Supreme Court, since the adjudication is simply of the right to make a contract, which is a purely moot question, unless the board shall see fit to exercise such right, the proceeding being substantially but one to secure evidence. Tregea v. Modesto Irrig. District, 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

A decision by a state court, which denied the petition of a woman, claiming to be the decedent's widow, for revocation of letters of administration to others and for her own appointment as administratrix on the ground that a divorce in another state from her former husband was void, involves no Federal question which will warrant a review in the Supreme Court of the United States, where the possibility of issuing any letters of administration has been superseded by the probate of a subsequently discovered will. Kimball v. Kimball, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639.

A writ of error to review the judgment of a state court in an action for usurpation of public office, instituted on the relation of persons superseded therein by a legislative act challenged as unconstitutional, will be dismissed where the terms of office of all the parties to the suit, both relators and defendants, have expired. Tennessee v. Condon, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579.

A writ of error to review a judgment of a state court refusing to cancel the revocation of a permit to do business in the state, granted renewable annually to a foreign insurance company, must be dismissed where the permit itself has become of no effect by the lapse of one year since it was granted. Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, *post,* —, 26 Sup. Ct. Rep. 619.

And see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.*

But the fact that there are no resident mortgagees in a particular case does not make the question of discrimination between nonresident and resident mortgagees by a state statute a merely abstract or moot question, so as to preclude a decision against the validity of the statute on writ of error to a state court, if such statute makes a discrimination against nonresident mortgagees with respect to sharing in the distribution of the assets of an insolvent foreign corporation. Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

In considering whether a state statute is repugnant to congressional legislation, the Supreme Court of the United States, on writ of error to a state court, can only consider the state statute in connection with the case before it. It cannot inquire whether, in another case arising upon a different state of facts, the statute may not produce results in conflict with the act of Congress, which the court will be bound to revise and correct. Austin v. Boston, 7 Wall. 694, 19 L. ed. 224.

And see note to State *ex rel.* Hill v. Dockery, 63 L.R.A. 571, on *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts.*

Other notes discussing writs of error to state courts are: *How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States,*—Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33; *What the record must show respecting the Federal question and its decision,*—Hooker v. Los Angeles, 63 L.R.A. 471; *What is the record for this purpose,*—Home for Incurables v. New York, 63 L.R.A. 329; *The practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal,*—Wedding v. Meyler, 66 L.R.A. 833.

It is the presence and recognition of this relationship with its reciprocal demands that obviates the necessity in the legislature of making one great class of all people. And it is for this reason that all persons do not stand alike before the law, and, therefore, constitutional discriminations may be made by dividing them into classes.

Black v. *State*, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283–296, 42 L. ed. 1037–1042, 18 Sup. Ct. Rep. 594.

In many instances the courts may not be able judicially to notice or declare that the classification made is purely arbitrary, and may, therefore, regard the question as a proper one for legislative consideration and determination, and, hence, may not interpose to declare that the legislative discretion has been abused. If, however, the legislature has singled out any class of persons or corporations, and imposed upon them restrictions or penalties from which others are exempt, and there is no reason why the former should be subject to the restriction and the latter not, the statute must be pronounced unconstitutional.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 641; *State* v. *Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Magoun* v. *Illinois Trust & Sav. Bank*, *supra*.

This court always applies the rule of reasonable ground.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150–157, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 225; *Connolly* v. *Union Sewer Piper Co.* 184 U. S. 540–563, 46 L. ed. 679–691, 22 Sup. Ct. Rep. 431; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 92–95, 45 L. ed. 102–105, 21 Sup. Ct. Rep. 43; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96–101, 43 L. ed. 909–911, 19 Sup. Ct. Rep. 609; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557–562, 43 L. ed. 552–554, 19 Sup. Ct. Rep. 281; *Missouri, K & T. R. Co.* v. *May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Especially is this a case where presumptions in favor of the validity of legislative action will not be indulged in to support the constitutionality of the act here involved. These presumptions may be invoked to support the constitutionality of some state legislation, but that principle of law cannot apply here. Of course, such a presumption cannot be invoked in all cases, for, if it could, there would be no constitutional limitation upon legislatures in making classifications.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150–154, 41 L. ed. 666–668, 17 Sup. Ct. Rep. 255; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

No legislature, by adroit legislative classifications, should be allowed to classify persons out of the equal protection of the law. It is the highest duty of this court to condemn all attempts of that kind.

Smyth v. *Ames*, 169 U. S. 466–527, 42 L. ed. 819–842, 18 Sup. Ct. Rep. 418; *Yick Wo* v. *Hopkins*, 118 U. S. 366–369, 30 L. ed. 225, 226, 6 Sup. Ct. Rep. 1064.

The principle of equality in placing the burdens of taxation upon the people is just as applicable here as if this were a law creating a direct property tax.

Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 733.

Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.

Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232–237, 33 L. ed. 892–895, 10 Sup. Ct. Rep. 33.

Inheritance laws must not discriminate between persons.

Magoun v. *Illinois Trust & Sav. Bank*, 170 U. S. 292, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594.

Tested by the law of the country, the act of 1893, as amended in 1899, is a taxation act.

United States v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 301, 42 L. ed. 1045, 18 Sup. Ct. Rep. 594; *Plummer* v. *Colcr*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Dos Passos, Inheritance Tax Law, pp. 5, 37; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Re Campbell*, 143 Cal. 627, 77 Pac. 674; *Eyre* v. *Jacob*, 14 Gratt. 427, 73 Am. Dec. 367; *State* v. *Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76.

There is no vested right in the state to this tax at the death of decedent.

Dos Passos, Inheritance Tax Law, p. 423; Blackwell, Tax Titles, § 1047; 1 Desty, Taxn. p. 9; *Flanigan* v. *Sierra County*, 196 U. S. 553, 49 L. ed. 597, 25 Sup. Ct. Rep. 314; *Re McPherson*, 104 N. Y. 321, 58 Am. Rep. 502, 10 N. E. 685; *Re Westurn*, 152 N. Y. 99, 46 N. E. 315; *Re Arnett*, 49 Hun, 599, 2 N. Y. Supp. 428; *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450, 17 L. ed. 805.

The remedy provided by the act of 1893

for the collection of the tax is repealed, and the tax cannot be collected.

Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; *Napa State Hospital* v. *Flaherty*, 134 Cal. 317, 66 Pac. 322; *Sonora* v. *Curtin*, 137 Cal. 589, 70 Pac. 674; *Gorley* v. *Sewell*, 77 Ind. 318; *Hampton* v. *Com.* 19 Pa. 329; *Santa Monica* v. *Guidinger*, 137 Cal. 659, 70 Pac. 732.

Mr. **U. S. Webb** argued the cause, and, with *Messrs. E. B. Power, Lewis F. Byington*, and *I. Harris*, filed a brief for defendant in error:

The rule of constitutional classification adopted by the supreme court of the state of California and applied to this case is the correct rule, and is supported by the decisions of this court.

Re Campbell, 143 Cal. 623, 77 Pac. 674; *Deyoe* v. *Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *People* v. *Central P. R. Co.* 105 Cal. 576, 38 Pac. 905; *Ex parte Jentzsch*, 112 Cal. 469, 32 L.R.A. 664, 44 Pac. 803; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181.

No right guaranteed by the 14th Amendment is invaded by the act in question.

Magoun v. *Illinois Trust & Sav. Bank*, *Gulf, C. & S. F. R. Co.* v. *Ellis*, and *Orient Ins. Co.* v. *Daggs*, *supra*.

The following cases uphold as constitutional inheritance tax laws making discriminations between relatives:

United States v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *State* v. *Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *State* v. *Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *State* v. *Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; *Minot* v. *Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; *Gelsthorpe* v. *Furnell* (*State ex rel. Gelsthorpe* v. *Furnell*) 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; *Eyre* v. *Jacob*, 14 Gratt. 428, 73 Am. Dec. 367; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Re Sherwell*, 125 N. Y. 376, 26 N. E. 464; *Kochersperger* v. *Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Billings* v. *People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798. See also *Scholey* v. *Rew*, 23 Wall. 331, 23 L. ed. 99; *High* v. *Coyne*, 93 Fed. 451.

Messrs. Lewis F. Byington and *I. Harris* filed a separate brief for defendant in error:

The act of 1905, even if it repeals the act of 1893 and the amendments thereto, does not affect the right of the state to its 5 per cent of the estates of persons who died prior to the 1st of July, 1905.

Prevost v. *Grencaux*, 19 How. 1, 15 L. ed. 572; *Amat's Succession*, 18 La. Ann. 405; *Rixner's Succession*, 48 La. Ann. 563, 32 L.R.A. 177, 19 So. 597; *Rabasse's Succession*, 49 La. Ann. 1413, 22 So. 767.

The same principle which makes the property of a decedent vest in his heir immediately at death vests the state with a certain percentage of it at the same time.

Billings v. *Hall*, 7 Cal. 1; *Re Stanford*, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462.

Succession taxes are not taxes in the ordinary sense of the word, but a modification of the succession and inheritance laws decreeing that only a certain percentage of a man's property shall go to his heirs, and the rest shall remain the property of the sovereign state.

Minot v. *Winthrop*, 162 Mass, 113, 26 L.R.A. 259, 38 N. E. 512; *State* v. *Ferris*, 9 Ohio C. C. 298; *State* v. *Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *Re Collateral Inheritance Tax*, 88 Me. 587, 34 Atl. 530; *State* v. *Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073.

If the act of 1905 can be held to relieve the estates of persons who died prior to the 1st of July, 1905, it is to that extent unconstitutional.

Re Stanford (Cal.) 54 Pac. 259; *Re Moore*, 90 Hun, 162, 35 N. Y. Supp. 782.

The act of 1905, in spite of the formal repealing clause, must be held to be a continuation of the act of 1893 and its amendments, in so far as it affects the estates of persons who died prior to the 1st of July, 1905.

26 Am. & Eng. Enc. Law, 2d ed. p. 758; *Central P. R. Co.* v. *Shackelford*, 63 Cal. 261; *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450, 17 L. ed. 805, 6 Rose's Notes, p. 433; *McMinn* v. *Bliss*, 31 Cal. 127; *Re Davis*, 149 N. Y. 545, 44 N. E. 185; *Re Sloane*, 154 N. Y. 113, 47 N. E. 978; *Provident Hospital & Training School Asso.* v. *People*, 198 Ill. 495, 64 N. E. 1031; *Re Scrimgeour*, 80 App. Div. 388, 80 N. Y. Supp. 636; *Collins* v. *Blake*, 79 Me. 218, 9 Atl. 358; *Re Prime*, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091.

The tax can be collected either under the old statute or the new, or under the general powers of the superior court in probate matters; or it may be collected by the ordinary civil action against the estate.

23 Am. & Eng. Enc. Law, 1st ed. p. 504; 27 Am. & Eng. Enc. Law, 2d ed. p. 342; *Re Vanderbilt*, 2 Connoly, 319, 10 N. Y. Supp. 239; *State* v. *Poulterer*, 16 Cal. 531; *Bergin* v. *Haight*, 99 Cal. 56, 33 Pac. 760; *Re Burton*, 93 Cal. 463, 29 Pac. 36; *Pennie*

v. *Roach*, 94 Cal. 521, 29 Pac. 956, 30 Pac. 106; *Simons* v. *Bedell*, 122 Cal. 347, 68 Am. St. Rep. 35, 55 Pac. 3.

[90] *Mr. Justice **White** delivered the opinion of the court:

In 1893 a law was enacted in California, imposing a charge on collateral inheritances and on bequests and devises. Cal. Stat. 1893, p. 193. The burdens which the law imposed were not laid upon inheritances, bequests, or devises in favor of the father, mother, husband, wife, children, brother, or sister of a decedent, or wife or widow of a son, or the husband of the daughter of the decedent, adopted children, and certain public and charitable corporations. In the year 1899 the law of 1893 was amended.. The amendment caused the charge imposed by the prior act to become applicable in the case of brothers and sisters of a decedent. This resulted because the amendment omitted brothers and sisters from the enumeration made in the act of 1893 of persons to whom the act was not to apply. Cal. Stat. 1899, p. 10.

In December, 1900, Cornelia E. Campbell died intestate in the city of San Francisco, and her estate was administered upon by the appropriate court. In December, 1901, a final decree was entered, apportioning the estate remaining, after the payment of certain specified amounts, among three brothers and a sister, who are of the plaintiffs in error in this court. One of the sums directed by the decree to be paid before distribution was a collateral inheritance charge of $488.70, under the act of 1893, as amended in 1899.

The brothers and sister appealed to the supreme court of California from that portion of the decree directing the payment of the charge just mentioned. The validity of the law imposing the burden was assailed upon various grounds of a local nature, and upon the Federal ground that the amendatory act of 1899, in so far as it purported to impose a charge on inheritances, bequests, or devises to brothers and sisters, denied the equal protection of the laws, and was hence repugnant to the 14th Amendment to the Constitution of the United States. The supreme court of California affirmed the decree. In doing so it held that the contentions of a local nature were without merit,
[91] *and the act of 1893, as amended by the act of 1899, was not in conflict with the 14th Amendment. 143 Cal. 627, 77 Pac. 674.

With the questions of a local nature decided by the state court we are not concerned, and shall therefore confine our attention to the Federal question, that is, the alleged repugnancy to the 14th Amendment, imposing the burden in question on brothers and sisters.

The asserted repugnancy of the statute to the Constitution of the United States, as elaborately argued at bar, rests upon the proposition that the statute denied to brothers and sisters of a decedent the equal protection of the laws, because the statute embraced an inheritance, bequest, or devise in favor of a brother or sister, and did not include bequests or devises in favor of a wife or widow of a son or the husband of a daughter of the decedent.

Before coming to consider this subject we must notice a wholly independent question, which the plaintiffs in error assert renders a reversal necessary, irrespective of the merits of the contention based upon the Federal question.

In March, 1905, since the record on this writ of error was filed in this court, the state of California enacted a new inheritance tax law. Cal. Stat. 1905, p. 341. This act differs from the act of 1893, as amended in 1899, in many particulars. It includes within the classes subjected to the burdens imposed persons not embraced in the act of 1893 as amended, and whilst it does not except from its operation persons embraced in the prior act as amended, creates as to some of such persons a different rate, and carves out exemptions as to designated amounts of property, not found in the earlier act. Besides, by the act, brothers and sisters or a descendant of such brothers and sisters. and the wife or widow of a son or a husband of a daughter of a decedent, are made subject to a like charge, less, however, in rate than the one theretofore imposed upon a brother or sister. The act of 1905, as declared in its title, and as manifested by its provisions, was intended to cover generally the subject of inheritance taxes, and by necessary effect operated to amend and *re-enact the [92] prior laws on the subject. In the body of the act was contained a section (27), expressly repealing the act of 1893 and the amendments thereto, without embodying a clause saving the right of the state in respect to the charges which had accrued to the state under the prior acts.

The proposition is that the act of 1905 relieved the plaintiffs in error from the duty to pay resulting from the prior laws, even if those laws were not repugnant to the 14th Amendment, and, therefore, the contention is that it becomes our duty to so decide, and hence to reverse the judgment without passing upon the Federal question. The plaintiffs in error do not suggest that the writ of error be dismissed because, by the California statute, upon which they rely, the constitutional question has become merely a moot one, but their contention is that we should

maintain jurisdiction and reverse upon the ground previously stated. We cannot assent to the proposition. The statute upon which it is based was enacted subsequently to the decision of the supreme court of California, and if that statute had the effect, as asserted, of depriving the state of power to enforce the judgment below rendered, the right to claim relief, based upon the action of the state, taken since the supreme court of California decided the case, will, we assume, be open to investigation in the state courts, if in deciding the Federal question adversely to the plaintiffs in error, we do not conclude the question referred to. Under these conditions we think it is our duty to decide the Federal question upon which the writ of error was prosecuted, and leave open the purely local question, which has arisen since the decision by the lower court.

Of course, of our own motion we must determine whether the enactment of the subsequent statute so obviously had the effect of relieving the plaintiffs in error from the burden imposed by the judgment below as to cause the Federal question to become merely a moot one. In view of the general and continuing nature of the legislation contained in the statute of 1905 (*Bear Lake & River Waterworks & Irrig. Co.* v. *Garland*, 164 U. S. 1, 11, 41 L. ed. 327, 331, 17 Sup. Ct. Rep. 7; *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450, 17 L. ed. 805), we are clearly of
[93] the opinion that it cannot *be said that this case has become a moot one. Especially is this true when the ruling of the supreme court of California in *Re Stanford*, 126 Cal. 112, 45 L. R. A. 788, 58 Pac. 462, is considered. In that case, in 1897, while an appeal was pending in the supreme court of California from a decree directing the payment by the estate of Stanford of a charge or charges imposed by authority of the act of 1893, the legislature of California amended the act, and established certain exemptions, which it declared should apply to all property, which had passed by will, succession, or transfer after the approval of the act of 1893, except in those cases where the tax had been paid to the treasurer of the proper county. As to enforce the proper amendatory act would have relieved the estate of Stanford from the burdens of which complaint was made, the question presented to the supreme court of California was whether, if the burdens were authorized by the act of 1893, it was the duty of the court to apply the provisions of the amendatory act, and reverse the judgment pending before it, because the right to enforce the impositions had terminated by the effect of the amendatory act. After deciding that the act of 1893 authorized the burdens complained of, the court, in considering the terms of that statute, the nature and character of an inheritance tax, and the power of the state over the disposition of property in case of death, held that it was its duty to affirm the decree because of the vested right existing in the state under the act of 1893, and because the act of 1897, in attempting to abrogate such vested right, was repugnant to specified provisions of the Constitution of California. Putting aside, then, all question as to the operation of the statute of 1905, and reserving from any decree which we may render all rights, if any, in favor of the plaintiffs in error which may have arisen from the passage of that statute, we are brought to a consideration of the merits of the Federal question.

The contention is that the assailed law of California was repugnant to the 14th Amendment because it subjected to the burdens of an inheritance tax or charge brothers and sisters of a decedent, and did not subject to any burden such *strangers to the [94]
blood as the wife or widow of a son or the husband of a daughter of a decedent. We do not stop to refer in detail to the many forms of argument by which the contention is sought to be sustained, but content ourselves with stating that, whatever be the form in which the propositions relied on are advanced, they all reduce themselves to and must depend upon the soundness of the contention that the 14th Amendment compels the states, in levying inheritance taxes, and, *a fortiori*, in regulating inheritances, to conform to blood relationship. That is to say, in their last analysis all the arguments depend upon the proposition that the 14th Amendment has taken away from the states their power to regulate the passage of property by death or the burdens which may be imposed resulting therefrom, because that amendment confines the states absolutely, both as to the passage of such property and as to the burdens imposed thereon, to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this court. *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281. It is true that in the first of the cited cases it was expressly declared or impliedly recognized that in the exercise by a state of its undoubted power to regulate the burdens which might be imposed on the passage of property by death, a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of

the 14th Amendment was to control the states in the exercise of their plenary authority to regulate inheritances and to determine the persons or objects upon which an inheritance burden should be imposed. In this case there can be no doubt, if the right of a state be conceded to select the persons who may inherit, or upon whom the burden resulting from an inheritance may be imposed, the complaint against the statute is entirely without merit. The whole case, therefore, must rest upon the assumption that because the state of California has not followed the rule of blood relationship,
[95] *but, as to particular classes, has applied the rule of affinity by marriage, therefore the constitutional provision guaranteeing the equal protection of the laws was violated. But, unless the effect of the 14th Amendment was inexorably to limit the states in enacting inheritance laws to the rule of blood relationship, such a regulation plainly involved the exercise of legislative discretion and judgment, with which the 14th Amendment did not interfere. Such a regulation cannot in reason be said to be an exercise of merely arbitrary power. To illustrate. It assuredly would not be an arbitrary exercise of power for a state to put in one class, for the purpose of inheritance or the burdening of the privilege to inherit, all blood relatives to a designated degree, excluding brothers and sisters, and to place all other and more remote blood relatives, including brothers and sisters, in a second class, along with strangers to the blood. This being true it cannot, without causing the equality clause of the 14th Amendment to destroy the powers of the states on a subject of a purely local character, be held that a classification which takes near relatives by marriage and places them in a class with lineal relatives is so arbitrary as to transcend the limits of governmental power. If this were not true, state legislation preferring a wife in the distribution of the estate of her husband to a brother or sister of the husband would be void as repugnant to the 14th Amendment. So also would be the provision in the California statute we are considering, preferring an adopted child of a decedent to a brother or sister. With the motives of public policy which may induce a state to prefer near relatives by affinity to collateral relatives, we are not concerned, since the 14th Amendment does not deprive a state of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority.

Affirmed.

*H. C. HERRICK, A. V. Noyes, Charles La- [96]
brosse, Leon Larrieu, W. S. Gray, and Peter Crane, *Appts.*,

v.

BOQUILLAS LAND & CATTLE COMPANY.

(See S. C. Reporter's ed. 96-102.)

1. **Appeal from territorial supreme court—questions reviewable—sufficiency of evidence.**—The sufficiency of the evidence to support the findings of fact is not open to consideration on appeal from a territorial supreme court to the Supreme Court of the United States, in the absence of any exception duly taken to rulings on the admission or rejection of evidence.

2. **Private land claims—confirmation—effect of recital in patent.**—A recital in a patent from the United States, confirming a Mexican land grant to the original grantees, "their heirs, successors in interest, and assigns," that two persons named therein had acquired an undivided interest in the land, which patent was based on a decree to that effect of the court of private land claims, established by the act of March 3, 1891 (26 Stat. at L. 854, chap. 539, U. S. Comp. Stat. 1901, p. 765), is sufficient to establish a record title in the persons so named as against others holding merely by adverse possession, although, under §§ 8, 13, of that act, the confirmation of the grant by that court only quitclaims the title of the United States, and saves the rights of third parties.

3. **Limitation of actions—retroactive effect.**—The limitation of ten years, prescribed by Ariz. Rev. Stat. 1901, ¶ 2938, for actions to recover lands adversely held, has no application to such an action brought between the date when such statute was enacted and the date when, by its terms, the revision of the statutes was to take effect.

[No. 105.]

Submitted December 7, 1905. Decided January 2, 1906.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court in and for Cochise County, in that territory, in favor of plaintiff in an action of ejectment. *Affirmed.*

See same case below (Ariz.), 71 Pac. 924; on rehearing, 76 Pac. 612.

The facts are stated in the opinion.

Mr. **Ben Goodrich** submitted the cause for appellants.

Mr. **Francis J. Heney** submitted the cause for appellee.

Mr. Justice **White** delivered the opinion of the court:

This is an action of ejectment, commenced

NOTE.—*As to review by the United States Supreme Court of territorial decisions*—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

in August, 1901, by the appellee, to recover
[97] a tract of land containing 17,355.86 *acres, and damages for the alleged unlawful withholding of possession. It was alleged that the plaintiff was the owner and entitled to the possession of the described land, and that title had been in it or in its grantors and predecessors in interest ever since January 1, 1875; and the defendants—thirty in number—were alleged to have unlawfully withheld possession of the premises in dispute from about November 28, 1900. Some of the defendants filed disclaimers or failed to answer. The appellants and others jointly answered, relying solely on rights alleged to result from an asserted adverse possession by each of them of a portion of the demanded premises for more than twenty years prior to the bringing of the action. The case was tried to the court without a jury. The court made findings of fact and stated its conclusions of law thereon. Thereupon judgment was entered in favor of the plaintiff. On appeal, the supreme court of the territory affirmed the judgment; and the opinions delivered on the original hearing and on a rehearing are reported in 71 Pac. 924, and 76 Pac. 612. The supreme court adopted the findings of fact made by the trial court. The findings thus adopted as to the title and right of possession of the plaintiff were as follows:

"That on the 8th day of May, A. D. 1833, the Mexican government, by good and sufficient grant, conveyed to plaintiff's grantors and predecessors in interest the lands and premises herein described, being the lands and premises in controversy.

"That on the 14th day of December, in the year of our Lord one thousand and nine hundred, the government of the United States, by its letters patent, recognized and confirmed the validity of the said grant of lands in plaintiff's complaint, and hereinafter particularly described, to Ygnacio Elias Gonzales and Nepumoceno Felix, and to their heirs, successors in interest, and assigns forever; and found and decreed that W. R. Hearst and Phebe A. Hearst had acquired an undivided interest in such lands and premises of the said two grantees.

"That on the 3d day of July, 1901, the said W. R. Hearst and Phebe A. Hearst, by
[98] deed in writing, conveyed all of their *said interest in and to the said lands and premises to the plaintiff herein, and that plaintiff has not since disposed of its title so acquired, or any part thereof, to said lands and premises."

In addition, the trial court, among its conclusions of law, incorporated the following:

"That plaintiff and its predecessors and grantors in interest have been, since the 1st day of January, 1875, and ever since have been, and still are, the owners and entitled to the possession of the lands and premises in plaintiff's complaint, and hereinafter particularly described, and each and every part and portion thereof."

The supreme court of the territory, in its opinion on the rehearing, held this latter statement to be not a mere conclusion of law, but the finding of an ultimate fact; and the court therefore adopted it as part of the findings of fact upon which it based the decree of affirmance. As to possession by the defendants, it was found as follows:

"That each and every of said defendants in this cause were, on the 14th of December, 1900, and had been for more than ten years next preceding that date, occupying various portions of the said lands and premises, and each and every of the said defendants who have failed to appear and answer herein have, since the last named date, withheld possession of divers portions of said lands and premises from the plaintiff and its grantors and predecessors in interest, and still and now so withhold the same; that since the said December 14, 1900, the annual value of the rents, issues, and profits of that part of said lands and premises so withheld from plaintiff by the said defendants is as follows, to wit: . . ."

This appeal was prosecuted.

On appeal from the supreme court of a territory our jurisdiction, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Harrison* v. *Perea*, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129, and cases cited. As on this record there is no question presented as to rulings of the court in respect *to the admission or [99]
rejection of evidence, we can alone consider the sufficiency of the findings.

The errors assigned are sixteen in number, and resolve themselves into three classes:

1. Those which assert that the supreme court of the territory refused to consider the findings made by the trial court, and this embraces the 1st, 2d, and 5th assignments. But these assignments disregard the opinion of the supreme court of the territory, delivered on the rehearing, and do not require further notice.

2. Those which question the sufficiency of the evidence to support the findings of fact. These are numbered 8 and 13, and likewise need not be further referred to, as they address themselves to a matter not open for our consideration.

3. Assignments which, in various modes of statement, attack the sufficiency of the findings made by the trial court, and adopted by the supreme court of the territory, which

include all of the assignments not already disposed of.

The contentions concerning the insufficiency of the findings to support the judgment are resolvable into two propositions, which we shall separately consider:

First. That, irrespective of the adequacy or inadequacy of the possession asserted by the defendants below, the findings are insufficient to sustain the legal conclusion of title in the plaintiff. This proposition rests upon the premise that the matter included in the conclusions of law of the trial court, which the supreme court held to be a finding of fact, and which it adopted as such, was but a mere conclusion of law, and, therefore, cannot be considered in determining the sufficiency of the findings of fact to sustain the deduction of law made by the court below as to title in the plaintiff. And with this premise it is insisted that if the findings of fact proper are alone considered, they are insufficient to establish title in the plaintiff, because, although they show the Mexican grant, and its confirmation and a conveyance by William R. and Phebe A. Hearst to the plaintiff of an undivided interest in the land, [100] the findings fail as against *defendant to show any title whatever in William R. and Phebe Hearst, or in the plaintiff as their grantee, derived from the grantees of the Mexican government.

Conceding, merely for the sake of argument, the correctness of the premise, we think the proposition based thereon is without merit, since the findings, without reference to the action of the court in adopting the particular finding referred to, sustain as against the defendants the conclusion as to title. Those findings are that the plaintiff held title to an interest in the land in controversy, acquired by reason of a conveyance made on the 3d day of July, 1901, by William R. and Phebe A. Hearst. They, moreover, established that the land thus conveyed was originally acquired by the predecessors and grantors of the plaintiff through a grant made by the Mexican government in 1833, and that "on the 14th day of December, in the year 1900, the government of the United States, by its letters patent, recognized and confirmed" said Mexican grant to two named individuals, "and to their heirs, successors in interest, and assigns forever; and found and decreed that W. R. Hearst and Phebe A. Hearst had acquired an undivided interest in such lands and premises of the said two grantors."

It is urged that the statement in the finding as to it having been decreed that there was an undivided interest in William R. and Phebe A. Hearst was adopted from a decree to that effect rendered by the court of private land claims, established under the act of March 3, 1891. 26 Stat. at L. 854, chap. 539, U. S. Comp. Stat. 1901, p. 765. From this it is deduced that the recital in the patent as to the title in W. R. and Phebe A. Hearst was *res inter alios*, and that, in the absence of an express and substantive finding of title in the parties named from the grantee of the Mexican government, the mere recital on the subject in the patent furnished no support whatever for the legal conclusion that there was title. This is based upon the terms of §§ 8 and 13 of the act establishing the court of private land claims, wherein it was provided that the effect of the confirmation of a grant by that court should be *only to quitclaim the title, [101] and not to affect the interests of third parties. But, conceding that the patent, as asserted, is based on a decree of the court of private land claims, and that its recitals are controlled by the terms of the act creating that tribunal, the proposition is without merit. *Knight* v. *United Land Asso.* 142 U. S. 161, 188, 189, 35 L. ed. 974, 984, 12 Sup. Ct. Rep. 258. In that case it was held that although a patent which had been issued in consequence of the report of a tribunal appointed by Congress merely quitclaimed the rights of the United States, and saved the rights of third parties, it nevertheless was conclusive as to the existence of a record title upon those claiming to hold under rights which originated subsequent to the cession, and, *a fortiori*, as to a person claiming title by mere possession. By the application of this doctrine it follows that the judgment confirming the land grant and the patent thereunder, which specifically decreed an interest in the confirmed grant to the parties named, was adequate to establish a record title as against persons asserting the character of rights upon which the defendants relied.

Second. It is further insisted that, in view of the finding of the court below as to possession of the defendant for more than ten years prior to the commencement of the action, the findings are inadequate to sustain the legal conclusion of the right of the plaintiff to recover, because of the force and effect of the period of limitation prescribed in paragraph. 2938 of the Revised Statutes of Arizona for 1901. That paragraph is as follows:

"Any person who has a right of action for recovery of any lands, tenements, or hereditaments against another having peaceable and adverse possession thereof, cultivating, using, and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward."

The court below held, and its ruling on this subject is not questioned, that prior to the adoption of this revision of the Arizona

statutes there was no statute of limitations in that territory barring a right of action [102] for the recovery of lands by *one claiming title against another holding merely by peaceable and adverse possession. The revision went into effect on September 1, 1901, and the present action was brought a few days prior to such date, *viz.*, on August 26, 1901.

In approaching the question whether paragraph 2938 was applicable to the case, the court below assumed that the effect of the finding as to possession by defendants was to show peaceable and adverse possession by them for the period of ten years. The court, however, decided that under no canon of construction or rule giving a retroactive effect to a new statute of limitation could paragraph 2938 be made to apply to this case. Thus, suggesting the possible construction which might be claimed for the paragraph, it was said that if construed as absolutely barring causes of action existing at the time of its passage it was unconstitutional,—citing *Sohn* v. *Waterson*, 17 Wall. 596, 21 L.ed. 737. Further, that even if the statute were construed as providing that all actions existing at the time of the passage of the statute should be barred if not sued upon within the time which elapsed between the date of such passage and the date fixed for the going into effect thereof, this action was brought within such period, and the statute could not operate as a bar,—citing *Wrightman* v. *Boone County*, 82 Fed. 413, and various state decisions therein referred to. And, lastly, it was decided that if the paragraph was construed as not applying to a suit which, though commenced after the passage of the act, was pending at the time the same took effect, the statute had no application,—citing *State, Vreeland, Prosecutor*, v. *Bergen*, 34 N. J. L. 438.

We think the supreme court of the territory was clearly right in the views which it thus expressed, and therefore it committed no error in determining that under no possible hypothesis could the limitation prescribed in paragraph 2938 of the Revised Statutes of Arizona operate to bar the plaintiff's action, in view of the findings of fact in respect to the title of plaintiff.

Affirmed.

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[103] *SUCCESSION OF JUAN SERRALLES, by Their Attorney in Fact, Eduardo Wellenkamp, *Appts.*,

v.

BELEN ESBRI, Widow of Cartagena.

(See S. C. Reporter's ed. 103-118.)

1. Appeal—from Porto Rico supreme court—case involving denial of right under Federal statute.— A judgment of the supreme court of Porto Rico requiring an indebtedness to be liquidated in United States currency at the rate of 100 cents for each peso of indebtedness, on the ground that the act of April 12, 1900 (31 Stat. at L. 77, 80, chap. 191), § 11, under which the debtor claimed the right to pay in such currency at the rate of 60 cents for each peso of indebtedness, had no application to the case, is reviewable in the Supreme Court of the United States under § 35 of that act, as denying a right claimed under a Federal statute.

2. Contracts—medium of payment.— United States currency at the rate of exchange prescribed by Congress in the act of April 12, 1900 (31 Stat. at L. 77, 80, chap. 191), § 11, and not at the rate of $1 for each peso of indebtedness, must be accepted in discharge of the obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso, since this provision evidently contemplated only such change in coins as might occur while Porto Rico remained under the same political power.

3. Constitutional law—impairment of contract obligations—legislation fixing medium of payment.— Contract obligations are not impaired by so much of the act of Congress of April 12, 1900 (31 Stat. at L. 77, 80, chap. 191), § 11, as requires United States currency at the rate of exchange prescribed by that act, and not at the rate of $1 for each peso of indebtedness, to be accepted in discharge of an obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso of indebtedness.

[No. 65.]

Argued November 27, 1905. Decided January 2, 1906.

APPEAL from the Supreme Court of Porto Rico to review a judgment which affirmed a judgment of the District Court of Ponce, requiring an indebtedness to be liquidated in United States currency at the rate of 100 cents for each peso of indebtedness, instead of at the rate of exchange prescribed by Congress in the Foraker act. *Reversed* and remanded for further proceedings.

Statement by Mr. Justice **Peckham:**

The appellee, plaintiff below, commenced this action, called a "declaratory action of greater import" (Porto Rico Law Civ. Proc.

NOTE.—*As to what laws are void as impairing obligation of contracts*—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 19; and Fletcher v. Peck, 3 L. ed. U. S. 162.

arts. 480–482), to obtain payment of certain sums due on an indebtedness of the defendants (appellants), secured by mortgage, as stated in that instrument. She obtained judgment in her favor in the proper district court of Porto Rico, which was affirmed by the supreme court of the island, and the defendants have appealed from that
[104] judgment *to this court. The sole question is whether the debt may be solved in American money at the rate of 60 cents thereof for each peso of indebtedness, or must $1 in American money be paid for each peso.

The following are the facts: One Nicholas Cartagena y Mangual desired to sell the fractional part, owned by him, of a sugar plantation, known as "Ursula," situated in the municipal district of Juana Diaz, in the province of Porto Rico, such fractional part being 18 per cent of the value of the whole plantation, valued at 80,000 pesos. The purchaser, Juan Serralles, agreed to pay for such share 18,000 pesos. Accordingly a deed of purchase and mortgage was made between the parties on the 1st day of September, 1894. That instrument contained the statement that the sale was effected "in consideration of the sum of 18,000 pesos, commercial money," which shall be paid by the purchaser in instalments, *viz.*, "2,000 pesos on the 15th day of July, of the year 1898; 2,000 pesos on the same day and month of the year 1899; an equal sum of 2,000 pesos on the 15th day of July, 1900, and 3,000 pesos on the 15th day of July, of the years of 1901 to the year 1904, both inclusive, all of which to be paid in the money current in the commerce, whatever may be the coinage of the money that as such is in circulation or is accepted in this province, at the rate of 100 centavos (cents) of the money in circulation for each peso, excluding all kinds of paper money in circulation or to be issued, even if its circulation should be compulsory."

The instalments were to bear interest at the rate of 10 per cent per annum from the date of the deed, which interest was due and payable quarterly. The parties also declared "that the price for which said sale is made is the just and true value at present of the share and interest hereby sold and conveyed," they being "fully aware that that is the value that shall serve as a basis in the public sale that shall be held if the obligation is not paid, and its payment should be demanded judicially."

A few days after the execution and de-
[105] livery of this instrument *it was discovered that Cartagena was not the owner of all of the one-eighteenth part of the plantation, because that interest was acquired during his marriage with his first wife, and was what is termed "conjugal partnership property," acquired for a valuable consideration during her life. When she died, her interest went to her children, and so the seller, Cartagena, owned the abovementioned fractional part of the plantation, with those children. It therefore became necessary to make another deed and mortgage, conveying the interest of all the owners of the fractional part of the plantation including such children. This was accordingly done, and on the 6th of October, 1894, another instrument, in the nature of a deed and mortgage, was executed by the proper parties, in ratification and extension of the first instrument, and which contains substantially the same provisions as the first instrument, and the payments were to be made to the parties conveying the premises in the proportion in which they were interested in that property. These 18,000 pesos were to be paid by the purchaser, at the same times mentioned in the former instrument, "in current commercial money, whatever the coinage may be of money which, with such character, be in circulation or accepted in this province, at the rate of 100 cents of the circulating medium for each peso, and to the exclusion of all paper money created or to be created, even though its circulation be compulsory."

On the 15th of September, 1900, a quarterly payment of interest became due under the terms of the mortgage, and the appellant proposed to pay it in American money then current, at an amount equivalent in value to the former provincial money, which was not then in circulation. This offer was refused. The appellee then commenced an action in a municipal court, to recover the interest due September 15, 1900, in American money, at the rate of $1 for each peso that was due. She obtained what is termed an "executory judgment" for such payment, and that judgment (of the municipal court) was affirmed by the district court, and the appellant then paid the *same. Upon quarterly in-
[106] stalments of interest due December 15, 1900, and March 15, 1901, the appellants made the same offer to pay in American money of equivalent value of the provincial money or peso, which was not then in circulation, and the offer was again refused, and this declaratory action of greater import was then commenced, to recover one American dollar for each peso of indebtedness due up to the date of the commencement of suit, and to obtain a declaration that the future payments should be made in the same manner. Before the commencement of this action, in 1901, the province had been ceded to the United States, which (prior to the cession) had occupied it by

its troops in 1898. On the 12th day of April, 1900, Congress passed an act (31 Stat. at L. 77, 80, chap. 191) § 11 of which (reproduced in the margin)† provided for retiring the Porto Rican coins and substituting American money therefor.

In the pleading on the part of the plain-[107]tiff below the foregoing *facts were averred, but no averment or contention was made that the so-called "executory judgment" which plaintiff had theretofore obtained constituted *res judicata* as to the question now in issue.

The defendants (appellants herein) put in an answer, setting up various facts unnecessary to be here adverted to.

They also averred that under § 11 of the act of Congress, above mentioned, they had the right to pay the instalments due on the mortgage, in American money at the established rate of 60 cents in the coin of the United States for one peso of Porto Rican coin.

The trial court, in its judgment, after reciting the existence of the executory judgment in the action above-described and also all the proceedings in the case before it, decreed the payment of the interest or instalments which might then be due, or thereafter to grow due, to the plaintiff, in United States coin at the rate of $1 thereof for each peso of indebtedness. Basing its decree wholly upon the literal language of the contract, the court said: "It appears that Don Juan Serralles y Colon bound himself to make the payments to said Cartagena, by virtue of the said contract of sale, in money current in commerce, of whatever coinage it may be, at the rate of 100 cents of the current money for each peso; it is plain and evident that the heirs of said Serralles are bound to pay in dollars all the instalments arising from the same contract, or the interest on the same, for dollars are the money current at present in this island."

An appeal was taken by the defendants to the supreme court on the ground, among others, that the judgment of the district court violated articles 1281 and 1283 of the Civil Code. The articles are as follows:

"Art. 1281. If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of the stipulations shall be observed.

"If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail."

*"Art. 1283. However general the terms of[108] a contract may be, there should not be understood as included therein things and cases different from those with regard to which the persons interested intended to contract."

Further ground of appeal was the alleged violation of the 11th section of the act of Congress above mentioned, under which appellants claimed the right to pay in United States coin at the equivalent value of 60 cents for each peso.

The supreme court, in due time, after argument, affirmed the judgment of the court below on the law, holding that the contract was clear, and its literal terms must be complied with. It did not, nor did the district court, hold the prior judgment to be *res judicata*.

The court also denied the right claimed by the defendants under the above-mentioned act of Congress, to pay their indebtedness at the rate of 60 cents of American money for each peso of such indebtedness, on the ground that the act did not apply to such cases as the one before the court.

Mr. **James S. Harlan** argued the cause and filed a brief for appellants.

No brief was filed for appellee.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The question arises herein whether this court has jurisdiction to hear the case, up-

†Sec. 11. "That for the purpose of retiring the Porto Rican coins now in circulation in Porto Rico, and substituting therefor the coins of the United States, the Secretary of the Treasury is hereby authorized to redeem, on presentation in Porto Rico, all the silver coins of Porto Rico known as the peso, and all other silver and copper Porto Rican coins now in circulation in Porto Rico, not including any such coins that may be imported into Porto Rico after the first day of February, nineteen hundred, at the present established rate of sixty cents in the coins of the United States for one peso of Porto Rican coin, and for all minor and subsidiary coins the same rate of exchange shall be applied. The Porto Rican coins so purchased or redeemed shall be recoined at the expense of the United States, under the direction of the Secretary of the Treasury, into such coins of the United States now authorized by law as he may direct, and from and after three months after the date when this act shall take effect no coins shall be a legal tender, in payment of debts thereafter contracted, for any amount in Porto Rico, except those of the United States; and whatever sum may be required to carry out the provisions hereof, and to pay all expenses that may be incurred in connection therewith, is hereby appropriated, and the Secretary of the Treasury is hereby authorized to establish such regulations and employ such agencies as may be necessary to accomplish the purposes hereof: Provided, however, That all debts owing on the date when this act shall take effect shall be payable in the coins of Porto Rico now in circulation, or in the coins of the United States at the rate of exchange above named."

on appeal or otherwise. The action is one to recover the interest due on an indebtedness from the appellants to the appellee on account of the purchase by the former of a certain interest in a plantation in Porto Rico, owned by the testator of appellee, which indebtedness was secured by a mortgage. This action is in its nature something like one to foreclose a mortgage. The question arising in the case is in regard to the kind of money in which the indebtedness of appellants (both that due at the time of the [109] commencement of the *action and that accruing thereafter) should be paid, the appellee asserting her right to be paid in American money at the rate of $1 for each peso of indebtedness, while the appellants, on the contrary, assert their right under § 11 of the act of Congress of April 12, 1900, already mentioned, to pay the indebtedness in money or coins of the United States, at the rate of 60 cents in such coins for each peso of their indebtedness. This right was denied by the court below on the ground that there was a clear contract to pay as demanded by the appellee, and that the act of Congress had no application to the case. Judgment was accordingly given in favor of the appellee, that the appellants should pay to the appellee the indebtedness due or thereafter to grow due to her, at the rate of $1 in American money for each peso of their indebtedness. Appellants thus claimed a right under a statute of the United States, which was denied, and under § 35 of the Foraker act (April 12, 1900) this court has jurisdiction to review the judgment. *Crowley* v. *United States*, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; *Rodriguez* v. *United States*, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617.

The record also shows that a prior action had been commenced by appellee, in a municipal court of Porto Rico, between the same parties, to recover an instalment of interest due September 15, 1900, and that the same defense was there made in regard to the character of the money in which the debt should be paid. The municipal court in that case decided in favor of the appellee herein, and judgment to that effect having been duly entered, an appeal therefrom was taken to the district court, which affirmed the judgment, and the same was thereupon paid by the appellants herein. That judgment is not set up by the appellee as *res judicata*, and while it is recited in the judgments in this case both in the district and supreme courts as having been recovered, it is not held to be such by either of the courts, but in such judgments it is referred to as an "executory judgment," and by article 1477 of the Porto Rico "Law of Civil Procedure" (page 299) it is provided that "judgments rendered in executory actions shall not give rise *to the exception of *res* [110] *judicata*, the parties reserving their rights to institute the ordinary action on the same question." As the courts below have treated and denominated the prior judgment in the municipal court as an "executory judgment," obtained in an executory action, the reason for not holding the judgment to be *res judicata* becomes apparent when the above article of the Code is considered.

We come, then, to a consideration of the proper construction of the provisions in the two deeds, regarding the kind of money in which the debt is to be paid. They are set forth in the foregoing statement and are substantially alike, exeepting that the first deed, that of September, 1894, in speaking of the coinage, says that the payment is to be made in money that is in circulation or is accepted in the province, at the rate of 100 *centavos* (cents) of the money in circulation for each peso, and in the amended deed of October 6, 1894, the translator of the original Spanish leaves out the word "centavos," and gives what he regards as its proper translation,—the word "cents," —so that the provision reads that the money is to be paid at the rate of 100 "cents" of the circulating medium for each peso. These two deeds represented the same transaction, and were drawn, of course, in the Spanish language. In the first deed the interest of the children of Cartagena was not referred to, because of the mistaken assumption that Cartagena had the whole title, and, upon discovering the mistake, the second deed was made, conveying his interest and the interest of his children, amounting to one-eighteenth of the whole value of the plantation, as conveyed by that deed to the same purchaser. The later deed was regarded by all parties as a mere rectification and ratification of the first deed, and it is quite clear that the word "centavos," contained in the first deed, was used in both, and that the word "cents" is but a translation of the original Spanish word "centavos," which was used in this contract drawn in the Spanish language.

This is in truth assumed to be correct by counsel in the court below, in his communication to that court in behalf of the present *appellee (which forms part of the record [111] herein), as he there uses the word "cents," and then follows it by the use of the word "centavos."

It may be, therefore, stated as a fact that the original contract in the deeds provided for the payment in money current in the province at the rate of 100 centavos for each peso. There is no finding in so many words, as to the value of the peso mentioned in the contract. The Spanish word "centavo" is

said to be, in Spanish and in South American countries, a small copper or nickel coin, in value six-tenths of a cent (actual), and one cent (nominal); the one-hundredth of a peso. See Standard Dictionary of the English language. The centavo being worth really six-tenths of a cent, and being the one-hundredth part of a peso, would, of course, make the peso worth 60 cents in American money.

The 11th section of the act of Congress, already mentioned, provides for the redemption of all silver coins of Porto Rico known as the peso, and all other copper and Porto Rican coins in circulation in Porto Rico "at the present established rate of 60 cents in the coins of the United States for one peso of Porto Rican coin, and for all minor and subsidiary coins the same rate of exchange shall be applied." The Congress thus fixed the rate of exchange in the redemption of these coins, and it must be assumed to have been fixed at the value of the peso in American coin.

From these facts it appears to us that there is no rational doubt that at the time when this contract was executed the peso in circulation in Porto Rico was worth not to exceed 60 cents, American money. At the time when the money was due under the contract, in September, 1900, it is admitted that all the pesos and centavos theretofore in circulation had been at that time redeemed by the United States, pursuant to the provisions of the act of Congress, and the money in circulation in Porto Rico was then and thereafter the money of the United States. This was the money current in commerce in Porto Rico and was in circulation and accepted therein as such
[112] money. It *is now claimed by the appellee that, as the American money was the money of commerce, and was alone in circulation, she was entitled in September, 1900, under the provisions of the contract, to be paid 100 cents, or, in other words, $1 of that money for every peso of indebtedness owed by the appellants, either then due or thereafter to grow due. By calling the centavo a cent in American money, while worth but six-tenths of a cent, the claim is made that the contract really provided for the payment of 100 cents of American money for every peso of indebtedness. In other words, a centavo is made a cent, and it is said that the appellants promised to pay 100 cents per peso. This construction of the contract has been upheld by the courts below because, as it is said, the strict and plain letter of the contract calls for it, and the result is that the appellants are adjudged to pay over 60 per cent more than the value of the interest they purchased, and that much more than the value of the peso, and also that much more than the real amount of their debt. While it is true that the silver coinage of Porto Rico, known as the peso, and all other silver and copper coins which were in circulation on April 12, 1900, had been retired before September, 1900, and that the money then current in commerce in Porto Rico was American money, we do not, on that account, think that the appellee had the right to claim payment of $1 in American money for each peso of indebtedness. The centavo is not a cent. It is equal to but six-tenths of a cent, and the parties contracted, the one to pay and the other to receive, 100 centavos to the peso, not 100 cents to the peso. Although the translator seems to have assumed that the word "cents" was the correct and accurate translation of the word "centavos," it must be remembered that the contract was in fact to pay centavos, and that the centavos were in fact, as we think is plainly shown in this record, worth only about six-tenths of a cent, and that while 100 centavos were worth one peso, 100 American cents were worth $1, or above 60 per cent more than the same number of centavos. It is *entire-[113]
ly incredible that either party ever meant any such result as is now contended for by the appellee. Even if it were conceded that the liberal and strict construction of the contract is as decided by the courts below, yet we are clear that such literal and strict construction does not express the real intention of the parties when the contract was made.

Articles 1281 and 1283 of the Civil Code of Porto Rico, set forth in the foregoing statement, show the law to be in Porto Rico substantially the same as it is here; that is, that where it is plain that a strict and literal construction of the contract does not convey the real meaning of the parties, such construction is not to be entertained. See cases cited in *United States* v. *Utah, N. & C. Stage Co.* 199 U. S. 414, *ante*, 251, 26 Sup. Ct. Rep. 69. In that case the strict and literal construction of the contract was contended, by the officers of the government, to be its proper construction, and hence, it was argued, when the contractor might, under the provisions of his contract, be required to perform new or additional mail, messenger, or transfer service, under the authority of the Postmaster General, without additional compensation, that then such official could require such additional service as arose by reason of the establishment of what amounted to a new station, which additional service required, above the normal increase of service, an additional distance to be traveled in wagons of over 300,000 miles. This court held that the parties never meant any such thing, and the judg-

ment of the court of claims for the recovery of compensation for the extra distance traveled was affirmed.

On looking at this contract we are of opinion that it evidently contemplates only such change in coins as might occur while Porto Rico was under the same political power. It speaks of the payment of the debt in the money current in commerce, whatever may be the coinage of the money that, as such, is in circulation "in this province." The words "in this province" evidently did not contemplate any change of government, but only a possible change of coinage under the same government. It may be assumed that in 1894 no one [114] could have contracted *with reference to a war between Spain and the United States, which did not break out until four years thereafter, nor would anyone have contemplated the cession of Porto Rico to the United States, and the entire substitution of American money for that which had theretofore circulated in Porto Rico, and the retirement of all the other money.

The value of the interest sold in the plantation was agreed by both parties, at the time of the execution of the instrument of deed and mortgage, to be 18,000 pesos, and so it was plainly stated in that instrument. The transaction was a bona fide one, providing for actual conveyance of the interest in the plantation, and there was plainly no gambling in the possible changes in the value of the coin, which might take place under a foreign government, when the various payments were to be made. The parties evidently had no thought of the war, or of being transferred to a foreign government as a result thereof. Under the circumstances it is impossible to conceive of sane persons agreeing in this case upon the value of the interest purchased and sold, and then that the purchaser should further agree to pay over 60 per cent more than the value of the thing purchased if it should so happen in the future that different coinage might be in circulation under a different sovereignty, which would effect that result.

The question may be asked, What did the parties mean by this use of language, if they did not mean precisely what the courts below have said they did, and where is the justification for changing the interpretation as gathered from their language? It may not, perhaps, always be clear to see and determine what parties did mean by the language they used in a contract, and at the same time it may be perfectly clear they did not mean to contract with reference to what the courts below have called the literal and specific import of the language actually used. In this case we have no such difficulty. We have just stated what, in our opinion, the meaning really was, and that it was aimed at the possible change in coinage or of the value of the new coin under the decree of the government of Spain itself. *Why that [115] contingency should have presented itself is not stated clearly as a fact in either of the judgments of the courts below. (It may be here remarked that the judgments of those courts also partake of the nature of findings of fact and opinions of the court thereon.) There is a recital in the judgment or decree of the supreme court of what was stated by counsel for appellants in his written communication to the court, and which is part of the record, and that statement was, in substance, that the change was contemplated by the Spanish government at that time (1894), by which the peso then in circulation was to be retired, and another coin was to be issued which would be worth 60 instead of 57 cents to the peso, and it was with that contingency in mind that the parties provided as they did in the contract in question. It is true the supreme court does not find the fact of the existence of this intention on the part of the Spanish government, but, in giving a statement of what it regarded as the distinction between the case at bar and one theretofore decided by the same court, in a manner seemingly inconsistent with this decision here, the supreme court said:

"This case being different from what occurred in the case of Dona Josefa Cayol y Julia, and the agricultural corporation 'Balseiro and Gergetti,' which case was recently decided by this supreme court, and in which neither of the parties had expressed their will in so clear and explicit a manner as in the present case, nor could the case offer any difficulty, since the plaintiff herself had recognized in her complaint—and it was also proven in the course of the suit—that the clause of the deed, the application of which was being considered, and on which she based her claim that the purchasers Balseiro and Georgetti should pay her the interest on that part of the price, the payment of which had been postponed, in American currency without the discount fixed by the government of the United States for the money of this country, had been established by the parties in consideration of the exchange of the Mexican money, which had already been announced by the Spanish government *on that date when the contract [116] was made, for which reason this supreme court had to dismiss the appeal in cassation interposed by the plaintiff Dona Josefa Cayol, from the judgment rendered by the district court of Arecibo, denying the claim made by the said Dona Josefa Cayol, the court basing its decision precisely on this

same article 1283 of the Civil Code, the application of which is the question at issue in the present appeal."

True, it appears to have been proved in that case, what the record does not show to have been specifically proved here, that there was at the time this contract was entered into a contemplated exchange of money to be circulated, and the contemplated change had been announced by the Spanish government at the time when the contract was made. But this fact is not a necessity, in order to maintain our view of the proper construction of the contract, for it simply furnishes what may be termed a presumption that the use of the language as to the payments was made with reference to this particular and contemplated exchange. The wholly incredible nature of the contract, if construed in the way the lower courts have done, is none the less apparent, and we cannot agree with a construction which binds the appellants to pay more than 60 per cent than the parties agreed the interest in the plantation was worth, and just that amount more than both parties supposed was to be paid.

In truth, a careful reading of the whole decree of the supreme court (while also considering that the recitals in that decree of matters contained in the appellants' brief were not negatived by the court as to matters of fact, the case being decided wholly upon the asserted strict construction of the contract) rather leads one to the conclusion that the court assumed the truth of those recitals as to the contemplated change of coinage, but regarded the fact as immaterial in view of what it thought to be the plain language of the contract. Of course we do not intimate that the court below was bound to deny the truth of the recitals or else it was to be taken as admitting it.

[117] We only *refer to it in passing, in connection with the language of the whole decree, and the reasons given for the judgment, as some ground for the belief that the court in fact assumed the truth of the recitals, but thought them wholly immaterial. The court also pays no heed to the evidence which was received upon the trial of the case, showing the manner in which settlements of existing debts had been made upon instruments like the one in question, with or without the particular clause as to payments, the evidence being that the debts were paid at the rate of exchange provided for in the act of Congress. This, of course, must have been upon the ground that the words of the contract, as construed by the court, governed.

In *San Juan* v. *St. John's Gas Co.* 195 U. S. 510, 49 L. ed. 299, 25 Sup. Ct. Rep. 108, the contention was that the money due the gas company for lighting the street lamps was payable in Porto Rican money, but this court said that the contract was for payment in current foreign money, exclusive of Spanish gold; and it was conceded that if the foreign current money was required by the contract, money of the United States, current at the time the contract was made, was within the contemplation of the parties. Such money was also current in the island when performance was due. The case does not cover the one at bar.

Nor is the debt payable at the rate of 100 cents for each peso, on the theory that the money in circulation at the time and place for the performance of the contract was the money in contemplation of the parties thereto in the absence of a contract for the payment in some other money. See 195 U. S. 510, 49 L. ed. 299, 25 Sup. Ct. Rep. 108, cases cited, page 520, L. ed. page 304, Sup. Ct. Rep. 108.

There was, as we have seen, no contract to pay in American money at the rate contended for by appellee. In providing for the withdrawal of all coins in circulation in Porto Rico, Congress provided at the same time for fixing the equivalent between those coins and American coins for the payment of all existing debts. This was simply fixing the value of those coins relatively to their value in American coin and with reference to the payment of debts then existing. All money then unpaid *on this mortgage [118] obligation was an existing debt within the act, and hence might be paid in American money at the rate of exchange therein specified. The withdrawal of the coins of Porto Rico in circulation at the time of the passage of the act of Congress, and provided for therein, did not take legal effect, so far as concerned debts then existing, except upon the condition that those debts might be solved in the coins of the United States, at the rate of exchange stated in th act. This did not impair or change the obligation of any contract, and was but an exercise of power to fix the value of the coins which were to be withdrawn, and to state the rate of exchange at which existing debts might be paid in American money; and as there was no contract to pay at any other rate, the act was valid and applied to this case.

We are of opinion that the appellants are entitled to pay the balance remaining unpaid of the debt secured by the mortgage in American money, at the rate of exchange prescribed by Congress.

The judgment of the court below is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

MONTANA CATHOLIC MISSIONS, *Plff. in Err.*,
v.
MISSOULA COUNTY, State of Montana.

(See S. C. Reporter's ed. 118-130.)

Courts—jurisdiction of Federal circuit court—lack of merit in claim of Federal question.—The claim that grazing cattle owned by a Jesuit society are exempt from state taxation, based either upon the theory that, because the income of the society was devoted to the charitable work of improving and educating the Indians on the Flathead reservation, in Montana, the entire beneficial use or ownership of the property taxed was in tribal Indians, or upon the ground that the Federal government, by permitting and approving the work of the society, and by aiding it from time to time by making appropriations in its behalf, had constituted it one of the agencies to carry out its obligation to the Indians,—is too clearly lacking in merit to confer jurisdiction on a Federal circuit court.

[No. 151.]

Submitted December 13, 1905. Decided January 2, 1906.

IN ERROR to the Circuit Court of the United States for the District of Montana to review a judgment dismissing, for want of jurisdiction, a suit to recover taxes alleged to have been illegally assessed. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The plaintiff in error commenced this action in the circuit court of the United States for the district of Montana, to recover from the defendant the amount of certain back taxes, which it alleged had been illegally assessed, and which it had been compelled to pay in order to prevent the seizure and sale of the property owned by it, and upon which the taxes were levied. Both parties to the action were residents of the state of Montana at the time it was commenced. The defendant demurred to the complaint upon the ground, among others, that the court had no jurisdiction of the person of the defendant or of the subject-matter of the action. The demurrer was sustained by the court, and the complaint dismissed on the sole ground that it had no jurisdiction, and the court has certified the question of jurisdiction directly to this court, as provided for in the 5th section of the act of 1891. 26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.

The following is the complaint:

The plaintiff above-named complains to the court, and alleges:

I. That it is, and since prior to the year 1890 has been, a corporation organized and existing under the provisions of chapter 34, fifth division of the Compiled Statutes of the state of Montana, relating to the incorporation of religious, benevolent, and other like societies, and that its purposes are set forth in its articles of incorporation as follows:

The particular business or object of said corporation shall be to hold the legal title to real estate in the territory of Montana, for the use and in trust for the Society of [120] Jesus, also to hold and in trust for said society all funds, property, and effects of said society, or any members thereof, or any person or persons, corporation or corporations, conveyed, transferred, delivered, or assigned to the said corporation, for the use and benefit of said society; to conduct, erect, govern, and maintain churches, colleges, schools, and libraries, and all other such necessary and useful enterprises as may be properly connected with the society and corporation. The general business and object of said corporation shall be to inculcate and further the interests of Christian education among the inhabitants of the territory of Montana, including the Indians and other residents on reservations within the said territory, and also to advance the interests of the Christian religion through the erection and maintenance of churches, colleges, and schools, and the preaching of the Gospel.

II. The Society of Jesus referred to in the said articles of incorporation is an association or order of ministers of the Gospel, none of the members of which can, under the rules of the said order, hold, or does hold, any property in his own right.

III. Plaintiff further avers that about the year 1854 the said Society of Jesus established a mission among the Flathead Indians, then residing in the western portion of what is now the state of Montana, and stationed among them members of the said order, with directions to teach, educate, enlighten, and care for the said Indians. That the said mission being so established, members of the said order so deputed went among the said Indians, and from about the year 1854 to the present time have continued in the work of teaching, educating, and enlightening the said Flathead Indians.

IV. The plaintiff further avers that since the creation of the Flathead Indian reservation in the state of Montana, members of the said order, commonly known as Jesuit Fathers, have, by the direction of said order and by permission of the Indians living

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

and entitled to live within the same, and the government of the United States, been [121] permitted to reside within the said *reservation for the purpose of teaching and educating the Indians residing thereon, and that they have been, during all of said period, continuously engaged in the work of teaching and educating the said Indians.

V. That with the permission of the Indians inhabiting and entitled to inhabit the said reservation and the government of the United States, the said Jesuit Fathers have constructed on the said reservation, at great expense, extensive school buildings, with dormitories, and in connection therewith, for the purpose of teaching the said Indians the manual arts, a blacksmith shop, wagon shop, printing office, saddlery shop, shoe shops, bakeries, and other shops of like character, and, with the same purpose, cultivate fields and gardens.

VI. That for the more successful conduct of the training and education of the Indians, the said Jesuit Fathers take into their care and custody at tender ages the children of the said Indians, and keep them at the said schools, and clothe, feed, and house them until they arrive at mature years, and that they now have, and for more than ten years last past have had, in their charge and care, upwards of two hundred and fifty of the children of the Indians residing on, and entitled to reside on, the said reservation.

VII. That for many years the government of the United States, in recognition of the value of the work of the said Jesuit Fathers in the training and education of the said Indians, appropriated and paid to them large sums of money for the purpose of carrying on the said work of educating the said Indians and caring for their children, but that such contributions are no longer made by the government.

VIII. That with a view to provide means for the carrying on of the said work of educating the said Indians the said Jesuit Fathers have acquired a large band of neat cattle, which roam over and feed upon the said reservation. That the right to keep and graze the said cattle upon the lands included within the said reservation was, long prior to the year 1895, granted to the Jesuit Fathers by the Indians residing upon [122] the said reservation *and entitled to reside thereon, which right was confirmed by the acquiescence and permission of the government of the United States, and that the cattle now owned by them or by the plaintiff herein, as hereinafter set out, now graze upon the lands included within the said reservation by the express permission of the Indians residing and entitled to reside thereon, and of the government of the United States.

IX. That a large number of the said cattle are annually killed and consumed as food by the children of the Indians so residing on and entitled to reside on the said reservation, and who are under the care of the said Jesuit Fathers, as aforesaid, and by the fathers in charge of the said children, and assistants employed by them in the work of educating the said Indians, and that others of said cattle are annually shipped to Eastern markets, and the income derived from the sale of the same is devoted to, and used exclusively for, the work carried on by the said fathers on the said reservation, of educating the said Indians, as hereinbefore set out, and that all the said income is consumed in the said work.

X. That a large portion of the work of rounding up the said cattle, branding, and otherwise caring for them, slaughtering and shipping the same, is done by the Indians residing on the said reservation, under the direction of the said fathers, and that the said Indians are enabled by this employment to earn in part a livelihood, and are instructed and gain experience in the business and occupation of cattle raising, and are encouraged themselves to engage in it,—a business for the conduct of which the said reservation is particularly adapted.

XI. That prior to the year 1895 all property so as aforesaid acquired by the said Jesuit Fathers was conveyed to the plaintiff herein, to hold the same in trust for the said Jesuit Fathers, and that by such conveyance it now has the legal title to all of the cattle acquired by the said Jesuit Fathers on the said reservation, and the increases thereof. And plaintiff avers that it is, and at all times since its organization has been, an institution of purely public charity, and that all of the cattle now *owned by it, or which have been owned by [123] it since the year 1895, or at any time, have been and are used exclusively for educational purposes, as hereinbefore set forth.

XII. And plaintiff further avers that it is its purpose in the future to devote all cattle now on the said reservation, or which it may acquire thereon, and any income derived from the sale of the same, to the same purposes to which they have heretofore been devoted, as hereinbefore set out, and that it has no purpose now, nor has it had at any time any purpose, to devote any portion of said cattle or any income derived from the sale of the same to any purpose other than the education and training of the Indians residing or entitled to reside on the said reservation, and that it never has made, and does not contemplate making, any profit out of the raising of the said

cattle, with the intent to devote the same to any other purpose.

XIII. And plaintiff avers that, notwithstanding the facts aforesaid, the defendant, county of Missoula, which is one of the counties of the state of Montana, through its treasurer, annually, since the year 1897, has demanded of the plaintiff that it pay to the said county taxes upon all cattle owned by it and being upon the said reservation, and threatened to seize and sell the said cattle or so much thereof as might be necessary to satisfy the taxes demanded unless the same should be paid.

XIV. That pursuant to such demand, and to prevent the seizure and sale of the said cattle, or so many thereof as might be necessary, the plaintiff, under protest, on or about November 23, 1898, paid to the said county and to its treasurer, who turned the same over to the said county as taxes claimed by it to be due on account of cattle owned by the said plaintiff on the said reservation for the years 1897 and 1898, the sum of $1,257.48; that the plaintiff, under protest, on or about November 22, 1899, paid to the said county and to its treasurer, who turned the same over to the said county, as taxes claimed by it to be due on account of cattle owned by the said plaintiff on said reservation for the year 1899, the sum of $867.82; that the plaintiff, under protest, on or about November 26, 1900,
[124] paid *to the said county and its treasurer, who turned the same over to the said county, as taxes claimed by it to be due on account of cattle owned by the said plaintiff, on the said reservation for the year 1900, the sum of $661.20; and that plaintiff, under protest, on or about November 26, 1901, paid to the said county and to its treasurer, who turned the same over to said county, as taxes claimed by it to be due on account of cattle owned by the said plaintiff on the said reservation for the year 1901, the sum of $321.95; and plaintiff avers that it neither had nor owned any cattle "at any time since 1895," in the county of Missoula, state of Montana, except such cattle as it held on the said reservation as hereinbefore set out, and that the said taxes were exacted of it upon the said cattle. "All of which were reared on the said reservation, and fed on grasses and herbage grown thereon."

XV. And now plaintiff avers that the defendant is indebted to it on account of said payments, by it made, as hereinbefore set out, in the sum of three thousand one hundred and eight and 45/100 dollars ($3,108.45), with interest on the sum of $1,257.48 from the 23d day of November, 1898, amounting to $345.66; for interest on $867.82 from the 22d day of November, 1899, amounting to $169.35; for interest on the sum of $661.20 from the 26th day of November, 1900, amounting to $75.55; and for interest on the sum of $321.95 from the 26th day of November, 1901, amounting to the sum of $11.03.

Wherefore plaintiff demands judgment for said amounts, together with interest as above set forth, and for its costs.

Mr. **Thomas J. Walsh** submitted the cause for plaintiff in error:

When by reason of a Federal question being involved, the jurisdiction of the circuit court is properly invoked, it is not limited to a determination of the Federal question, but it may proceed and determine every question in the case.

New Orleans, M. & T. R. Co. v. *Mississippi*, 102 U. S. 135, 26 L. ed. 96; *Little York Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 24 L. ed. 656; *Briscoe* v. *Southern Kansas R. Co.* 40 Fed. 277; *Osborn* v. *Bank of United States*, 9 Wheat. 821, 822, 6 L. ed. 224; *Manigault* v. *Ward*, 123 Fed. 707.

It is not necessary that the contention made by the plaintiff with reference to its rights under the Constitution or laws of the United States shall appear sound to the court. If the claim of the plaintiff is apparently made in good faith, and is not a frivolous one, the United States court has jurisdiction.

Illinois C. R. Co. v. *Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Illinois C. R. Co.* v. *Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; *St. Paul, M. & M. R. Co.* v. *St. Paul & N. P. R. Co.* 15 C. C. A. 167, 52 U. S. App. 372, 68 Fed. 2; *St. Louis, I. M. & S. R. Co.* v. *Davis*, 132 Fed. 629.

The property of tribal Indians is not taxable by the state.

The Kansas Indians (*Blue Jacket* v. *Jonnson County*) 5 Wall. 757, 18 L. ed. 673.

To whatever extent these cattle are taxed, the lands of these Indians are rendered just so much less productive to them. The net results to them from their lands are diminished by just exactly the amount of the tax. It operates, in effect, the same as would a tax upon the lands.

Income Tax Cases (*Pollock* v. *Farmers' Loan & T. Co.*) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *State, Sisters of Charity, Prosecutor*, v. *Chatham Twp.* 52 N. J. L. 373, 9 L.R.A. 198, 20 Atl. 292.

The state can do nothing that will destroy or impair the efficacy of the guardianship of the United States over the Indians.

State v. *Cooney*, 77 Minn. 518, 80 N. W. 696; *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

The schools erected by the Fathers, as

well as the various shops and mills in connection with them, and these cattle, became, and have become, means and instrumentalities of the general government to carry out its purposes and to fulfil its treaty obligations; and that the means and instrumentalities of the general government are not subject to taxation by the states is a proposition of Federal law that has long been settled.

M'Culloch v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Page* v. *Pierce County*, 25 Wash. 6, 64 Pac. 801; *Van Allen* v. *The Assessors* (*Churchill* v. *Utica*) 3 Wall. 573, 18 L. ed. 229.

There is no more right in the state to tax the cattle referred to in the complaint than there is to seize and sell for taxes on them the school appliances, the press in the printing shop, or the stock of supplies in the blacksmith shop, the wagon shop, or the harness shop.

Methodist Episcopal Church, South, Book Agents, v. *Hinton*, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; *State* v. *Fisk University*, 87 Tenn. 233, 10 S. W. 284; *New Haven* v. *Sheffield Scientific School*, 59 Conn. 163, 22 Atl. 156; *Cooper Hospital, Prosecutor*, v. *Burdsall*, 63 N. J. L. 85, 42 Atl. 853; *State, Sisters of Charity, Prosecutor*, v. *Chatham Twp. supra; State, Long Branch Firemen's Relief Asso., Prosecutor*, v. *Johnson*. 62 N. J. L. 625, 43 Atl. 573; *Cassiano* v. *Ursuline Academy*, 64 Tex. 673; *People ex rel. Blackburn* v. *Barton*, 63 App. Div. 581, 71 N. Y. Supp. 933.

The property in question here is vested in a purely charitable corporation, is not subject, like the property of an individual, to be applied to such purposes as may suit the whim or caprice of the owner. But besides, it is, as has been declared by this court, impressed with a public character.

Church of Jesus Christ of L. D. S. v. *United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792.

The appropriation of any part of the property upon which these taxes were levied to any purposes foreign to those for which the plaintiff in error was incorporated could be restrained by the state (*People ex rel. Ellert* v. *Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270), which is permitted to maintain the action by reason of the public interest in the property as well as by reason of the fact that, from indefiniteness in the designation of the beneficiaries,—a characteristic of charitable trusts (*Russell* v. *Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327),—no individual can assert a sufficient definite legal interest in the property to maintain the action. Not only that, but the circumstances under which it was acquired by the plaintiff in error should doubtless furnish ground to a court of equity to compel it to discharge its obvious moral obligation to devote it exclusively to the benefit of the Indians on the reservation. These circumstances furnish abundant ground for the claim that the permission of the government, and of the Indians, to the Fathers, to graze and rear these cattle on the reservation, was given only in pursuance of a tacit and implied agreement on their part that they would devote the same to the nurture, education, and enlightenment of the Indians.

2 Perry, Tr. 733.

An agreement may be implied from the acts of the parties, the circumstances and conditions of their business relations, and particularly by reason of, or pursuant to, a uniform practice extending through years, though express words may not have been employed to indicate the agreement.

Hayes. v. *Union Mercantile Co*. 27 Mont. 264, 70 Pac. 975; *Rice* v. *Rice*, 104 Mich. 371, 62 N. W. 833.

Trusts raised in consequence of an agreement on the part of a party acquiring property to hold it for, or devote it to, specific purposes, are not at all uncommon.

3 Pom. Eq. Jur. 1055.

Often equity implies such an understanding without anything like a definite agreement on the part of the donor so to hold it.

Curdy v. *Berton*, 79 Cal. 420, 5 L.R.A. 189, 12 Am. St. Rep. 157, 21 Pac. 858.

If the plaintiff in error claims in good faith, and not wholly without reason, that the Indians are interested in the cattle in question, the jurisdiction is properly invoked, and the court must then determine whether that interest in fact exists, and, if it does, whether, by reason of it, the property is exempt.

City R. Co. v. *Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

It is true the complaint does not point out the specific provision of the Constitution or the particular statute or treaty that is to be construed, or in virtue of which the right is claimed; but it is not essential, and it would violate all rules of pleading, to do so.

Crystal Springs Land & Water Co. v. *Los Angeles*, 76 Fed. 153; *Bridge Proprs.* v. *Hoboken Land & Improv. Co.* 1 Wall. 116–143, 17 L. ed. 571–576; *McCullough* v. *Virginia*, 172 U. S. 102–118, 43 L. ed. 382–388, 19 Sup. Ct. Rep. 134.

No counsel for defendant in error.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

There is nothing on the face of the complaint above set forth to show either the existence of any question involving the construction or application of the Federal Constitution, or that the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question. This must appear in the complaint by the statement in legal and logical form, such as good pleading requires. *Arbuckle* v. *Blackburn*, 191 U. S. 405, 413, 48 L. ed. 239, 241, 24 Sup. Ct. Rep. 148; *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 530, 48 L. ed. 287, 290, 24 Sup. Ct. Rep. 174. It must appear that the suit really and substantially involves a controversy of such a character. This pleading seems simply to be a claim that the plaintiff is exempt from taxation on the cattle which it owns, because it is an institution of purely public charity; and it would seem from that fact that it was claiming such exemption under some act of the state of Montana, and that its right to recover back these taxes depended [127] upon a statute of that state. *There is no provision in the Federal Constitution, neither is there any Federal law, nor any treaty between the United States and the Indians, that is referred to in the complaint, and it is not averred therein that the claim of the plaintiff to be exempt from taxation is founded upon any constitutional provision or law or treaty of the United States. It cannot be assumed, from any averment in the complaint, that the alleged right of a private owner of property to be exempt from taxation thereon, because it was devoted to purposes of charity among the Indians, was founded upon any Federal ground. On the contrary, it would seem to be plain that it was based upon some statute of the state wherein the tax was imposed and collected, which exempted from state taxation property wholly devoted to charity. The case is, therefore, not one which, from the subject-matter of the controversy, is apparently and in its essence of a Federal nature, or one that involved any of the foregoing questions of Federal right. *Swafford* v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783.

But it is now urged that the entire beneficial use or ownership of the property taxed is in tribal Indians, and that it is, therefore, not subject to taxation by or under state authority; also that the property is made use of by the Federal government, and that it is one of the means and instrumentalities adopted by it through which it carries out its governmental purposes; and such property is, therefore, not subject to be taxed by the state.

That the entire beneficial use or ownership of the property taxed is in tribal Indians, while the legal title only is in plaintiff, is not alleged in the complaint, and such a conclusion does not follow from the allegations to be found in that pleading. It is true that the property of Indians living in the tribal state, and so recognized by the government, is withdrawn from the operation of state laws, and is exempt from taxation thereunder. *The Kansas Indians* (*Blue Jacket* v. *Johnson County*) 5 Wall. 737, 757, 18 L. ed. 667, 673; *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478. The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the *law, and means, in this connection, such [128] a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf. And one is also said to have the beneficial ownership of land who has done everything to entitle him to a patent from the government, and who, therefore, has the legal right to such patent, and all that remains to be done is for the proper officer to issue it. *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Central P. R. Co.* v. *Nevada*, 162 U. S. 512, 40 L. ed. 1057, 16 Sup. Ct. Rep. 885. In such case the land is taxable to such owner, though he has not the legal title. He is the beneficial owner. If such were the case here, it might then be said that the Indians really owned such property, and that it was therefore exempt from taxation. But, as we have said, there is no such averment in the complaint, and no such inference can be drawn from the facts therein set forth. Taking the complaint as it is, it shows on its face that the Indians have neither any legal nor equitable title to the property, neither have they any legal or equitable right to its beneficial use; and it also appears from the complaint that the property is owned unconditionally and absolutely by the plaintiff. The plaintiff, as the owner of these cattle, may, at any time, abandon its present manner of using them, and may devote them, or any income arising from their ownership, to any other purpose it may choose, and the Indians would have no legal right of complaint. The plaintiff might refuse to spend another dollar upon the Indians upon these reservations, and refuse to further maintain or aid them in any way whatever, and no right of the Indians would

be thereby violated, nor could they call upon the courts to enforce the application of the plaintiff's property, or the income thereof, to the same purposes the plaintiff had theretofore applied them. There is nothing in *Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 7, 34 L. ed. 480, 10 Sup. Ct. Rep. 792, which, in the remotest degree, applies to this case. This court has heretofore determined that the Indians' interest
[129] in this kind of property, *situated on their reservation, was not sufficient to exempt such property, when owned by private individuals, from taxation. *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Wagoner* v. *Evans*, 170 U. S. 588, 42 L. ed. 1154, 18 Sup. Ct. Rep. 730. In the first of above-cited cases the right to graze over the reservation was leased by the Indians to the owners of the cattle, and it was alleged that if the cattle were taxed the value of the lands would be reduced, because the owners of the cattle would not pay as much for the right to graze as they would if their cattle were not subjected to taxation, and that therefore the tax was, in effect and substance, upon the land. This court held that the tax put upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians, citing *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896, and other cases, as authority for the decision. This is reaffirmed in the second case above cited. In this case the Indians have not even given a lease, and the owners are not obliged to pay anything for the privilege of grazing, and may, as we have said, devote the property, or the income thereof, to purposes wholly foreign to the Indians themselves. However meritorious the conduct of the owners of the cattle may be, in devoting the income or any portion of the principal of their property to the charitable work of improving and educating the Indians (and we cordially admit the merit of such conduct), we cannot see that there is, on that account, the least claim for exemption from taxation because of any Federal provision, constitutional or otherwise.

Nor is there any merit in the proposition that the plaintiff is made use of by the government of the United States, and is one of the means used by it to carry out its obligations to the Indians, under the Constitution or laws of the United States, and that therefore the property of the plaintiff which is thus used is not subject to state taxation. No such averment of fact is to be found in the pleading; nor does any such conclusion arise from the facts which appear therein. The government may lease a building from a private owner for the purpose of better carrying on its governmental duties, and yet the building is not *such an instrumentality of government as [130] prevents its taxation by or under state authority. Congress has not constituted this corporation an agency of its own for the purpose of discharging any duties which the government may owe to the Indians. It has, as the complaint avers, made in the past some appropriations from time to time to the corporation to aid it in its own work among the Indians, but that is far from constituting the corporation an agency of its own, to carry into effect its own governmental powers, granted by the Constitution or by law. And even such appropriations ceased years ago.

The case, in short, is one of that class where we have frequently held that the claim of a Federal question must have some foundation of plausibility (*St. Joseph & G. I. R. Co.* v. *Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *McCain* v. *Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644) in order to give jurisdiction. This has none.

The Circuit Court was right in refusing jurisdiction, and its judgment dismissing the complaint on account of the lack thereof is affirmed.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend, James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher, *Appts.*,

v.

MICHAEL J. COLBERT, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Morgan, Deceased, *et al.*

(See S. C. Reporter's ed. 130-147.)

1. Wills—bequest to corporation—misnomer.—The institution incorporated as

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NOTE.—*On devises for charitable uses*—see notes to Inglis v. Sailor's Snug Harbor, 7 L. ed. U. S. 617, and Vidal v. Philadelphia, 11 L. ed. U. S. 205.

As to bequests for religious purposes—see notes to Cottman v. Grace, 3 L.R.A. 145, and Bullard v. Chandler, 5 L.R.A. 104.

On bequests for educational purposes—see notes to Bullard v. Chandler, 5 L.R.A. 104, and Penny v. Croul, 5 L.R.A. 858.

As to power of a court of equity to remove a trustee or appoint a new trustee—see note to May v. May, 42 L. ed. U. S. 179.

On uncertainty in bequests—see notes to Cottman v. Grace, 3 L.R.A. 145; Stratton v. Physio-Medical Institute, 5 L.R.A. 33, and Heiskell v. Chickasaw Lodge No. 8, 4 L.R.A. 699.

"The President and Directors of Georgetown College" by the act of Congress of June 10, 1844 (6 Stat. at L. 912, chap. 41), which expressly provides that no misnomer of a corporation shall defeat or annul any donation, is entitled to the property bequeathed to "Georgetown University in the District of Columbia," where there is not, in such District, any such incorporated institution of learning as "Georgetown University," separate from and independent of "Georgetown College."

2. **Wills—bequests for religious purposes.**—Religious control exercised over incorporated institutions which are not sectarian institutions under their charters does not make them such within the meaning of D. C. Rev. Stat. § 457, and § 34 of the Maryland Bill of Rights, invalidating gifts and devises for religious purposes, unless made at least one month before the death of the donor or testator.

3. **Wills—bequest to educational institution for colonial research.**—The power conferred upon Georgetown College by the act of June 10, 1844 (6 Stat. at L. 912, chap. 41), to give instruction in the liberal arts and sciences, enables it to take a bequest to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia, and the obtaining and preserving of archives and papers relating to that subject.

4. **Trusts—death or resignation of trustees—appointment of successors.**—The death or resignation of the trustees named in a will, who are directed to pay and see to the application of a bequest to an educational institution, to be held and used as an endowment for the purposes of colonial research, does not cause the trust to fail, but the court may appoint their successors.

5. **Wills—uncertainty in bequest.**—Uncertainty as to the amount cannot successfully be urged to defeat the bequest of a sum not exceeding $5,000, to be equally divided between two named charitable institutions, which the testator directs to be made in the event of the invalidity of a prior bequest of a sum not exceeding $5,000 for another purpose.

6. **Wills—uncertainty in bequest.**—A bequest of a sufficient sum, not to exceed $3,000, the income to be applied to maintain a scholarship in a medical college, is not void for any uncertainty as to the amount.

7. **Wills—uncertainty in bequest.**—The discretion to be exercised by the trustees under a will in selecting the medical college in which a scholarship is to be maintained does not avoid the bequest, where the testator expressed his preference for Georgetown College, if the scholarship could be maintained in that institution, and if not, directed that it be a scholarship in some medical college in the District of Columbia.

[No. 153.]

Argued December 13, 14, 1905. Decided January 2, 1906.

APPEAL from the Court of Appeals of the District of Columbia to review a judgment construing a will, entered by that court upon reversing the judgment of the Supreme Court of that District. *Affirmed.*

See same case below, 24 App. D. C. 187.

Statement by Mr. Justice **Peckham:**

One of the appellants, Mrs. Speer, on the 5th of March, 1901, filed this bill in her own behalf and by her husband and next friend, Emory Speer, in the supreme court of the District of Columbia, to obtain a judicial construction of the will of her deceased brother, Ethelbert Carroll Morgan, who died, testate, on May 5, 1891, a resident of the District of Columbia. Answers to the bill were duly filed and the supreme court gave judgment construing the will, which, upon appeal to the court of appeals of the District of Columbia, was reversed, and judgment was entered, construing the will, by the court of appeals. From that judgment Mrs. Speer, together with some of the parties defendant in the suit, appealed, and brought the case here for review.

The will in question was executed on the 22d day of April, 1891, and the testator died May 5, 1891. He was never married, and left as his next of kin and heirs at law two brothers and three sisters, *viz.:* James D. and Cecil Morgan, and Mrs. Speer, the plaintiff in this suit, and Mrs. Anna M. Mosher and Mrs. Ada M. Hill. He appointed William J. Stephenson and John H. Magruder the executors and trustees of his will, the former of whom subsequently died and the *latter [132] resigned, and Michael J. Colbert and James Mosher were duly appointed by the court as substituted trustees under the will. The estate of the testator was treated by him in his will as consisting of two parts,—that which he had himself accumulated, and that which came to him through the will of his father, who died in June, 1889. His own accumulations amounted to a little over $23,000, while the estate which he received from his father somewhat exceeded $55,000, the total being a trifle over $78,000. The estate of the deceased had been received by the substituted trustees, Colbert and Mosher, when this bill was filed by Mrs. Speer against them, and also against Mrs. Anna M. Mosher, the wife of James Mosher, and a sister of the testator, and also against the two corporations incorporated as St. Vincent's Orphan Asylum and as Trustees of St. Joseph's Male Orphan Asylum, both being in the District of Columbia, who were made parties because, as the plaintiff alleges in her bill, they claim to be the beneficiaries under the clauses of the will of the testator, leaving a legacy to be equally divided between St. Vincent's and

St. Joseph's Catholic Orphan Asylums in the city of Washington, and in order that they might make proof of their identity, if any existed, with the St. Vincent, and also with the St. Joseph, Catholic Orphan Asylums, mentioned in the will, and that they might be bound by the adjudication which might be made by the court in all respects hereafter; and also against John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, and Edward I. Devitt, who, the plaintiff alleged, claimed to be, by succession, the president and directors of Georgetown College, and who, as such, claimed an interest in the estate of the testator, under the clauses of his will mentioning Georgetown University, in the District of Columbia; and the plaintiff alleged that they were made defendants in order that they might make proof of succession to the original incorporators of Georgetown College, and that their claims to the legacy mentioned in the will
[133] might be *adjudicated by the court. The bill alleged that the will of the testator was duly admitted to probate in the proper court in the District of Columbia. After making certain provisions, not here material, the will of the testator is as follows:

"All the rest and residue of my estate real, personal and mixed of which I am now possessed or shall possess at my death (other than my share under my father's will of which I would become possessed at my mother's death) I give bequeath and devise to my trustees hereinafter named and their heirs and assigns with full power to sell convey mortgage and reinvest, in trust nevertheless to apply the income and profits to the use and benefit of my sisters Eleanora Speer wife of Emory Speer and Minnie Mosher wife of James Mosher in equal parts during their lives and at their death to deliver and convey each sister's share to her issue and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her.

"And if my said two sisters shall both die leaving no issue living at their deaths I direct my said trustees to deliver and convey all the said rest and remainder of my estate (excepting my share aforesaid under my father's will) to Georgetown University in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof.

. . . . . .

"And I hereby give bequeath and devise any and all the estate real personal and mixed devised to me under my father's will and to which I become entitled to have and possess upon my mother's death to my trustees hereinafter named their heirs and assigns forever with full power to sell convey mortgage encumber and reinvest in trust nevertheless to pay and see to the application of

"First the sum of ten thousand ($10,000) dollars to Georgetown University in the District of Columbia to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia and obtaining and preserving *ar-[134] chives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

"Second a sum not to exceed five thousand ($5,000) dollars to be applied and expended under the personal supervision of my trustees to the purchase and erection of a chime of bells and either a side altar or memorial window or a bell and either a side altar or a memorial window for some one Catholic church . . . said church to be in the District and to—designated by my mother by her last will or otherwise and if she fail so to do I direct my trustees to carry out this trust as a memorial of my mother Nora Morgan and donate the same to some Catholic church . . . giving a preference, if there be one, built by the Jesuits. And in event this clause & gift be void I direct said sum not exceeding $5,000 five thousand dollars shall be equally divided between St. Vincents' and St. Joseph's Catholic orphan asylums in the city of Washington.

"Third. A sufficient sum not to exceed three thousand dollars the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship.

"Fourth, the sum of five thousand ($5000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as I may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department, in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

"And lastly as to all the rest and residue of my aforesaid *share of my father's estate[135] my said trustees their heirs and assigns shall hold the same for the benefit of my aforesaid sisters Ellenora and Minnie upon

the same limitations conditions remainders and powers and in the same manner as the trustees under my father's will, will then hold retain and possess the 'remainder' and bulk of the respective shares of my said two sisters I wish my brother Cecil to have my share of my father's library I nominate and appoint William J. Stephenson and John H. Magruder my executors and trustees of this my last will and testament.

"In witness whereof I have signed and sealed and published and declared this as my will this 22nd day of April, 1891."

The plaintiff alleged that the bequest and devise to Georgetown University, upon the death of the two sisters, without issue living at the time of their death, were void, because, as alleged, there was no such incorporated institution in the District of Columbia as Georgetown University, capable of taking the bequest and devise, and also upon the ground that, assuming there was a simple misnomer, and that Georgetown College was meant instead of Georgetown University, yet, even upon that assumption, Georgetown College was incapable of taking the devise and bequest, because it was under the supervision and control of the Order of Jesuits, and that the college was therefore a sectarian institution. It was also averred that the bequest of $10,000 to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, "was void, upon the same ground, and also because there was no charter power or authority in Georgetown College (assuming that institution to be meant) to receive the bequest." Also that the bequest of a sum not to exceed the amount of $5,000, to be applied and expended under the personal supervision of the trustees, for the purchase and erection of a chime of bells, etc., was void as was also the alternative bequest of an amount not to exceed
[136] that sum for *the benefit of the two Catholic orphan asylums in the city of Washington, the alternative bequest being void on the ground that those asylums were under the charge and control of persons belonging to religious orders, and therefore incapable of taking the bequest, and on the further ground that the amount of the bequest was uncertain. The bill averred also that the remaining bequest of a sum not to exceed $3,000, and also the bequest of $5,000, for the purpose of maintaining and founding scholarships, etc., were void, because of their uncertainty and the want of clearly defined conditions under which the funds should be applied. The defendants answered the bill and none of them conceded the validity of the claims made therein. Colbert, one of the substituted trustees, and also John D. Whitney and others, for and on behalf of the president and directors of Georgetown College, and also the trustees of St. Joseph's Male Orphan Asylum and of St. Vincent's Orphan Asylum, all claimed the validity of the bequests contained in the will, while the answer of Mosher, the other substituted trustee, simply expressed his willingness that the provisions of the will of the testator should be given effect and carried out only so far as they were legal and valid.

On the trial proof was taken in regard to the name and corporate status of Georgetown College, claiming the devises and bequests made to and on behalf of Georgetown University.

The supreme court, in an elaborate opinion (reported in 31 Wash. L. Rep. 630, 646), held that the devises and bequests to trustees named in the will, of the testator's estate, exclusive of that which came to him under the will of his father, were valid and effectual. The court also held that all the clauses and subclauses in the will of the testator, disposing of property acquired by the testator under his father's will, were void, and that the property therein spoken of became part of the residuum of the estate of the testator, and vested in the beneficiaries entitled to take under the residuary clause of the will. The court of appeals, upon review *of this judgment, held that the clauses of [137] the will were valid, except the bequest of "a sum not to exceed five thousand dollars," to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, and the erection of an altar or memorial window, etc.; but the alternative bequest of the sum not to exceed $5,000, to be equally divided between St. Vincent and St. Joseph's Orphan Asylums in the city of Washington, was good. It also held that the clause in the will, providing for the application of $5,000 to form a fund to be known as the E. Carroll Morgan fund or scholarship, to be applied as "I [the testator] may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide, to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia," was void. No appeal has been taken from this last portion of the judgment of the court of appeals.

Mr. **Conway Robinson** argued the cause and filed a brief for appellants:

A college is an organized assembly or collection of persons established by law and empowered to co-operate for the performance of some special function, or for the

promotion of some given object, which may be educational, political, ecclesiastical, or scientific in its character.

27 Am. & Eng. Enc. Law, p. 682; Black, Law Dict. *College*, p. 220.

In the most common use of the word, it (college) designates an institution of learning (usually incorporated) which offers instruction in the liberal arts and humanities and in scientific branches, but not in the technical arts, or those studies preparatory to admission to the professions.

Black, Law Dict. *College*, p. 221.

A university is an institution of higher learning, consisting of an assemblage of colleges united under one corporate organization and government, affording instruction in the arts, sciences, and the learned professions, and conferring degrees.

27 Am. & Eng. Enc. Law, *University*, p. 682; Black, Law Dict. *University*, p. 1202.

As an incorporated religious sect, order, or denomination, and as an institution duly empowered and enfranchised as such corporation to teach religion or the gospel, and which, as shown by the record in this cause, actually taught the same, testators' legacies and devises to this institution are in direct contravention of the Declaration of Rights.

Murphy v. *Dallam*, 1 Bland, Ch. 529; *Grove* v. *Disciples of Jesus Christ*, 33 Md. 454; *State use of Methodist Episcopal Church* v. *Warren*, 28 Md. 354; *Church Extension of M. E. Church* v. *Smith*, 56 Md. 392; *Catholic Cathedral Church* v. *Manning*, 72 Md. 116, 19 Atl. 603.

No charter powers constitute the sanction of the legislature contemplated and required by said Declaration of Rights, but such sanction must be expressly given to each particular devise or bequest in order to render it valid.

Catholic Cathedral Church v. *Manning*, and *Church Extension of M. E. Church* v. *Smith*, *supra*; *Orrick* v. *Boehm*, 49 Md. 85.

The terms "literary or scientific college or university" do not embrace a medical college.

People v. *Gunn*, 96 N. Y. 321.

The corporation of the Roman Catholic Clergymen is unquestionably a mere private corporation, its original endowment, and most of its subsequent endowments, having come from private parties and private sources.

Society for the Propagation of Gospel v. *New Haven*, 8 Wheat. 464, 487, 5. L. ed. 662, 668; *Vincennes University* v. *Indiana*, 14 How. 269, 277, 14 L. ed. 416, 420.

Had the act of June 10, 1844, contained any language purporting to repeal, change, or alter anything in the prior Maryland statute or acts of Congress, it would have been null and void.

Charlotte, C. & A. R. Co. v. *Gibbes*, 142 U. S. 391, 35 L. ed. 1054, 12 Sup. Ct. Rep. 255; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 28, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 189, 31 L. ed. 654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Providence Bank* v. *Billings*, 4 Pet. 514, 562, 7 L. ed. 939, 956; *Berlin* v. *New Britain*, 9 Conn. 181; *Com.* v *Pennsylvania Canal Co.* 66 Pa. 47, 5 Am. Rep. 329; *Pennsylvania College Cases*. (*Jefferson College* v. *Washington & J. College*) 13 Wall. 212, 214, 20 L. ed. 552, 553; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 592, 41 L. ed. 565, 17 Sup. Ct. Rep. 198.

The act of June 10, 1844, is void and unconstitutional under art. 5 of the Constitution of the United States.

United States v. *Lee*, 106 U. S. 219, 220, 27 L. ed. 181, 182, 1 Sup. Ct. Rep. 240; *Wright* v. *Wright*, 2 Md. 452, 56 Am. Dec. 723; *Harness* v. *Chesapeake & O. Canal Co.* 1 Md. Ch. 252; *University of Maryland* v. *Williams*, 9 Gill & J. 412, 31 Am. Dec. 72; *Grove* v. *Todd*, 41 Md. 641, 20 Am. Rep. 76; 2 Kent, Com. 13; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *Hurtado* v. *California*, 110 U. S. 535, 536, 28 L. ed. 238, 239, 4 Sup. Ct. Rep. 111, 292; *Fletcher* v. *Peck*, 6 Cranch, 135–137, 3 L. ed. 177, 178.

There is a fundamental principle of right and justice inherent in the nature and spirit of the social compact, the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above, and restrains, and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation in the unjust exercise of legislative power.

University of Maryland v. *Williams*, 9 Gill & J. 408, 31 Am. Dec. 72; *Hagerstown* v. *Sehner*, 37 Md. 191; *Calder* v. *Bull*, 3 Dall. 388, 1 L. ed. 649; *Fletcher* v. *Peck*, *supra*; *Baltimore* v. *State*, 15 Md. 469, 74 Am. Dec. 572; *Harness* v. *Chesapeake & O. Canal Co.* 1 Md. Ch. 251.

In a similar case in Maryland it was held that the later act created a new corporation, and did not destroy the old corporation.

University of Maryland v. *Williams*, 9 Gill & J. 365, 31 Am. Dec. 72.

In a Georgia case a railroad company first obtained a charter under the general incorporation laws, and afterwards was

chartered by special act of the legislature, and the latter was held a separate, independent, and distinct charter.

Snook v. *Georgia Improv. Co.* 83 Ga. 66, 9 S. E. 1104.

Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute, and to the corporation created by it, there can be but one legislative paternity.

Nashua & L. R. Corp. v. *Boston & L. R. Corp.* 136 U. S. 373, 34 L. ed. 367, 10 Sup. Ct. Rep. 1004.

Mr. **Marion Erwin** also argued the cause and filed a brief for appellants:

If the bequest for an endowment for the medical department be considered as intended for the corporation claimed in the catalogue of 1889–90 to be a university, chartered and recognized as such by the acts of Congress of 1815 and 1833, the bequest, even to the medical department, would be a gift to, or for the benefit and in ease of, a denomination or religious order, and would therefore fall within the prohibition of the Bill of Rights.

If, on the other hand, there be no charter other than that of 1844 for instruction of youth in the "liberal arts and sciences," the gift for the endowment of the medical department would be a gift to a medical college without a charter, and would therefore be void, or it would be a gift to a literary college not empowered to receive such a gift for such a purpose.

People v. *Gunn*, 96 N. Y. 317.

The "medical department," the beneficiary, not being an incorporated institution, or, if an incorporated institution, its charter having lapsed and the use not being a charity, the devise must fail.

Stratton v. *Physio-Medical College*, 149 Mass. 505, 5 L.R.A. 33, 14 Am. St. Rep. 442, 21 N. E. 874; *Goodell* v. *Union Asso. of Children's Home*, 29 N. J. Eq. 32; 2 Pom. Eq. Jur. 1019, note; *Church Extension of M. E. Church* v. *Smith*, 56 Md. 397; 2 Perry, Tr. §§ 711, 712; *James* v. *Allen*, 3 Meriv. 17; *Norris* v. *Thomson*, 19 N. J. Eq. 311; *Morice* v. *Bishop of Durham*, 9 Ves. Jr. 399, 10 Ves. Jr. 522; *Atty. Gen.* v. *Haberdashers' Co.* 1 Myl. & K. 428.

If the bequest be considered as one for the company of the medical department of Georgetown University, and if that be a charity, when the charter lapsed there was a resulting trust in favor of the testator's heirs at law and next of kin.

Easterbrooks v. *Tillinghast*, 5 Gray, 17.

The bequest is not only indefinite as to its objects and uncertain as to the beneficiary, but the claimants before the court as the beneficiaries are persons claiming to be the successors under a charter which provides for no such use.

Stratton v. *Physio-Medical College*, *supra*; *People* v. *Powers*, 147 N. Y. 104, 35 L.R.A. 502, 41 N. E. 432.

The power to take and hold property by gift, grant, devise, or otherwise expressed in the charter of a religious corporation, did not extend to relieve it from the provisions of the Bill of Rights.

Church Extension of M. E. Church v. *Smith*, 56 Md. 363; *Catholic Cathedral Church* v. *Manning*, 72 Md. 116, 19 Atl. 603.

The purpose of the act of Congress of 1866, in keeping in force the Bill of Rights, is manifest. It is a remedial statute, and, as such, must be construed liberally to effect the object aimed at, and to prevent the evils (from a public-policy standpoint) which the statute was intended to cure.

Endlich, Interpretation of Statutes, § 111; *Doe ex dem. Howson* v. *Waterton*, 3 Barn. & Ald. 151.

The history of statutes similar to the 34th section of the Maryland Bill of Rights, and the liberal construction uniformly given them to effect the object aimed at, is given in—

Price v. *Maxwell*, 28 Pa. 33.

The courts go behind corporate charter cloaks to determine from the facts whether the gift is for the benefit, or in ease, of a religious order, denomination, or teacher of religion.

Price v. *Maxwell*, *supra*; *State ex rel. Nevada Orphan Asylum* v. *Hallock*, 16 Nev. 373; *Coates* v. *Campbell*, 37 Minn. 501, 35 N. W. 366; *Cook County* v. *Chicago Industrial School for Girls*, 125 Ill. 541, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183; *State ex rel. Orr* v. *New Orleans*, 50 La. Ann. 880, 24 So. 666; *Boyce* v. *Christian*, 69 Mo. 492.

The stated reading of the Bible in a public school renders it a place of worship within the provision of the Constitution of Wisconsin. The use of the Bible as a text-book, and the stated reading thereof in the public schools without restriction, is sectarian instruction.

State ex rel. Weiss v. *District Board*, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967.

We do not think, however, that this bequest for colonial research is a gift at all to the university as the beneficiary.

Church Extension of M. E. Church v. *Smith*, 56 Md. 397.

The gift is not a charity.

Kelly v. *Nichols*, 17 R. I. 306, 18 R. I. 62, 19 L.R.A. 413, 21 Atl. 906, 25 Atl. 840; *Craig* v. *Lilly*, 6 Sadler (Pa.) 183, 19 W.

N. C. 375, 9 Atl. 171; *Goodell* v. *Union Asso. of Children's Home, supra;* 2 Pom. Eq. Jur. § 1019; *Gloucester* v. *Wood,* 3 Hare, 131.

A gift to a specific object of charity that fails, where there is no general charitable intention, cannot be applied *cy près,* even in those jurisdictions where that doctrine is applicable.

Atty. Gen. v. *Bishop of Oxford,* 1 Bro. Ch. 444, note; *Anonymous,* 2 Freem. C. L. Rep. 261; *Atty. Gen.* v. *Whitelcy,* 11 Ves. Jr. 251; *Cherry* v. *Mott,* 1 Myl. & C. 123; *Clark* v. *Taylor,* 1 Drew. 642; *Fisk* v. *Atty. Gen.* L. R. 4 Eq. 521; *Carter* v. *Balfour,* 19 Ala. 814; *Russell* v. *Kellett,* 3 Smale & G. 264; *Sinnett* v. *Herbert,* L. R. 7 Ch. 232; *Re White,* 55 L. J. Ch. N. S. 701; *Lechmere* v. *Curtler,* 24 L. J. Ch. N. S. 647; *Stratton* v. *Physio-Medical College,* 149 Mass. 505, 5 L.R.A. 33, 14 Am. St. Rep. 442, 21 N. E. 874.

To be a valid trust, there must be persons who can prove to the court their undoubted right to the uses of the trust, or objects named of a tangible nature which can be assisted; otherwise it could not determine who could complain of a breach of the trust, or enter a decree for its performance.

Bishop of Cloyne v. *Young,* 2 Ves. Sr. 91; *Robinson* v. *Waddelow,* 8 Sim. 134; *Knight* v. *Knight,* 3 Beav. 148, 174; *Williams* v. *Kershaw,* 5 Clark & F. 111; *Kendall* v. *Granger,* 5 Beav. 300; *Nichols* v. *Allen,* 130 Mass. 211, 39 Am. Rep. 445; *Church Extension of M. E. Church* v. *Smith,* 56 Md. 362; *Grimes* v. *Harmon,* 35 Ind. 221, 9 Am. Rep. 690; *Heiss* v. *Murphey,* 40 Wis. 276; *Goddard* v. *Pomeroy,* 36 Barb. 548; *Gumble* v. *Pfluger,* 62 How. Pr. 118; *Philadelphia Baptist Asso.* v. *Hart,* 4 Wheat. 1, 4 L. ed. 499.

The rule has since been reviewed by the Supreme Court of the United States, and modified only to the extent that gifts strictly to charitable uses are to a certain extent excepted from its operations.

Ould v. *Washington Hospital for Foundlings,* 95 U. S. 303, 24 L. ed. 450; *Russell* v. *Allen,* 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327; *Jones* v. *Habersham,* 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336.

A bequest for the "purchase and distribution of such books as may have a tendency to promote the interest of virtue and religion and happiness of mankind," was held not to be a charity, and void for uncertainty.

2 Perry. Tr. § 713; *Brown* v. *Yeale,* 7 Ves. Jr. 50; *Briggs* v. *Hartley,* 19 L. J. Ch. N. S. 416.

Courts do not uphold or administer trusts for particular purposes which are not charitable within the meaning of the law, nor trusts expressed in general words which do not come within the legal signification of the word "charity."

2 Perry, Tr. § 709.

No particular church was named as the beneficiary for the chime, altar, or window; and the testator left it to his mother to designate one.

Bristol v. *Bristol,* 53 Conn. 242, 5 Atl. 687.

But in any event, the mother having died without exercising the power, the bequest lapsed.

Gambell v. *Trippe,* 75 Md. 252, 15 L.R.A. 235, 32 Am. St. Rep. 388, 23 Atl. 461; *Fontain* v. *Ravenel,* 17 How. 382, 15 L. ed. 85.

This is a gift for improvement of a Catholic church.

Baker v. *Fales,* 16 Mass. 495.

The words used "not to exceed 5,000," were not intended to mean $5,000.

2 Perry, Tr. § 714; *Ewen* v. *Bannerman,* 2 Dow & C. 74; *Flint* v. *Warren,* 15 Sim. 626; *Second Cong. Soc.* v. *First Cong. Soc.* 14 N. H. 315; *Russell* v. *Jackson,* 10 Hare, 204; *Coxe* v. *Basset,* 3 Ves. Jr. 155; *Hartshorne* v. *Nicholson,* 26 Beav. 58.

Where a bequest was to testator's mother, to use whatever portion she pleases on condition that she make a will leaving whatever portion she does not use to certain charitable objects, it was held that the trust in favor of the charitable objects failed for uncertainty of amount donated.

Mills v. *Newberry,* 112 Ill. 123, 54 Am. Rep. 213, 1 N. E. 156.

To constitute a valid trust, undoubtedly three circumstances must concur: Sufficient words to raise it, a definite subject, and a certain or ascertained object.

Cruwys v. *Colman,* 9 Ves. Jr. 323.

Charitable trusts are further distinguished from ordinary trusts by the uncertainty of their beneficiaries. Such uncertainty does not cause a charitable trust to fail.

5 Am. & Eng. Enc. Law, p. 905.

This statement is to be understood, however, as referring to the uncertainty of the individuals to which the bequest is made, and not to the uncertainty of a class of individuals from which the beneficiaries shall come.

Ibid.

The trustees named having no longer the power to execute the personal discretion vested in them, one being dead and the other having resigned, the trust is not capable of being executed.

Fontain v. *Ravenel,* 17 How. 369–382, 15 L. ed. 80–86; *Gambell* v. *Trippe, supra.*

Whenever a power is of a kind that in-

dicates a personal confidence, it must prima facie be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom, by legal transmission, the same character may belong.

Cole v. *Wade*, 16 Ves. Jr. 27; *Alexander* v. *Alexander*, 2 Ves. Sr. 643; *Powles* v. *Jordan*, 62 Md. 503; *Gambell* v. *Trippe*, *supra*; *Atty. Gen.* v. *Berryman*, 1 Dick. 168; *Fontain* v. *Ravenel*, *supra*.

The view that, while the amount is uncertain, the substituted trustees can, under the direction of the court, make the selection of the medical college; and that, when the selection is made, this will fix the object and render definite the sum which will have to be set aside to create the income to maintain the scholarship,—is directly opposed to that expressed by this court.

Fontain v. *Ravenel*, 17 How. 369, 15 L. ed. 80. See also *Pritchard* v. *Thompson*, 95 N. Y. 76, 47 Am. Rep. 9.

It is merely a bequest falling within the class of gifts designated "benevolence" and "liberality."

Stratton v. *Physio-Medical College*, 149 Mass. 505, 5 L.R.A. 33, 14 Am. St. Rep. 442, 21 N. E. 874.

The beneficiaries are indefinite, uncertain, not chartered, and not limited to any charitable objects.

2 Pom. Eq. Jur. § 1019, notes; *Gloucester* v. *Wood*, 3 Hare, 131; *Goodell* v. *Union Asso. of Children's Home*, 29 N. J. Eq. 32; *DeCamp* v. *Dobbins*, 29 N. J. Eq. 46; *Jones* v. *Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; *Atty. Gen.* v. *Haberdashers' Co.* 1 Myl. & K. 428; 2 Perry, Tr. § 712; *Kelly* v. *Nichols*, 17 R. I. 306, 18 R. I. 62, 19 L.R.A. 413, 21 Atl. 906, 25 Atl. 840.

It is clear that the first provision, creating a $5,000 "E. Carroll Morgan fund" or "scholarship," to be applied as testator might thereafter indicate, is void. It does not appear that he did verbally so indicate.

Aston v. *Wood*, L. R. 6 Eq. 419; 2 Perry, Tr. § 705, note.

This alternative provision also avoids the bequest for the following reasons: It was not a bequest to either use definitely; the discretion to apply it to the one purpose or the other was a power and discretion vested in his trustees named personally, to be exercised in conjunction with unnamed persons to be personally selected by them.

Pritchard v. *Thompson*, *supra*; *People* v. *Powers*, 147 N. Y. 104, 35 L.R.A. 502, 41 N. E. 432; *Gambell* v. *Trippe*, 75 Md. 252, 15 L.R.A. 235, 32 Am. St. Rep. 388, 23 Atl. 461; *Powles* v. *Jordan*, *Cole* v. *Wade*, *Atty. Gen.* v. *Berryman*, and *Alexander* v. *Alexander*, *supra*; *Bristol* v. *Bristol*, 53 Conn. 242, 5 Atl. 687; *Fontain* v. *Ravenel*, *supra*.

Mr. **Joseph R. Lamar** also argued the cause and filed a brief for appellants:

A secular charter does not destroy a religious order.

State ex rel. Nevada Orphan Asylum v. *Hallock*, 16 Nev. 373; *Kelley* v. *Welborn*, 110 Ga. 540, 35 S. E. 636; *Kerr* v. *Dougherty*, 79 N. Y. 327; *Kenrick* v. *Cole*, 61 Mo. 572; *Knight's Estate*, 159 Pa. 500, 28 Atl. 303. See also cases cited in note to *Dakota Synod* v. *State*, 14 L.R.A. 418.

The provision to "see to the application" contemplates that the trustees should themselves devise a scheme. The death of the one and the resignation of the other make it impossible for the trustees to "see to the application," and the gift cannot be effectuated under the *cy près* power, for it does not exist in the District.

Fontain v. *Ravenel*, 17 How. 369, 15 L. ed. 80.

The bequest for colonial research not being intended as an absolute gift to Georgetown University, but to it in trust, and the trust failing, the property must descend either to the heir or to the residuary legatee.

Stratton v. *Physio-Medical College*, 149 Mass. 505, 5 L.R.A. 33, 14 Am. St. Rep. 442, 21 N. E. 874; *Maught* v. *Getzendanner*, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471.

The colonial endowment fund is not a charity, but rather a benevolence.

2 Underhill, Wills, 1197–1199; *World's Columbian Exposition* v. *United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654, 56 Fed. 630; *Kelly* v. *Nichols*, 17 R. I. 306, 18 R. I. 62, 19 L.R.A. 413, 21 Atl. 907, 25 Atl. 840; *Mason* v. *Perry*, 22 R. I. 475, 48 Atl. 671.

To give property to an agent to do with it as he pleases is equivalent to a conveyance in fee; but, where the gift is to an agent, and it happens that the agent is to act as a trustee, but the amount of the gift or the object of the trust is not definitely stated, the devise fails.

Maught v. *Getzendanner*, *supra*.

A devise under which the object is to be selected or the amount to be fixed by the trustee is void.

Fontain v. *Ravenel* and *Maught* v. *Getzendanner*, *supra*; *Wheeler* v. *Smith*, 9 How. 55, 13 L. ed. 44; *Prettyman* v. *Baker*, 91 Md. 539, 46 Atl. 1020; *Nichols* v. *Allen*, 130 Mass. 211, 39 Am. Rep. 445; *Olliffe* v. *Wells*, 130 Mass. 221.

The devise for the colonial fund, and for the scholarship, is void because it fails to indicate who the beneficiaries are, or how they are to be determined.

Tilden v. *Green*, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; *Le-*

page v. *McNamara*, 5 Iowa, 124; *Barnes* v. *Barnes*, 3 Cranch, C. C. 269, Fed. Cas. No. 1,014; *Methodist Episcopal Church* v. *Jackson Square Evangelical Lutheran Church*, 84 Md. 173, 35 Atl. 8; *Beekman* v. *Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *White* v. *Fisk*, 22 Conn. 31.

Messrs. **Geo. E. Hamilton** and **M. J. Colbert** argued the cause and filed a brief for appellee:

Georgetown College is an edueational institution, and not a sectarian or religious institution.

Bradfield v. *Roberts*, 175 U. S. 296, 44 L. ed. 169, 20 Sup. Ct. Rep. 121.

It is never required that all particulars of name or description of person or thing should be preeisely accurate in order to the validity of the provisions of a will. It is always sufficient that the courts, after learning the surrounding facts and circumstances, should be able with reasonable certainty to declare the intent of the testator.

1 Redf. Wills, chap. 10, § 41.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The opinion of the court of appeals in this ease, delivered by Chief Justiee Alvey (24 App. D. C. 187), is entirely satisfactory to us, and leaves little to be said in addition.

[141] For *the purpose, however, of simply stating the opinion of this court upon the various questions, without discussing them at length, we add what follows.

The appellants insist that the gift of the property to the Georgetown University is void, as having been made to a seetarian institution less than one calendar month prior to the testator's death, and that sueh disposition was therefore in violation of §457 of the Revised Statutes of the District of Columbia. That seetion makes valid and effectual all sales, gifts, and devises prohibited by the 34th section of the Declaration of Rights of the state of Maryland, adopted in 1776, "provided, that in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." 14 Stat. at L. 232, chap. 237, passed July 25, 1866. The 34th section of the Maryland Bill of Rights makes void:

"Every gift, sale, or devise of lands to any minister, publie teacher, or preacher of the Gospel as such, or to any religious seet, order, or denomination, or to or for the support, use, or benefit of or in trust for any minister, public teaeher, or preaeher of the Gospel as such, or any religious sect, order, or denomination; every gift or sale of goods or ehattels to go in sueeession or take place after the death of the seller or donor, to or for such support, use, or benefit, and also every devise of goods or ehattels to or for support, use, or benefit of any minister, publie teacher, or preacher of the Gospel as such, or any religious sect, order, or denomination, without leave of the legislature."

It is also insisted that there is a misnomer of the eorporation, now elaiming the right to the bequest, inasmuch as such corporation was ineorporated under the name of "The President and Direetors of Georgetown College," while the bequest is to "Georgetown University, in the District of Columbia." It is contended that Georgetown College is a eorporation, incorporated on the 10th of June, 1844, under an act of Congress (6 Stat. at L. 912, ehap. 41), entitled "An Act to Ineorporate Georgetown *College, in the Distriet of Columbia," and [142] that there was and is another institution in Georgetown, sometimes called the University of Georgetown, or Georgetown University, whieh was distinct from the eollege incorporated under the above-mentioned aet of Congress, and not eovered by it, and that the testator knew of this so-ealled university, that he was a professor therein, and that sueh university was, at the time of the testator's death, a seetarian institution within the 34th section of the Maryland Bill of Rights above mentioned. The 4th section of the above aet expressly provides that no misnomer of the eorporation shall defeat or annul any donation, etc., to the corporation. We agree with the supreme eourt and the eourt of appeals of the Distriet of Columbia in the opinion that there was not, at the time of the exeeution of his will by the testator, or at the time of his death, any incorporated institution existing as Georgetown University or University of Georgetown, separate and apart from, or having powers other than, those granted to "The President and Directors of Georgetown College," by the aet of Congress of 1844, above eited. It appears in the evidence that this college was frequently spoken of as Georgetown University, and known as sueh, but the evidence entirely fails to show that there were two ineorporated institutions, the one, "Georgetown University," and the other, "The President and Direetors of Georgetown College." And we have no doubt that the testator meant the eorporation ealled Georgetown College when he used in his will the word "university." He meant to give the property to a eorporation, and to one that could take it, and the evidence shows there was no other eorporation of that kind. Upon this question the court of appeals said: "It is expressly alleged in the bill as a fact that there is no such incorporated institution as Georgetown University, though Georgetown College is frequently referred to and spoken of as Georgetown University, notwithstand-

ing it has never been incorporated as such. It is simply a popular designation applied
[143] to the college. It is alleged in the bill *that the defendants Whitney and others, under the name of The President and Directors of Georgetown College, in this District, claim to be the beneficiaries entitled to the legacies mentioned in the will of the testator as for Georgetown University. It is not attempted to be shown that there was, or is, in existence, in this District, any such incorporated institution of learning as 'Georgetown University,' separate from and independent of Georgetown College." It was not to any unincorporated so-called institution that the testator intended to leave the property, but to one that was incorporated and capable of taking a legacy.

Various acts of the legislature of Maryland were referred to on the argument, particularly the act of 1792, chapter 55; that of 1797, chapter 40; the act of 1805, chapter 118; that of 1808, chapter 37; also the act of Congress of March 1, 1815, chapter 70 (6 Stat. at L. 152), entitled "An Act Concerning the College of Georgetown in the District of Columbia;" also that of March 2, 1833 (6 Stat. at L. 538, chap. 86), in which the government grants certain lots in Washington city to the college above referred to. These various statutes were cited for the purpose of showing the validity of the claim that an institution called Georgetown University, as distinct from Georgetown College, was meant in the will of the testator. In regard to these particular acts we think they do not bear upon the case other than, as remarked by the court of appeals, to show the origin and growth of Georgetown College, and to identify the early foundation of the school with the president and directors of Georgetown College, as that institution was fully and completely incorporated by the above-cited act of Congress of June 10, 1844. That act must be resorted to as the measure of the powers and duties, as well as to define the character, of the corporation created thereby. *Bradfield* v. *Roberts*, 175 U. S. 291, 44 L. ed. 168, 20 Sup. Ct. Rep. 121.

Taking the character of the college from the act of Congress, we are of opinion that it is not a sectarian institution or within § 34 of the Maryland Bill of Rights.
[144] The reasoning upon *this subject (as well as that upon the alleged misnomer of the college) set forth in the opinion of the supreme court (31 Wash. L. Rep. 630) and in that of the court of appeals is entirely satisfactory, and we concur therein.

There is, in our judgment, no merit in the contention that the persons claiming as president and directors of the college are not the legal successors of the original incorporation. There is no evidence that the same has been dissolved. The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved, by the mere failure to elect trustees. We do not think that in this case there was any failure to elect, nor was there any dissolution.

We now come to the consideration of the validity of the disposition made of the testator's property which came to him from the will of his father. The testator gives and bequeaths all of that property to his trustees, thereafter named, in the will, and their heirs and assigns forever, "with full power to sell, convey, mortgage, encumber, and reinvest, in trust nevertheless to pay and see to the application of: First, the sum of ($10,000) ten thousand dollars to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund."

Aside from the objections to the bequest to Georgetown University already considered, a further objection is made, and the disposition is alleged to be void, because there is no charter power in any institution which could take under this bequest that authorizes it to prosecute such research, and obtain and preserve the archives relating thereto. It is well said, in the opinion of the court of appeals in this case, that the act of incorporation of Georgetown College, in 1844, confers "corporate power upon the institution for the instruction of youth in the liberal arts and sciences, and also clothes the corporation
[145] *with power to take any estate whatsoever, in any lands, etc., or goods, chattels, moneys, and other effects, by gift, bequest, devise, etc., and the same to grant convey or assign, and to place out on interest for the use of said college, and to apply the same [thereto]. The cultivation of historical research would seem to be a part of a liberal education, such as should be encouraged by a college intended to confer degrees upon students in acquiring a liberal education in the arts and sciences." In *Jones* v. *Habersham*, 107 U. S. 189, 27 L. ed. 407, 2 Sup. Ct. Rep. 336, it is said that "a corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school, or an asylum."

Although it is, under the will, the duty of the trustees therein named to exercise super-

vision over the administration of the fund, nevertheless, the death or resignation of the trustees named in the will cannot, and does not, defeat the bequest. There is not such a personal trust as renders it necessary to have the personal action of the trustee named in the will, and the trust does not fail upon the death or resignation of the named trustee. The court may appoint his successor. *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99, 7 L. ed. 617.

Both courts below have held the bequest of a sum not to exceed $5,000, to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, etc., to be void. We agree with those courts in that respect. We also agree with the views of the court of appeals, holding that the alternative bequest of this same sum, not to exceed $5,000, to be divided equally between the two orphan asylums, is valid. There is no material misnomer in either case, although they are incorporated institutions, one by the name of St. Vincent's Orphan Asylum and the other as St. Joseph's Male Orphan Asylum in the city of Washington, and they are referred to in *the will [146] simply as St. Vincent's Orphan Asylum and St. Joseph's Catholic Orphan Asylum.

Nor does the bequest violate the 34th section of the Maryland Bill of Rights, already referred to. The same reasoning on that point governs this bequest as is applicable to the bequest to the University of Georgetown. Neither of these orphan asylums is a sectarian institution under the acts of incorporation. The other objection made is that the clause directs that a sum, not exceeding $5,000, shall be equally divided between these orphan asylums; and it is said that there is such uncertainty in the amount of the bequest as to render it impossible to execute it, that it might be fulfilled by dividing a dollar between the asylums, or any other sum within the $5,000 named in the bequest. But it seems to us that the intention of the testator is clear to give the full sum of, but not to exceed, $5,000. That is, he gives $5,000 to be equally divided between these two asylums. While the amount is not to exceed $5,000, the direction for an equal division, taken in connection with the other facts, renders it, in our opinion, clear that the intention of the testator was that that sum should be the amount of the bequest. Courts are always reluctant to hold a bequest void for uncertainty, and they only do it when actually compelled to do so by the language used. *Inglis* v. *Sailor's Snug Harbor*, 3 Pet. 99, 7 L. ed. 617. If the testator had really intended that any less sum than $5,000 should be disposed of by and equally divided under this clause in his will, he would have said so.

Objection is also made to the bequest of "a sufficient sum, not to exceed three thousand ($3,000) dollars, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship." The first objection, as to the uncertainty of the amount of the bequest, we do not regard as meritorious. *It is a sum sufficient to found a [147] scholarship, and it shall not exceed, in any event, $3,000. If one can be founded, within the conditions named in the will, for a less sum than $3,000, then that less sum only can be used. The discretion to be exercised by the trustee in selecting the college with which to connect the scholarship does not render the bequest void. The testator has, by this clause in his will, himself expressed his preference for Georgetown College, if the scholarship can be maintained in that institution, but if not, it is to be a scholarship in some medical college of the District. This, we think, is not an improper or uncertain disposition of the bequest, or an illegal placing of a discretion in the trustee under the will. See *Atty. Gen.* v. *Gleg*, 1 Atk. 356; *Atty. Gen.* v. *Fletcher*, 5 L. J. Ch. N. S. 75; 2 Perry, Tr. 4th ed. § 721.

The last bequest objected to is that of $5,000, to form a fund known as the E. Carroll Morgan fund or scholarship, to be applied as the testator might thereafter indicate to his trustees, etc. This has been declared void by both courts, and no appeal has been taken from the judgment of the court of appeals, adjudging that item to be void. That bequest being adjudicated invalid, the fund provided for therein forms part of the residue of the testator's estate, and passes under the residuary clause of the will.

These views call for an affirmance of the judgment of the court of appeals, with costs to the several parties, to be paid out of the residuary fund, as provided for by the judgment of that court.

Affirmed.

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*JOSHUA ROBERTS MEAD, Anna Leoca- [148] die Lee, William Wesley Mead, and Stella Baham Meade, Trustees, etc., *et al.*, *Plffs. in Err.*,

v.

CITY OF PORTLAND *et al.*

(See S. C. Reporter's ed. 148–164.)

1. Constitutional law—due process of

NOTE.—*On the right to erect wharves*—see note to Madison v. Mayers, 40 L.R.A. 635.

On injury to abutter's easement by vacating

law—taking property without compensation—wharfage rights in city streets.—A reservation of "wharves and wharfing privileges" in a dedication of land for an addition to a city does not include the right to appropriate for wharfage purposes a street or an extension thereof which cannot be taken away or destroyed without compensation without denying the due process of law secured by the 14th Amendment to the Federal Constitution.

2. **Constitutional law—impairing contract obligations—wharfage rights in city streets.**—No right to use or appropriate for wharfage purposes a city street or an extension thereof, protected by the contract clause of the Federal Constitution from impairment by legislative change of the grade of the street, can be gathered from municipal grants to the owners of property fronting on opposite sides of the street of the right to construct wharves in a river on and in front of such property, reserving to the common council the right to regulate the passageways along the street and any part of the wharves extending therein "as a part of said street and sidewalks."

3. **Error to state court—questions reviewable—statutory construction.**—The construction of a state statute by the highest court of the state as a legislative change of the grade of a street for its full width is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute impairs the obligation of any contract right of abutting owners to appropriate the street or an extension thereof for wharfage purposes.

4. **Public improvements—change of grade—power not exhausted by partial exercise.**—The right of a bridge company or its municipal successor to change, under legislative authority, the grade of a street for its full width for an approach to a bridge without making compensation to abutting owners for consequential damages, is not so exhausted by exercising the right as to a portion of the street only as will prevent a subsequent change of grade of the rest of the street by extending the approach to cover an opening left in the center of the street to permit access to the wharves of abutting owners.

[No. 56.]

Argued November 27, 1905. Decided January 2, 1906.

IN ERROR to the Supreme Court of the State of Oregon to review a decree which affirmed a decree of the Circuit Court for the County of Multnomah, in that state, sustaining a demurrer to, and dismissing, the complaint in a suit to enjoin municipal authorities from closing a passageway in the approach of a bridge. *Affirmed.*

See same case below, 45 Or. 1, 76 Pac. 347.

Statement by Mr. Justice **McKenna:**

Bill in equity to enjoin defendants from closing a certain passageway in the approach of a bridge called the Morrison street bridge, in the city of Portland, Oregon. The approach leads to plaintiffs' wharves. The bill was demurred to and the demurrer sustained by the trial court, plaintiffs declining to plead further, and a decree was entered dismissing the bill. The decree was affirmed by the supreme court of the state. 45 Or. 1, 76 Pac. 347.

The bill alleges that some of the plaintiffs have been for many years owners of block 76 in the city of Portland, and other plaintiffs have been the owners of block 77. These blocks are bounded on the east by the Willamette river and on the west *by Front[149] street. Morrison street is the north boundary of block 76 and the south boundary of block 77. Attached to the properties are valuable riparian rights and wharf rights and privileges, which entitled the owners to build, maintain, and use the same to the established wharf line of the river, and on them are warehouses, docks, and wharves of great value, which are occupied by tenants. The properties are located within the donation land claimed by one Daniel H. Lownsdale, under whom plaintiffs claim as owners. In the dedication by Lownsdale of the plat of the town of Portland it is, among other things, provided as follows:

"The wharves and wharfing privileges are specially reserved to the owners of the claim, and never (except by deed) subject to any but the laws of the territory of Oregon or ordinances of the town or city corporation, as other town (private) property. . . . "

That the common council of said city of Portland adopted an ordinance, No. 2273, entitled "An Ordinance Authorizing the Construction of a Wharf on the Willamette River in Front and Opposite Lots Numbers

street, changing grade, etc.—see note to Selden v. Jacksonville, 14 L.R.A. 370.

As to what constitutes due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri *ex rel.* Hill v. Dockery, 63 L.R.A. 571.

3 and 4, in Block No. 77," approved September 26, 1878. †

[150] *Also an ordinance, No. 2387, entitled "An Ordinance Authorizing the Construction of a Wharf on the Willamette River in Front of and Opposite Lots Nos. 3 and 4, in Block No. 76," approved February 21, 1879. ‡

[151] *The predecessors in interest of plaintiffs constructed wharves in conformity with the provisions of the ordinances and the grades established therein, the wharf constructed pursuant to ordinance No. 2387 covering the south half of the street, and that constructed pursuant to ordinance No. 2273 covering the north half of the street. The wharves consisted of two floors or stories, with a large warehouse over the second floor. The second floors were built slightly above the level of Front street, with approaches as provided in the ordinances. The lower stories or floors of the wharves were considerably below the level of Front street, and were connected with that street by a roadway running on an incline along Morrison street from Front street down to the portion of the wharves built on Morrison street, which roadway was constructed by the respective owners of the properties. The wharves, docks, and warehouses, and the approach thereto, have been used by plaintiffs and their predecessors for more than twenty years, and have been used as landing places for boats and vessels navigating the river, and by people and teams having business at the docks and wharves, and the docks and wharves and the approach thereto have been used as a street or highway by the public. The grade of Morrison street occupied by the roadway leading from Front street and over that portion of the street upon which the wharves and docks were built has never been established except

†Ordinance No. 2273.

"Sec. 1. The owner or owners of lots 3 and 4, in block 77, in the city of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river, on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front street from a point 100 feet north of the north line of Morrison street, the lower floor of said wharf to be as near 10 feet above the base of grades as practicable; provided, that the owner or owners of said above-described property shall construct and maintain, at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the foot of Morrison street, and to be in accordance with plan on file in the office of the auditor and clerk.

"Sec. 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passageway, 15 feet in width along and over the north side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend southwardly into said street for a greater distance than 6 feet; provided, that the whole of said passageway and all of those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

"Sec. 3. The owners of the property described in § 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood, with the roof covered with tin, anything contained in ordinance No. 1140, entitled 'An Ordinance Providing for the Prevention of Fires and the Protection of Property Endangered Thereby,' and the several amendments thereto, to the contrary notwithstanding.

‡ Ordinance No. 2387.

"Sec. 1. The owners of lots 3 and 4, in block 76, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river on and in front of the above-described lots. The easterly side of said wharf to commence at a point 147 feet east of the east line of Front street, and running from the center line of Morrison street extended in a direct course to a point 130 feet south of the center line of Morrison street extended, at a distance of 137½ feet from the east line of Front street.

"The lower floor of said wharf to conform to the grade of Coulter and Church's wharf at its connection therewith; provided, that the owner or owners of the above-described property shall construct and maintain at their own expense a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf, said pontoon to be constructed at the foot of Morrison street, and to be in accordance with plan in auditor's office.

"Sec. 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block northwardly, except for a passageway, 15 feet in width, along and over the south side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend northwardly into said street for a greater distance than 6 feet; provided, that the whole of said passageway, and all those portions of said wharf extending over and into the street, shall be subject to regulation by the common council as a part of said street and sidewalk; and provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

"Sec. 3. The owners of property described in § 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in ordinance No. 1140, entitled 'An Ordinance Providing for the Prevention of Fires and the Protection of Property Endangered Thereby,' and the several amendments thereto, to the contrary notwithstanding."

by said ordinances, and said portions of Morrison street and the roadway have been and are now improved and used, and the same are a public street and highway, and were built and have been maintained "in reliance of the rights and privileges therein [the ordinance] maintained."

In 1878 the legislature of the state of Oregon passed an act authorizing the Port-
[152] land Bridge Company, or its assigns, to *construct and maintain a bridge crossing the Willamette river between Portland and East Portland for all purposes of travel and commerce, "at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland, as may be selected or determined on by said corporation or its assigns, on or above Morrison street of the said city of Portland, and in streets of said city of East Portland; . . . and provided, that the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland."

The bridge was constructed in 1886, the west end of which was located at the east end of Morrison street. Between the west end of the bridge and Front street a plank road or approach was constructed over Morrison street, but the approach did not conform to the grade of Front street, but was constructed at an elevation of more than 2 feet above such grade at the west end of the bridge, and thence inclined to Front street, and has always been maintained at such elevation. The bridge did not cover the whole of Morrison street from Front street to the west end of bridge, but was so constructed that a portion of Morrison street, in the center thereof and leading from Front street on an incline to the lower docks and wharves of plaintiffs, was left uncovered and unchanged, the same being about 18 feet wide and extending easterly from Front street about 95 feet. The approaches constructed by the bridge company have been and are sufficient for the passage to and from the bridge for foot passengers, cars, and vehicles using the bridge. The opening was left in the decking of Morrison street to provide access to the lower floors of the wharves, and as a means of ingress and egress from them, and did not materially interfere with or obstruct the use of city roadways and the wharves and docks as they had been theretofore used.

In 1895 the city of Portland purchased, under legislative authority, the Morrison street bridge from the Willamette Iron Bridge Company, the successor in interest to the Portland Bridge Company, and sub-
[153] sequently, under the provision of an *act of the legislature, approved February 21, 1895, the county court of Multnomah county assumed and has since had the care and operation of the bridge and its approaches.

In 1886 the Willamette Iron Bridge Company began the construction of the bridge and built two piers in the river to support the western end of the bridge in front of the outer line of plaintiffs' wharves, in such position as to obstruct navigation and to greatly interfere with the access to the wharves, and at the same time began to construct the approach to the bridge over Morrison street in such manner as to interfere with access to the wharves. The owners of the wharves in April, 1887, protested, and a compromise and settlement was effected between the parties, whereby the bridge company agreed to forever leave an opening in the bridge approach substantially as it now is, and in consideration thereof the wharf owners agreed to permit the piers to remain as constructed, and as they have ever since remained, and to waive all objection to the construction of the approach in the manner in which it was constructed, leaving the opening forever open and unobstructed for free ingress and egress to the wharves. The parties acted upon the agreement, and the wharf owners did not begin or prosecute legal proceedings. In 1890, however, the company, notwithstanding the agreement, threatened to close up the opening, whereupon the wharf owners commenced a suit in equity to enjoin the threatened injury, and thereupon, in consideration of the dismissal of the suit, the bridge company entered into another agreement to refrain from the threatened acts, and leave the opening and approach in the condition as the same now is.

It is alleged that the city of Portland acquired the bridge and the approach thereof subject to the said agreement, and the rights vested in the plaintiffs thereby, and that the defendants are proceeding, without tendering or offering compensation therefor, to close said opening, and thereby deprive plaintiffs of their property without due process of law, contrary to the 14th Amendment of the Constitution of the United States.

*And it is alleged that the ordinances of [154]
the city of Portland, hereinbefore set out, constitute a contract between the city and plaintiffs' predecessors, and the acts of the legislature of the state of Oregon which have been mentioned, so far as they undertake to confer upon defendants the power to close the opening of such bridge without payment of compensation, impair the obligation of such contract, and violate § 10, article 1, of the Constitution of the United States. An injunction was prayed.

Mr. **Charles H. Carey** argued the cause, and, with *Messrs. C. E. S. Wood, S. B. Linthicum, J. C. Flanders,* and *Carey & Mays,* filed a brief for plaintiffs in error:

By the settled rule in Oregon, abutting lot owners, by virtue of their ownership of lots facing on a street, own the fee to the middle of the street as a highway.

Banks v. *Ogden,* 2 Wall. 57, 17 L. ed. 818; *Huddleston* v. *Eugene,* 34 Or. 343, 43 L.R.A. 444, 55 Pac. 868; *McQuaid* v. *Portland & V. R. Co.* 18 Or. 237, 22 Pac. 899.

The lot owners therefore had the right, not only to wharf out in front of their lots, but in front of Morrison street also.

It is a situation quite different from that shown in cases where there was no reservation of the wharfage right, and where it is therefore held that a wharf built by a city at the terminus of a street is part of the street, free to the public, and not subject to a private use for which wharfage may be taken.

Russell v. *The Empire State,* Newberry, Adm. 541, Fed. Cas. No. 12,145; *The Geneva,* 16 Fed. 874; *Barney* v. *Baltimore,* 1 Hughes, 118, Fed. Cas. No. 1,029.

It is usually held that the legitimate and proper use of a street terminating at the river is as a landing place, and that the municipal corporation has the right to build wharves at the termini of its streets; but this does not apply where the right of wharfage is reserved.

1 Dill. Mun. Corp. § 109.

Even assuming that the city itself had the right to wharf out at the foot of Morrison street, it delegated the power, as it had the right to do.

Simon v. *Northup,* 27 Or. 501, 30 L.R.A. 171, 40 Pac. 560; *Farnum* v. *Johnson,* 62 Wis. 620, 22 N. W. 751; *Portland & W. Valley R. Co.* v. *Portland,* 14 Or. 188, 58 Am. Rep. 299, 12 Pac. 265.

The power to regulate wharves does not include the power to confiscate them.

Chicago, R. I. & P. R. Co. v. *Joliet,* 79 Ill. 44; 20 Am. & Eng. Enc. Law, p. 723; *Langdon* v. *New York,* 93 N. Y. 161; *State* v. *Mott,* 61 Md. 297, 48 Am. Rep. 105; *Re Hauck,* 70 Mich. 396, 38 N. W. 269; *McConvill* v. *Jersey City,* 39 N. J. L. 44; *Sweet* v. *Wabash,* 41 Ind. 7; *Bronson* v. *Oberlin,* 41 Ohio St. 476, 52 Am. Rep. 90; *Cantril* v. *Sainer,* 59 Iowa, 26, 12 N. W. 753; *People* v. *Gadway,* 61 Mich. 286, 1 Am. St. Rep. 578, 28 N. W. 101.

The owner of land bounded by a navigable river has the right of free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use, or for the use of the public. This right cannot be capriciously destroyed by a municipality by a change of harbor lines.

Yates v. *Milwaukee,* 10 Wall. 497, 19 L. ed. 984.

The same principle is applied in cases holding that a city must pay for obstructing a riparian owner's access to his wharf, either from the water or from the land side of his property.

Van Dolsen v. *New York,* 21 Blatchf. 458, 17 Fed. 819; *Myers* v. *St. Louis,* 82 Mo. 367; *Weber* v. *State Harbor,* 18 Wall. 57, 21 L. ed. 798; *Demopolis* v. *Webb,* 87 Ala. 668, 6 So. 408; *Langdon* v. *New York,* 93 N. Y. 152.

The action of the city in cutting off access to the wharves by covering Morrison street with an elevated approach to the bridge is, in effect, a taking of plaintiff's property without due process of law. An additional servitude was placed upon the highway.

Willamette Iron Works v. *Oregon R. & Nav. Co.* 26 Or. 233, 29 L.R.A. 88, 46 Am. St. Rep. 620, 37 Pac. 1016.

The injury to the plaintiffs is not an injury common to the public, for the reason that plaintiffs are entirely cut off from access on the land side of their wharves to the public highway, and the obstruction immediately adjoins and is against the front of plaintiffs' premises, so that, as to them, it is a private nuisance for which an action will lie, or which may be restrained by injunction.

Wilder v. *DeCou,* 26 Minn. 11, 1 N. W. 48; *Schulte* v. *Northern Pacific Transp. Co.* 50 Cal. 592; *Parker* v. *Taylor,* 7 Or. 435; *Price* v. *Knott,* 8 Or. 438; *Penniman* v. *New York Balance Co.* 13 How. Pr. 40; Gould, Waters, 122–124.

The right of wharfage is a property right which can be taken only by the exercise of the right of eminent domain on making compensation to the owner of the wharfage right.

1 Dill. Mun. Corp. § 107; *Crocker* v. *New York,* 21 Blatchf. 197, 15 Fed. 405; *Classen* v. *Chesapeake Guano Co.* 81 Md. 258, 31 Atl. 808.

Assuming that the ordinances granted rights in the nature of a franchise, the grant was based upon ample consideration to the city, since there was an outlay of money in making the improvements, equivalent to the payment of a valuable consideration for the license, as well as other considerations required by the ordinances; so that, if it is a license, and fully executed, it is now irrevocable.

Garrett v. *Bishop,* 27 Or. 349, 41 Pac. 10.

Even if the bridge act be deemed to be a legislative change of grade of Morrison street, which we deny, the city has not the

right arbitrarily to destroy the wharf rights.

Seattle v. *Columbia & P. S. R. Co.* 6 Wash. 379, 33 Pac. 1048.

By repeated decisions in Oregon a license, after it has been exercised and expenditures have been made in reliance thereon, is irrevocable, and, if the right to erect wharves at the foot of Morrison street under the ordinances be deemed mere licenses from the city, the right granted cannot be destroyed without compensation.

Curtis v. *LaGrande Hydraulic Water Co.* 20 Or. 34, 10 L.R.A. 484, 23 Pac. 808, 25 Pac. 378; *McBroom* v. *Thompson*, 25 Or. 567, 42 Am. St. Rep. 806, 37 Pac. 57; *Garrett* v. *Bishop*, 27 Or. 352, 41 Pac. 10; *North Powder Mill Co.* v. *Coughanour*, 34 Or. 21, 54 Pac. 223; *Bowman* v. *Bowman*, 35 Or. 281, 57 Pac. 546; *Hallock* v. *Suitor*, 37 Or. 13, 60 Pac. 384; *Savage* v. *Salem*, 23 Or. 385, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

The defendants cannot close this opening in Morrison street because of an agreement with the bridge company to leave it open, and because of the long acquiescence of the city in the plaintiffs' occupation and use of these wharves.

Having received benefits at the expense of the other contracting party, the city is stopped.

United States v. *Willamette Valley & C. M. Wagon-Road Co.* 54 Fed. 811; *Re Parker*, 11 Fed. 397; *Com.* v. *Andre*, 3 Pick. 225; *Vidal* v. *Girard*, 2 How. 191, 11 L. ed. 231; *Enfield* v. *Permit*, 5 N. H. 285, 20 Am. Dec. 580; *Pengra* v. *Munz*, 29 Fed. 830; *Vermont* v. *Society for Propagation of Gospel*, 2 Paine, 546, Fed. Cas. No. 16,920; *Cahn* v. *Barnes*, 7 Sawy. 48, 5 Fed. 326; *Com.* v. *Pejepscut*, 10 Mass. 155; *People* v. *Maynard*, 15 Mich. 470; *Menard* v. *Massey*, 8 How. 313, 314, 12 L. ed. 1093, 1094; *State* v. *Bailey*, 19 Ind. 454; *St. Louis use of McGrath* v. *Clemens*, 49 Mo. 552; *Hitchcock* v. *Galveston*, 96 U. S. 351, 24 L. ed. 662; *Chicago & N. W. R. Co.* v. *People*, 91 Ill. 251.

When the bridge was located and the amount of space in Morrison street to be appropriated was determined upon, the election was final, and other portions of the street were excluded.

Van Wyck v. *Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336.

This is merely a statement of a familiar rule of easements.

Jennison v. *Walker*, 11 Gray, 426; *Bannon* v. *Angier*, 2 Allen, 128; *Evangelical Lutheran St. J. Orphan Home* v. *Buffalo Hydraulic Asso.* 64 N. Y. 564; *Onthank* v. *Lake Shore & M. S. R. Co.* 71 N. Y. 194, 27 Am. Rep. 35; *Warner* v. *Columbus & L. E. R. Co.* 39 Ohio St. 72; *Willis* v. *Winona*, 59 Minn. 27, 26 L.R.A. 142, 60 N. W. 814. See also *Allen* v. *Monmouth County*, 13 N. J. Eq. 68; *Moorehead* v. *Little Miami R. Co.* 17 Ohio, 340; *Griffen* v. *House*, 18 Johns. 397; *Cayuga Bridge Co.* v. *Magee*, 6 Wend. 85; *State* v. *Norwalk & D. Turnp. Co.* 10 Conn. 157; *Blakemore* v. *Glamorganshire Canal Navigation*, 1 Myl. & K. 154.

Mr. **L. A. McNary** argued the cause, and, with *Messrs. J. P. Kavanaugh* and *George H. Williams*, filed a brief for defendants in error:

The question to be determined by this court in this case is the validity of the statute that is alleged to impair the contract, and not whether it was properly construed by the state court.

Central Land Co. v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169.

The ordinances of the city of Portland authorizing the construction of the wharves do not constitute a contract between the said city and plaintiffs' predecessors in interest.

Wabash R. Co. v. *Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748.

The disclaimer by plaintiffs of any proprietary interest or private ownership in the wharves on Morrison street is fatal to their claim to relief by injunction.

Northern Transp. Co. v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Hoboken Land & Improv. Co.* v. *Hoboken*, 36 N. J. L. 540; *Thayer* v. *New Bedford R. Co.* 125 Mass. 257.

The closing of the driveway through the approach on Morrison street is not a taking of plaintiffs' property without due process of law. The closing is merely the result of the establishment of the street grade, and that does not constitute a taking of property within the meaning of the Constitution.

2 Dill. Mun. Corp. 4th ed. § 686; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Selden* v. *Jacksonville*, 28 Fla. 558, 14 L.R.A. 370, 29 Am. St. Rep. 278, 10 So. 457; *Willets Mfg. Co.* v. *Mercer County*, 62 N. J. L. 95, 40 Atl. 782.

Mere inconvenience in the access to property is not a sufficient reason to prevent the city from closing the driveway.

Burns v. *Gallagher*, 62 Md. 462; *Mitchell* v. *Seipel*, 53 Md. 251, 36 Am. Rep. 404.

The wharves were not constructed under an irrevocable license. No exclusive right to, or interest in, the wharves was granted to, or claimed by, the owners of the private wharves; and in such case the license is revocable at the pleasure of the licensor.

Parish v. *Kaspare*, 109 Ind. 586, 10 N. E. 109; *St. Louis Nat. Stock Yards* v. *Wiggins Ferry Co.* 112 Ill. 384, 54 Am. Rep. 243; *Rayner* v. *Nugent*, 60 Md. 515.

The agreement of the bridge company to leave the driveway open does not bind the city, because, when the approach was built, it became a public highway under the control of the city, and the company had no authority to keep a part of the street surface open.

Pittsburg & W. E. Pass. R. Co. v. *Point Bridge Co.* 165 Pa. 37, 26 L.R.A. 323, 30 Atl. 511.

Mr. Justice **McKenna** delivered the opinion of the court:

If we determine what rights plaintiffs had in Morrison street and the river, we shall be able to determine their contentions. Plaintiffs claim a contract with the city based on the ordinances which authorize plaintiffs to construct their wharves, but they also claim rights which they say were attached to the property and reserved to it by Daniel H. Lownsdale, "of the wharves and wharfing privileges." The rights so reserved are made especially dominant. Indeed, the rights obtained from the city are somewhat minimized and depreciated. All
[160] the city *could do, it is said, and all the city attempted to do by its ordinances, was to authorize the riparian owners to build their wharves. Why authority from the city was necessary in view of the reservation in the Lownsdale dedication, if it was as extensive as contended, seems to call for explanation, and explanation is given by saying that the ordinance was but the exercise of the authority to regulate the manner in which the wharves were to be built by the riparian proprietors. And plaintiffs, to point their reliance on the reservation in the Lownsdale dedication, say: "Whether the ordinances do or do not purport to grant a privilege or right to use or appropriate the street or an extension thereof for wharfing purposes, the right exists, and it existed because of the reservation in the plat, long before the ordinances; and it exists independent of any action of the city. This right is different in kind from the right of the public to use the street. And it is a valuable right, which cannot be taken away or destroyed without compensation."

Plaintiffs however, in other parts of their argument, claim, by reason of the ordinances, an irrevocable license, and in the pleadings give prominence to nothing else but the rights conferred by the ordinances. On account of this probably neither the trial court nor the supreme court commented on the Lownsdale dedication. But we will not consider plaintiffs precluded by that omission. It is very clear to us that their contention under the Lownsdale dedication is not sound. The purpose of the dedication was an addition to the city. Streets were contemplated and power of the city over them, and this purpose and power is as clear and definite in the dedication as the reservation of rights to lot owners. This was the view of plaintiffs' predecessors when they applied for the ordinances. Therefore the fundamental proposition in the case is the power of the city over its streets, and how far that power was limited or could be limited by the ordinance upon which plaintiffs rely.

It will be observed that the wharves were constructed on Morrison street and "used as, and the same are, a public street and highway." In other words, the bill alleges that the wharves *on Morrison street formed [161] a part of the street, and were open to general and public use.

What power the city of Portland had to grant rights in its streets depends upon its charter; and interpreting the ordinance upon which plaintiffs rely, the supreme court of Oregon decided that neither the plaintiffs nor their predecessors in interest were granted rights or privileges in the street different in kind from that enjoyed by the public.

"The clear purpose of the ordinances," the court said, "was to authorize and regulate the construction of wharves in front of private property. It is so expressly stated in the title, and the granting part of the ordinances provides that the owner or owners of certain described property are authorized and permitted to construct a wharf in the river, 'on and in front of' such property. There is nowhere, in either of the ordinances, a grant of any right or privilege to build a wharf at the terminus of Morrison street. In the ordinance adopted in 1878 there is scarcely an inference that the lower floor of the wharf was to extend into Morrison street, and, as regards the upper floor, the provision is that it should not extend beyond the line of the block, except for passageway of a certain described width and over the north side of the street. The grantee was required to construct and maintain pontoons in the river at the foot of the street for the landing of small boats, with steps leading therefrom to the lower floor of the wharf. It was expressly provided that the whole of the passageways along the street and those portions of the wharf extending over and into the street 'shall be subject to regulation by the common council as a part of said street and sidewalks;' thus manifesting an intention to preserve the public character of the street, and not to vest in the grantee any rights or privileges therein not enjoyed by the general public. The ordinance of 1879, in describing the dimensions of the wharf authorized to be erected, says that it shall extend a certain

distance south from 'the center line of Morrison street,' and indicates that the wharf constructed by the property owners on the
[162] opposite side of the street extended *to that point. The grant, however, is confined to the construction of a wharf 'on and in front of' private property, there being a provision like the one in the former ordinance requiring the grantees to construct pontoons in the river for the landing of small boats, while the right is reserved to the council to regulate the passageways along the street and any part of the wharves extending therein 'as a part of the street and sidewalk.' The reasonable interpretation of these ordinances is that they were intended to regulate the construction of wharves by the property owners on either side of the street in front of their property, with permission, perhaps, to extend the lower floors of such wharves over and across the foot of Morrison street, for the purpose of affording access from the street to the wharves. There is, however, no grant of any privilege or right to use or appropriate the street or an extension thereof for wharfage purposes. On the contrary, the street and any improvements which may be put there by the abutting property owners were reserved to the use of the entire public, and the grantees had no greater rights under the ordinances than those enjoyed by the general public." And this construction, the court observed, was supported by the averments of the complaint. It was, therefore, decided that plaintiffs acquired no greater rights in the street than the general public, nor a right to compensation for loss or injury caused by a change in the grade any more than a change in the grade would entitle an abutting owner to compensation because he had improved the street in front of his property. And decided also that the ordinances "did not give to the plaintiffs or to their predecessors in interest authority to build a wharf at the foot of the street for commercial purposes, but rather conferred the right to improve the street by extending it into the river, so that they could the more readily reach their own property therefrom, and the fact that their improvements have been rendered valueless on account of the subsequent change in the grade of the street does not entitle them to compensation. Neither are they entitled to
[163] any rights under the rule applicable *to an executed parol license. Their occupation of the street and construction of the wharf and landing at the foot thereof were permissive, under ordinances of the city, defining their rights. They could not acquire any interest or easement in the street not conferred by the ordinances, because their use could not, in law, be adverse. *Thayer* v. *New Bedford R. Co.* 125 Mass. 253; Washb. Easements, §§ 152, 197."

Against these conclusions plaintiffs cite other Oregon cases. We are, however, not called upon to reconcile the cases. Plaintiffs point to no case decided prior to the construction of the wharves which interprets the ordinance as they now contend for, which might bring the case within the ruling of *Muhlker* v. *New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, and *Lewis* v. *Portland*, 25 Or. 159, 22 L. R. A. 736, 42 Am. St. Rep. 772, 35 Pac. 256. And if we could say that the construction of the ordinances by the supreme court is not indisputable, yet we are required by the rule expressed in *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, and the many cases which have followed it, to incline to an agreement with the state court.

In accordance with the doctrine announced in *Brand* v. *Multnomah County*, 38 Or. 79, 50 L. R. A. 389, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209, the supreme court decided that a change or alteration of the grade of a street may be made by lawful authority, without liability to abutting property owners for consequential damages, and that the act of October 18, 1878, was a legislative change of the grade of Morrison street for its full width. Plaintiffs do not deny that the legislature has such power. They make, however, two contentions: (*a*) That the act of 1878 was not intended to change the grade of the street, and did not do so. (*b*) If it did change the grade at all, it changed it as to those portions of the street only which were actually made use of on the new grade as an approach to the bridge, the remainder not being affected by the act. As to the latter point, it is contended that the power given to the bridge company to build an approach to the bridge on Morrison street to conform to the grade on Front street was exhausted with the exercise of the right, and that the defendants have no power under the act, after a lapse of twenty years, to extend the *approach of the
[164] bridge to cover the opening in Morrison street, and change the grade where it was not changed when the approach was built.

The act of 1878 is a local statute, and in its interpretation involves no Federal question, nor does it become such by the circumstances of this case. It expresses the legislative authority, and its interpretation by the supreme court of the state we must accept. And the power to grade was not exhausted by one exercise. *Goszler* v. *Georgetown*, 6 Wheat. 593, 597, 5 L. ed. 339, 340; *Wabash R. Co.* v. *Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748. It is a phase of the same contention that the bridge

company was given the right of election of the manner of constructing the approaches, and, being bound by that election, the city, its successor, is also bound.

Judgment affirmed.

JAMES B. HOWARD, *Plff. in Err.*,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 164-176.)

1. **Constitutional law—due process of law—judicial construction of statute.**—Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of the due process of law guaranteed by the 14th Amendment to the Federal Constitution.
2. **Constitutional law—due process of law—waiver of right to be present at trial.**—The accused cannot claim to have been denied the due process of law secured by U. S. Const., 14th Amend., by the action of the state court in holding that he could waive his right to be present at the trial to the extent of consenting, through his counsel, in advance of the swearing of the jury, to a private examination of a juror against whom complaint had been made, which resulted in the discharge of such juror, and the selection of another, not shown to be incompetent, in his place.
3. **Constitutional law—equal protection of the laws—statutory construction—discrimination.**—The decision of the Kentucky court of appeals that a reversal of a conviction for the error, if any, committed by the trial court in discharging a juror, was precluded by Ky. Crim. Code, § 281, does not deny the accused the equal protection of the laws secured by U. S. Const., 14th Amend., if such was the construction given that section by prior cases, and no discriminating application against him was made.

[No. 77.]

Argued November 10, 13, 1905. Decided January 2, 1906.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment affirming a conviction of murder in the Franklin Circuit Court. *Affirmed.*

See same case below, 25 Ky. L. Rep. 2213, 80 S. W. 211.

The facts are stated in the opinion.

Mr. **W. M. Smith** argued the cause, and, with *Messrs. J. A. Violett, J. A. Scott,* and *Carlo B. Little,* filed a brief for plaintiff in error:

A state can repeal any common-law offense, or change the modes of criminal procedure, so long as such change does not violate any absolute and fundamental right of the accused; as to the question here involved, the state of Kentucky has adopted the common law, without modification or change, and the provision of the 14th Amendment to the Constitution of the United States protects the fundamental rights thereby created and recognized.

Ray v. *Sweeney,* 14 Bush, 9, 29 Am. Rep. 388; *Chisholm* v. *Georgia,* 2 Dall. 419, 1 L. ed. 440; *Holden* v. *Hardy,* 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The provision of the 14th Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty, or property without due process of law, having brought within the Federal jurisdiction and power the protection against state action, the judicial power of the nation necessarily extends thereto; and it is not requisite for jurisdiction that the right or thing claimed come from the law of the United States; though it come from the state law, it will be protected from unlawful state action. It must not be so construed, however, as to interfere with the state in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceeding, so long as the law, as enforced by the state, affords equal protection to all persons within its jurisdiction similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty, and property.

Davidson v. *New Orleans,* 96 U. S. 99, 24 L. ed. 618; *Holden* v. *Hardy, supra; Lowe* v. *Kansas,* 163 U. S. 85, 41 L. ed. 80, 16 Sup. Ct. Rep. 1031; *Civil Rights Cases,* 109 U. S. 11, 27 L. ed. 839, 3 Sup. Ct. Rep. 18; *United States* v. *Cruikshank,* 92 U. S. 554, 23 L. ed. 592; *United States* v. *Harris,* 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Caldwell* v. *Texas,* 137 U. S. 699, 34 L. ed. 818, 11 Sup. Ct. Rep. 224; *Allen* v. *Georgia,* 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Brown* v. *New Jersey,* 175 U. S. 174, 44 L. ed. 120, 20 Sup. Ct. Rep. 77; *Maxwell* v. *Dow,* 176 U. S. 582, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Hurtado* v. *California,* 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Thomp-*

NOTE.—*As to what constitutes due process of law*—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On the right of the accused to be present at the trial—see notes to Gore v. State, 5 L.R.A. 832; and Lewis v. United States, 36 L. ed. U. S. 1011.

son v. *Utah*, 170 U. S. 344, 42 L. ed. 1063, 18 Sup. Ct. Rep. 620; *Ex parte Ulrich*, 42 Fed. 501.

By the "common law" which has been adopted by the state of Kentucky, and by the Constitution and statutes and the decisions of the courts of such state in the trial of a case when the life or liberty of the accused is in peril, he not only has the right to be present, but must be present during the whole of the trial, at every step, when anything material to his interest is done in his case, from the arraignment to the sentence. His presence is not only an inalienable right, but a jurisdictional fact, and cannot be waived. It is the duty of the trial court to see that this right is not violated; otherwise Federal jurisdiction under the 14th Amendment will attach to protect such right.

2 Story, Const. § 1791; Hale, P. C. p. 33; 3 Bacon, Abr. p. 512; Magna Charta, chap. 29; Brannon, 14th Amend. p. 271; Cooley, Const. Lim. 7th ed. p. 452; Underhill, Crim. Ev. § 232, p. 284; Wharton, Crim. Pl. & Pr. 8th ed. §§ 540, 545; *Schwab* v. *Berggren*, 143 U. S. 442, 36 L. ed. 218, 12 Sup. Ct. Rep. 525; *Lewis* v. *United States*, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; *State* v. *Carman*, 63 Iowa, 130, 50 Am. Rep. 741, 18 N. W. 691; Bishop, New Crim. Proc. §§ 269, 271; *Dougherty* v. *Com.* 69 Pa. 290; *Prine* v. *Com.* 18 Pa. 103; *Rolls* v. *State*, 52 Miss. 396; *State* v. *Smith*, 90 Mo. 37, 59 Am. Rep. 4, 1 S. W. 753; *French* v. *State*, 85 Wis. 400, 21 L.R.A. 405, 39 Am. St. Rep. 855, 55 N. W. 566; *Andrews* v. *State*, 2 Sneed, 550; *Witt* v. *State*, 5 Coldw. 11; *Gladden* v. *State*, 12 Fla. 577; *Maurer* v. *People*, 43 N. Y. 1; *Hill* v. *People*, 16 Mich. 351; *Schick* v. *United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826; *West* v. *Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; *Temple* v. *Com.* 14 Bush, 769, 29 Am. Rep. 442; *Allen* v. *Com.* 86 Ky. 642, 6 S. W. 645; *Hite* v. *Com.* 14 Ky. L. Rep. 308, 20 S. W. 217; *Meece* v. *Com.* 78 Ky. 586; *Rutherford* v. *Com.* 78 Ky. 640; *Crowley* v. *United States*, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; *Rogers* v. *Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *Willis* v. *Com.* 85 Ky. 68, 2 S. W. 654; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 371, 37 L. ed. 774, 13 Sup. Ct. Rep. 914; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; *Jacobi* v. *Alabama*, 187 U. S. 135, 47 L. ed. 107, 23 Sup. Ct. Rep. 48; *Johnson* v. *Com.* 9 Bush, 225.

When the absence of the accused during the trial is shown, the law presumes that his substantial rights have been prejudiced; and the holding of the court of appeals, that the record must affirmatively show that such rights were prejudiced, deprived the accused of his liberty without due process of law, and denied him the equal protection of the law.

Meece v. *Com.*; *Rutherford* v. *Com.*; *Allen* v. *Com.*; and *Crowley* v. *United States*, *supra*.

The court, in discharging juror J. C. Alexander, after he had been accepted on the jury, without cause therefor, acted beyond its power, and the court of appeals of Kentucky, in holding that, by reason of § 281 of the Criminal Code, it could not reverse on account of such error, deprived the accused of his liberty without due process of law and denied to him the equal protection of the law.

Klinger v. *Missouri* 80 U. S. 263, 20 L. ed. 637; *Munday* v. *Com.* 81 Ky. 233; *Wiggins* v. *Com.* 104 Ky. 766, 47 S. W. 1073; *Smith* v. *Com.* 20 Ky. L. Rep. 1848, 50 S. W. 241; *Colvin* v. *Com.* 22 Ky. L. Rep. 1408, 60 S. W. 701; *O'Brian* v. *Com.* 9 Bush, 333, 15 Am. Rep. 715; *Shelby* v. *Com.* 91 Ky. 566, 16 S. W. 461; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. **N. B. Hays** argued the cause, and, with *Mr. Charles H. Morris*, filed a brief for defendant in error:

It is the court, and not the juryman or the accused, who shall say whether or not the proposed juror is free from bias and prejudice.

Thompson & M. Juries, § 259; *Snow* v. *Weeks*, 75 Me. 106.

The essentials under the Constitution and laws of Kentucky, like those at common law, are that the jury in a felony case shall be composed of twelve men, that they shall be impartial, and that their verdict shall be free and unanimous. These are the substantive rights secured by a trial by jury. The procedure and mode of selecting the jury is not such a right unless the right to challenge is equivalent to the right to select.

Cooley, Const. Lim. 8th ed. 445–460.

In *Hayden* v. *Com.* 20 Ky. L. Rep. 274, 45 S. W. 886, the trial court discharged two jurors after they had been sworn on their *voir dire*, and in the absence of the accused from the court room, and the same question as presented here was involved, and the court held there was no error.

There was no error in the discharge of Alexander, the juror. It was no abuse of discretion by the trial court.

Proffatt, Jury Trials, § 194; *State* v. *Adams*, 20 Kan. 311.

No objection or exception having been

made or taken in the trial court as to alleged error of the trial court in asking said question in the absence of plaintiff in error, and no error having been assigned by plaintiff in error in his motion and reasons for a new trial for the same, there was no error appearing on the record for review by the court of appeals.

Rutherford v. *Com.* 78 Ky. 639; *Kennedy* v. *Com.* 14 Bush, 340; *Wilkerson* v. *Com.* 88 Ky. 30, 9 S. W. 836; *Merritt* v. *Com.* 11 Ky. L. Rep. 17, 11 S. W. 471; *Brown* v. *Com.* 14 Bush, 400; *Ellis* v. *Com.* 9 Ky. L. Rep. 824, 7 S. W. 169; *Crockett* v. *Com.* 10 Ky. L. Rep. 159, 7 S. W. 907; *Redmon* v. *Com.* 82 Ky. 335; *Vinegar* v. *Com.* 104 Ky. 110, 46 S. W. 510; *Branson* v. *Com.* 92 Ky. 333, 17 S. W. 1019.

The conviction of the plaintiff in error was due process of law; and this question having been neither presented to the trial court, nor passed on adversely to him by it, it was not before the Kentucky court of appeals for review, and, it being without jurisdiction to consider such question, there is no ruling of the trial court or the Kentucky court of appeals, as appears from the record, which presents to this court any question of a Federal nature.

Dreyer v. *Illinois*, 187 U. S. 83, 47 L. ed. 85, 23 Sup. Ct. Rep. 28; *Jacobi* v. *Alabama*, 187 U. S. 135, 47 L. ed. 107, 23 Sup. Ct. Rep. 48; *Brooks* v. *Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Baldwin* v. *Kansas*, 129 U. S. 53, 32 L. ed. 641, 9 Sup. Ct. Rep. 193.

Assuming that the trial court asked the juror Alexander the question it is said to have asked him, in the absence of the plaintiff in error,—the record presents no Federal question. It was by agreement, and no objection or exception was taken thereto. This question was not even presented to the trial court on motion for a new trial. The Kentucky court of appeals, being a court of review, had no original jurisdiction to pass on said question in the absence of an objection and exception in the trial court. Before this court will review any Federal question the plaintiff in error must have presented it in the highest state court, and it must have been decided there adversely to him. Under § 281 of the Criminal Code the trial court is not only the highest court, but the only court, that could pass on said question.

Dreyer v. *Illinois*, and *Jacobi* v. *Alabama*, *supra*; *Layton* v. *Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Tarrance* v. *Florida*, 188 U. S. 519, 47 L. ed. 572, 23 Sup. Ct. Rep. 402.

When the challenge to a juror has been allowed and an impartial juror substituted in his place, the constitutional right of the accused to a fair and impartial jury has not been impaired.

Thompson & M. Juries, § 251, p. 268; *Reynolds* v. *United States*, 98 U. S. 156, 25 L. ed. 247; *Hopt* v. *Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Hayes* v. *Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 305; *Spies* v. *Illinois* (*Ex parte Spies*) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *United States* v. *Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815.

The right of appeal is neither a constitutional right nor a right under the common law.

4 Cooley's Bl. 3d ed. p. 391; *Montee* v. *Com.* 3 J. J. Marsh. 132; *Com.* v. *Mitchell*, 3 J. J. Marsh. 630; *Com.* v. *Craig*, 15 B. Mon. 536; *Comely* v. *Com.* 17 B. Mon. 409; *Rutherford* v. *Com. supra*; *Cornelius* v. *Com.* 15 B. Mon. 545.

The court of appeals of Kentucky has no jurisdiction to review a decision of the trial court on a challenge to a juror for cause, and the discharge of the juror Alexander upon a challenge for cause by the commonwealth was final, and was subject to neither exception nor review by the appellate court. It would have been not the erroneous exercise of a power, but the usurpation of a power withheld from such court under the law, if the court of appeals had reviewed the decision of the lower court.

Kennedy v. *Com.* 14 Bush, 344; *Morgan* v. *Com.* 14 Bush, 114; *Terrell* v. *Com.* 13 Bush, 250.

In order to give the appellate court jurisdiction under the laws of Kentucky there must be an objection and exception to the decision of the trial court at the time such decision is made, and the substantial rights of the accused must be prejudiced thereby.

Branson v. *Com.* 92 Ky. 330, 17 S. W. 1019; *Loving* v. *Warren County*, 14 Bush, 320; *Cook* v. *Com.* 13 Ky. L. Rep. 702, 18 S. W. 356; *Brooks* v. *Com.* 12 Ky. L. Rep. 403, 14 S. W. 416.

Either ground shown by the affidavit of Hackett on the motion and challenge to the juror Alexander is sufficient, in the exercise of the discretion of the trial court, for the discharge of Alexander.

Klinger v. *Missouri*, 13 Wall. 257, 20 L. ed. 635.

Under the common law, a trial began when the case was opened for the Crown.

Proffatt, Jury Trial, § 208.

So the Kentucky court of appeals holds that the trial begins when the jury is sworn and charged with the deliverance of the accused.

Collier v. *Com.* 110 Ky. 518, 62 S. W. 4; *Meece* v. *Com.* 78 Ky. 586; *Willis* v. *Com.*

85 Ky. 68, 2 S. W. 654; *Allen* v. *Com.* 86 Ky. 642, 6 S. W. 645; *Yarbrough* v. *Com.* 89 Ky. 155, 25 Am. St. Rep. 524, 12 S. W. 143; *Hite* v. *Com.* 14 Ky. L. Rep. 303, 20 S. W. 217; *Williams* v. *Com.* 78 Ky. 93; *Tye* v. *Com.* 3 Ky. L. Rep. 59; *Huff* v. *Com.* 19 Ky. L. Rep. 1066, 42 S. W. 907; *Gaskins* v. *Com.* 97 Ky. 496, 30 S. W. 1017.

Section 281 of the Criminal Code gives to the trial court an unreviewable discretion in acting upon motions and grounds for new trials in criminal cases.

Terrell v. *Com.* 13 Bush, 246; *Rutherford* v. *Com.* 13 Bush, 608; *Smith* v. *Com.* 100 Ky. 137, 37 S. W. 586; *Collier* v. *Com.* 110 Ky. 518, 62 S. W. 4.

The construction of said section by the Kentucky court of appeals is the rule of construction in the Federal courts.

Smiley v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

The Federal courts will follow the interpretation and construction given the state statutes by the highest court of the state as to rights, privileges, and immunities, unless such construction is violative of the Federal laws.

Leeper v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Bergemann* v. *Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Fielden* v. *Illinois*, 143 U. S. 452, 36 L. ed. 224, 12 Sup. Ct. Rep. 528; *Brown* v. *New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

The 14th Amendment gives the Federal government the power to enforce due process of law against arbitrary and unwarranted state actions, and nothing more.

Hurtado v. *California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Anderson* v. *Henry*, 45 W. Va. 319, 31 S. E. 998.

Mr. Justice **McKenna** delivered the opinion of the court:

The plaintiff in error seeks to review the judgment of the court of appeals of the commonwealth of Kentucky affirming a conviction and sentence of murder against him. He was indicted, with others, for killing one William Goebel. The grounds of review by this court are based upon certain rulings of the trial court which, plaintiff in error contends, were repugnant to the due process clause of the 14th Amendment of the Constitution of the United States.

It appears from the record that eleven jurors, including one J. C. Alexander, had been accepted by the parties. The commonwealth had exhausted three of its peremptory challenges, and plaintiff in error eleven of his,—he was given by the statutes fifteen. At this point the commonwealth's attorney suggested that Alexander had formed and expressed an opinion on the merits of the case, and had improperly conversed with a person, not a member of the jury, on a subject connected with the case. The commonwealth's attorney then made a motion to discharge Alexander from the jury, in support of which he filed the following affidavit of one Ben Hackett, who had been excluded as a juror in the case:

The affiant, Ben Hackett, says that after the killing of William Goebel he and Mr. J. C. Alexander, who has been accepted on the jury to try this case, had many conversations and arguments *about the said killing, [171] this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him. These arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel, were frequent, and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

This affiant further says that on yesterday afternoon, late, after Mr. Alexander had been accepted as a juror to try the case, and after this affiant had been excused, after those accepted as jurors had been charged and admonished by the court, immediately after adjournment for supper, and as the jury was being conducted by the sheriff away from the courthouse, affiant by accident met the jury as they were passing out through the courthouse yard, when, in passing, Mr. Alexander said to this affiant: "Hello, Ben, I am glad they cut you off this jury, as I did not want to serve on this jury with you."

Affiant, Ben Hackett, says the foregoing statements are true.

(Signed) Ben F. Hackett.

The following proceedings were then had, as appears from the order of the court, from which we quote:

"It was agreed by counsel on either side that the court might, in the absence of the defendant and counsel, question the said Alexander as to the truth of the said statements, contained in said Hackett's affidavit, that he said to said Hackett while in the custody of the sheriff, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you,' and the said Alexander having admitted the truth of said statement, but claimed the

said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of said Alexander was a violation of the admonitions of the court, when he was placed in the custody of the sheriff, it was ordered and adjudged
[172] that said Alexander be, and he is *now excused as a juror in this case, and he is now ordered to be discharged; and the court, being thus advised, overruled defendant's objection, and discharged and excused said Alexander, and defendant, by counsel, excepts.

"Thereupon defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the commonwealth, and the court being advised, sustained said objection, and refused to discharge said entire panel, to which ruling defendant, by counsel, excepts."

By these rulings, it is contended that plaintiff in error was deprived of due process of law. Error is assigned under the 5th, 6th, and 14th Amendments of the Constitution of the United States.

Plaintiff in error cannot avail himself of the provisions of the 5th and 6th Amendments, for reasons we have so often expressed that it would be the extreme of superfluity to repeat them. It is enough to say that those Amendments do not apply to proceedings in the state courts. The invocation of the 14th Amendment is attempted to be justified on two grounds: (1) That the trial court, in discharging Alexander, acted beyond its power, and that the court of appeals of Kentucky, in holding that, by reason of § 281 of the Criminal Code of the state, it cannot reverse on account of such error, deprives plaintiff in error of his liberty without due process of law. (2) By the common law, which has been adopted by Kentucky, and by the Constitution and statutes of the state, an accused has not only the right to be present, but must be present during the whole of the trial. "His presence is not only an inalienable right, but a jurisdictional fact, and cannot be waived."

The argument of plaintiff in error is very elaborate, but there is scarcely any phase of it which has not been answered adversely to his contention by decisions of this court.

He seems to make an issue with the court of appeals of the state upon the law of the state, and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *Re Converse*, 137 U. S. 624, 631, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191,
[173] *and other cases, which hold that a "state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state,—common, statutory, and constitutional. Our inquiry can only be, Did the state law, as applied, afford plaintiff in error due process, as those words are used in the 14th Amendment? We think it did. It is not necessary to enter into a lengthy discussion of what constitutes due process of law. That has been done in a number of cases and there is nothing in the present case which calls for a repetition and an extension of the discussion. It may be admitted that the words "due process of law," as used in the 14th Amendment, protect fundamental rights. What those are cannot ever be the cause of much dispute. In giving them protection, however, it was not designed, as was observed by the Chief Justice in *Re Converse*, "to interfere with the power of the state to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state." These words are apposite in the present case. Of what does plaintiff in error complain? The discharge of a juror before he was sworn, and the absence of the plaintiff in error from the examination of the juror by the presiding judge. But plaintiff in error consented through his counsel to the examination, and there is not an intimation that the juror selected in Alexander's place was not as competent as he. Nor can we say that the discharge of Alexander took from the other jurors who had been chosen their competency to try the case or to give to plaintiff in error the right to a new panel. In *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350, it was said "the accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590. *The right to challenge is [174]
the right to reject, not to select, a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained." *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

In passing on the action of the trial court in examining Alexander in the absence of plaintiff in error, the court of appeals said that the court had been compelled to relax the rule prescribed by the statute that "the defendant must be present and shall remain in custody during trial," and cited

Hite v. *Com.* 14 Ky. L. Rep. 308, 20 S. W. 217; *Meece* v. *Com.* 78 Ky. 586. In the first case, absence from the court room by the accused for a few minutes at a time, on account of sickness, the trial continuing in his absence, it was held did not prejudice the substantial rights of the accused.

In *Meece* v. *Com.*, upon the jury coming back to the court room for further instructions, the court made certain alterations in the instructions in absence of the accused, but in the presence of his counsel. It was held not to be error, the court saying:

"While we recognize the fact that the accused, when on trial for a criminal offense, should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence either before or after the submission of the cause to the jury, still this court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the court below; and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist except by reason of the legislation of the state on the subject; and, when permitting an appeal, the lawmaking power has the right to determine for what cause a reversal may be had."

The court of appeals also said, in passing on the contention of plaintiff in error, based on the examination of Alexander:

[175] *"It has also been held by this court that a trial for felony begins when the jury is sworn. *Willis* v. *Com.* 85 Ky. 68, 2 S. W. 654. At the time the examination of Alexander took place, and when he was discharged, the jury had not only not been sworn, but it had not been completed.

"There are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive,—such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him; and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court, as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jury to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury."

It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial, from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the 14th Amendment of the Constitution of the United States.

It will be observed that the court of appeals also decided that, even though the exclusion of Alexander had been error, a reversal of the case was forbidden by § 281 of the Criminal Code of the state, and cited *Curtis* v. *Com.* 110 Ky. 845, 62 S. W. 886; *Turner* v. *Com.* 25 Ky. L. Rep. 981, 76 S. W. 853; *Alderson* v. *Com.* 25 Ky. L. Rep. 32, 74 S. W. 679. See also *Powers* v. *Com.* [176] 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, where § 281 was construed the same way. The court, in its construction of § 281, followed the construction established by prior cases, and did not make a discriminating application of that section against plaintiff in error. He was, therefore, not deprived of the equal protection of the laws.

Judgment affirmed.

Mr. Justice **Harlan**, concurring:

The record does not, in my judgment, show an absence of the due process of law enjoined by the 14th Amendment of the Constitution of the United States, as that Amendment has been interpreted by this court. For that reason, without approving all that is said in the opinion of the court, I concur in the judgment of affirmance.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,

v.

F. E. DEER.

(See S. C. Reporter's ed. 176–178.)

Judgment—jurisdiction to garnish debt due nonresident.—A state court has jurisdiction to render a valid judgment in garnishment of a debt due by a railway company doing business in the state, and permanently liable there for service and suit, to a nonresi-

NOTE.—*On the protection of a nonresident creditor against garnishment*—see notes to Illinois C. R. Co. v. Smith, 19 L.R.A. 577; and King v. Cross, 44 L. ed. U. S. 211.

dent who was served by such publication as the statutes of the state prescribe.

[No. 164.]

Submitted December 14, 1905. Decided January 2, 1906.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment affirming a judgment of the City Court of Montgomery, in that state, in favor of plaintiff in an action to recover a debt, in which defendant set up as a defense a judgment of a Florida court in garnishment of such debt due plaintiff, who was a resident of Alabama, and was served by such publication as the Florida statutes prescribe. *Reversed.*

See same case below, 39 So. 1028.

The facts are stated in the opinion.

Mr. **George W. Jones** submitted the cause for plaintiff in error:

To hold that the situs of a debt is at the domicil of the creditor is palpably untenable. It cannot be in the hands of the creditor until the debt is paid. If the *res* were in the hands of the creditor, the debt would, of necessity, be discharged.

Chicago, R. I. & P. R. Co. v. *Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *King* v. *Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131; *Rothschild* v. *Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; *Holland* v. *Mobile & O. R. Co.* 16 Lea, 418; *Carson* v. *Memphis & C. R. Co.* 88 Tenn. 646, 8 L.R.A. 412, 17 Am. St. Rep. 921, 13 S. W. 588.

The fact that the supreme court of Alabama may have considered that the Florida court was without jurisdiction cannot affect the validity of the Florida judgment pleaded.

Laing v. *Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

The garnishment judgment and its payment in Florida constituted a complete defense to the suit in Alabama.

Chicago, R. I. & P. R. Co. v. *Sturm, supra; Pittsburg, C. C. & St. L. R. Co.* v. *Bartels*, 108 Ky. 216, 56 S. W. 152; *Burlington & M. River R. Co.* v. *Thompson*, 31 Kan. 194, 47 Am. Rep. 497, 1 Pac. 622; *Fithian* v. *New York & E. R. Co.* 31 Pa. 114; *Hannibal & St. J. R. Co.* v. *Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Plimpton* v. *Bigelow*, 93 N. Y. 601; *Chicago, B. & Q. R. Co.* v. *Moore*, 31 Neb. 629, 28 Am. St. Rep. 534, 48 N. W. 475; *Singer Mfg. Co.* v. *Fleming*, 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; *Connor* v. *Hanover Ins. Co.* 28 Fed. 549; *Gunn* v. *Howell*, 35 Ala. 144, 73 Am. Dec. 484.

The Florida record was valid on its face.

Maxwell v. *Stewart*, 21 Wall. 71, 22 L. ed. 564.

Foreign corporations doing business by agents within a state are treated as residents of the state, and debts due from them to nonresidents are garnishable in that state.

Lancashire Ins. Co. v. *Corbetts*, 165 Ill. 592, 36 L.R.A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; *National F. Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468, 32 Atl. 663; *Fithian* v. *New York & E. R. Co. supra; Selma R. & D. R. Co.* v. *Tyson*, 48 Ga. 351; *German Bank* v. *American F. Ins. Co.* 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53; *Cousens* v. *Lovejoy*, 81 Me. 467, 17 Atl. 495; *Burlington & M. River R. Co.* v. *Thompson, supra.*

No counsel for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action to recover a debt admitted to have been due to the plaintiff, the defendant in error. But it was agreed *in[178] the trial court that a suit was brought by one Brock against the plaintiff in Florida, in which the railroad company, the present plaintiff in error, was summoned as garnishee, judgment was recovered against the latter as such for the sum now in suit, and the sum paid by it into court, all before the present suit was begun. The proceedings in Florida were strictly in accordance with the laws of that state. The railroad company did business there, and was permanently liable to service and suit, and the defendant, the present defendant in error, was notified by such publication as the statutes of Florida prescribed. He was not, however, a resident of the state, but lived in Alabama, and the supreme court of the latter state affirmed a judgment in his favor on the ground that the Florida court had no jurisdiction to render the judgment relied on as a defense. —Ala.—

Whatever doubts may have been felt when this case was decided below are disposed of by the recent decision in *Harris* v. *Balk*, 198 U. S. 215, 49 L. ed. 10, 23, 25 Sup. Ct. Rep. 625. There the garnishee was only temporarily present in Maryland, where the first judgment was rendered, and the defendant in that judgment was absent from the state, and served only as the defendant in error was served in Florida. Yet the Maryland judgment was held valid, and a decision by the supreme court of North Carolina, denying the jurisdiction of the Maryland court, was reversed. In the present case the railroad company was permanently present in the state where it was served. In view of the full and recent discussion in *Harris* v. *Balk*, we think it unnecessary to say more.

Judgment reversed.

[179]*CINCINNATI, PORTSMOUTH, BIG SANDY, & POMEROY PACKET COMPANY, *Plff. in Err.*,

v.

GEORGE W. BAY and William Bay.

(See S. C. Reporter's ed. 179-186.)

1. **Error to state court—Federal question—when raised in time—effect of certificate of state court.**—A certificate of the highest court of a state to the effect that it necessarily considered the Federal question relied upon to sustain a writ of error from the Supreme Court of the United States, which the record shows was raised, removes any objection that such question was raised too late under the local procedure.
2. **Contracts—unlawful restraints on interstate commerce—incidental restraints.**—The interference, if any, with interstate commerce, contemplated by a contract for the sale of certain river craft, which permits a suspension of payment of instalments of the purchase price in case of serious competition in the freight and passenger traffic over a route between two named Ohio ports on the Ohio river, and requires the vendors to withdraw from such competition for five years, is too insignificant to render the contract invalid under the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), as imposing a restraint on interstate commerce.
3. **Contracts—unlawful restraints on interstate commerce—rights and liabilities of parties.**—A purchaser of river craft cannot invoke the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale,—especially where the rates referred to primarily, if not exclusively, relate to domestic, and not to interstate, business.

[No. 174.]

Argued December 15, 1905. Decided January 2, 1906.

NOTE.—*On illegal trusts under modern antitrust laws*—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

Certificate of state court as showing presence of Federal question.

A certificate of a chief or presiding justice of the highest court of a state cannot relieve the Supreme Court of the United States from determining for itself whether the record shows that the suit really involves any question which will entitle it to review the judgment of the state court. Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

Such a certificate is incompetent to confer jurisdiction not shown on the record (Felix v. Scharnweber, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; Powell v. Brunswick County, *supra;* Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84), though it may have the effect of making more certain and specific what is too general and indefinite in the record (Parmelee v. Lawrence, 11 Wall. 36, 20 L. ed. 48; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. St. Rep. 939).

The certificate may induce the Federal court, where the question is a close one, not to construe the pleadings so strictly as to hold that they do not sufficiently present a Federal question. Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup Ct. Rep. 47.

A certificate of the chief justice of a state court, stating that the validity of state legislation subsequent to the charter of a corporation was drawn in question upon the ground that it impaired the obligation of a contract, and that the decision was in favor of the validity of such legislation, may be resorted to, in the absence of an opinion, to show that a Federal question which was otherwise raised in the record was actually passed upon by the court. Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

The certificate of a state court of last resort may serve to remove any doubt whether rights under the Federal bankrupt law were so relied upon and passed upon in affirming, without opinion, a judgment dismissing a suit brought by a trustee in bankruptcy to recover an alleged asset of the bankrupt estate, as to sustain a writ of error from the Federal Supreme Court. Rector v. City Deposit Bank Co. 200 U. S. 405, *post,* 527, 26 Sup. Ct. Rep. Rep. 289.

And where the record shows that the jurisdictional question may have been involved, a certificate by the presiding judge of a state court, certified by the clerk as part of the record, that one of the questions mentioned in the 25th section of the judiciary act was decided in the manner prescribed by that act, will be presumed to have been made by authority of the court, and the Supreme Court of the United States must take jurisdiction. Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965.

A certificate signed by the clerk and certified by the presiding justice of a state court, though entitled to great weight as showing that a Federal question was decided by the court, which gives it in the manner required to give the Supreme Court of the United States jurisdiction, is not conclusive that such a question was raised in the case. Caperton v. Bowyer, 14 Wall. 216, 20 L. ed. 882.

And it certainly cannot be regarded as conclusive when the same judge, in the opinion on file in the case, places the decision entirely on a ground independent of a Federal question. Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77.

A certificate of the presiding judge of a state court is insufficient to show that a

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Lawrence County, in that state, in favor of plaintiffs in an action to recover the purchase price of certain river craft, in which the defendant alleges that the contract of sale was illegal under the Federal antitrust act. *Affirmed.*

The facts are stated in the opinion.

Mr. **Ledyard Lincoln** argued the cause, and, with *Mr. Julius L. Anderson,* filed a brief for plaintiff in error:

Repeated attempts have been made to restrict the broad and general language of the Sherman antitrust act, but the Federal courts, and especially this court, have uniformly held that the act means just what it says, and cannot be confined to unreasonable restraints nor such as were condemned by the common law before its passage.

United States v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 312–341, 41 L. ed. 1007, 1017–1027, 17 Sup. Ct. Rep. 540; *United States* v. *Joint Traffic Asso.* 171 U. S. 505, 573–575, 43 L. ed. 259, 288–290, 19 Sup. Ct. Rep. 25; *United States* v. *Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, Affirmed in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 331, 402, 48 L. ed. 679, 697, 726, 24 Sup. Ct. Rep. 436; *Chesapeake & O. Fuel Co.* v. *United States,* 53 C. C. A. 256, 115 Fed. 610.

It cannot be questioned that the transportation of persons and property from one state to another is interstate commerce.

United States v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 312, 325, 41 L. ed. 1007, 1017, 1022, 17 Sup. Ct. Rep. 540; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Lottery Case* (*Champion* v. *Ames*) 188 U. S. 321,

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Federal question was raised and decided, where the recorded opinion of the court shows that the decision was based on a ground that did not involve a Federal question. Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

Where, from the entire record, it appears that the decision of the state court depends upon the construction, and not the constitutionality, of a state statute, the certificate of the state court is unavailing to show that the constitutional question was involved. Lawler v. Walker, 14 How. 149, 14 L. ed. 364; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169.

Something more definite than a certificate of the highest court of a state that certain statutes, challenged as in violation of the Federal Constitution, were held valid, without naming those statutes, is necessary to satisfy the requirement that the record should show that such a question was involved. Lawler v. Walker, *supra.*

And see note to Hooker v. Los Angeles, 63 L.R.A. 471, on *What the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court.*

A certificate of the state court that such questions arose and were decided as required by § 25 of the judiciary act to give the Supreme Court jurisdiction to review the decision of the state court is unnecessary, where the record shows on its face that such questions arose, and how they were decided. Ableman v. Booth, 21 How. 506, 16 L. ed. 169.

Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84, lays down the rule that a certificate of the chief justice or presiding officer of the highest state court that a Federal question was involved is not properly a part of the record.

Although the contrary nowhere seems explicitly to have been stated, Mr. Justice Wayne uses some language in Lawler v. Walker, *supra,* from which it might be inferred that he regarded such a certificate as part of the record. But such a certificate, though it may help out the failure of the record to show beyond all question the presence of a Federal controversy, seems generally to have been regarded as something distinct from the record itself. Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Felix v. Scharnweber, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759; Mississippi & M. R. Co. v. Rock, 4 Wall. 177; 18 L. ed. 381; Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Parmelee v. Lawrence, 11 Wall. 36, 20 L. ed. 48; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

And see note to Home for Incurables v. New York, 63 L.R.A. 329, on *The record for the purpose of showing jurisdiction in the Supreme Court of the United States of a writ of error to a state court.*

Other notes respecting the review of decisions of the state court in the Supreme Court of the United States are: *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts,* Apex Transp. Co. v. Garbade, 62 L.R.A. 513; *How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States,* Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33; *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts,* State *ex rel.* Hill v. Dockery, 63 L.R.A. 571; *The practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal,* Wedding v. Meyler, 66 L.R.A. 833.

345–352, 47 L. ed. 492, 496–499, 23 Sup. Ct. Rep. 321.

The transportation of goods on a through bill of lading from one point in a given state to another in the same state by way of an adjoining state or territory is interstate commerce.

Hanley v. *Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214.

The states of Kentucky and West Virginia extend to low-water mark on the Ohio side, so that even boats plying directly from Syracuse to Cincinnati, without stopping at intermediate points, would necessarily, at ordinary stages of the river, pass through parts of West Virginia and Kentucky.

Indiana v. *Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Handly* v. *Anthony*, 5 Wheat. 374, 5 L. ed. 113; *Booth* v. *Shepherd*, 8 Ohio St. 243; *McFall* v. *Com.* 2 Met. (Ky.) 394.

It has been held by this court in a number of cases involving contracts which did not relate directly to interstate commerce, but were local in their nature, that they were not within the prohibition of the Sherman act, although the parties contracting in fact sold commodities or solicited business beyond the state line; but the contract must affect interstate commerce directly, and not remotely or incidentally.

United States v. *E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Hopkins* v. *United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson* v. *United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

But in the case of *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 325, 1007, 1022, 17 Sup. Ct. Rep. 540, the court uses the following language: Transportation of commodities among the several states or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the states or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale. Precisely at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them or upon contracts relating to them may be somewhat difficult to determine, but interstate transportation presents no difficulties.

It is not necessary that the restraint upon trade should be entire, or the monopoly aimed at complete.

United States v. *E. C. Knight Co.* 156 U. S. 16, 39 L. ed. 330, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 244, 245, 44 L. ed. 136, 148, 149, 20 Sup. Ct. Rep. 96; *Northern Securities Co.* v. *United States*, 193 U. S. 407, 48 L. ed. 729, 24 Sup. Ct. Rep. 436; *United States* v. *Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 278; *Chesapeake & O. Fuel Co.* v. *United States*, 53 C. C. A. 256, 115 Fed. 619; *Lufkin Rule Co.* v. *Fringeli*, 57 Ohio St. 607, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030; *Harding* v. *American Glucose Co.* 74 Am. St. Rep. 235, note, 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577.

The provisions of the contract in the case at bar—especially those looking to a suppression of competition by strangers—go far beyond the fair protection of the Big Sandy Company.

Horner v. *Graves*, 7 Bing. 735; 24 Am. & Eng. Enc. Law, pp. 850, 851; *United States* v. *Addyston Pipe & Steel Co. supra.*

In Ohio it is well settled that all restraint of trade is presumptively invalid. That a partial restraint may be enforced only where it appears that it is founded upon a valuable consideration, and is reasonable and not oppressive.

Lange v. *Werk*, 2 Ohio St. 519; *Lufkin Rule Co.* v. *Fringeli*, 57 Ohio St. 596, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030.

The supreme court of Ohio and other courts have repeatedly held that contracts in restraint of competition, and tending to monopoly, are against public policy and void.

Central Ohio Salt Co. v. *Guthrie*, 35 Ohio St. 666; *Emery* v. *Ohio Candle Co.* 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; *State ex rel. Watson* v. *Standard Oil Co.* 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *South Chicago City R. Co.* v. *Calumet Electric Street R. Co.* 171 Ill. 391, 49 N. E. 576; *Anderson* v. *Jett*, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670; *Texas & P. R. Co.* v. *Southern P. R. Co.* 41 La. Ann. 970, 17 Am. St. Rep. 445, 6 So. 888. See note to *Harding* v. *American Glucose Co.* 74 Am. St. Rep. 235.

The two packet companies who signed the contract were not engaged in private, but in quasi public business, and therefore any restraint upon such business would be prejudicial to the public interest, and cannot be sustained.

United States v. *Trans-Missouri Freight Asso.* 166 U. S. 333, 335, 41 L. ed. 1025, 1026, 17 Sup. Ct. Rep. 540; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *United States* v. *Addyston Pipe & Steel Co.* 46 L.R.A. 122,

29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 291.

It is claimed that the illegality of the contract should have been specially pleaded by the defendant. To this there are two answers. First, that the facts bringing the case within the condemnation of the act of Congress and of the common law appear upon the face of the pleadings and are admitted by them. Indeed, the petition is demurrable. Second, we submit it is not the law that illegality must be pleaded, where the plaintiff cannot prove his case without disclosing the illegality; as, for instance, where it appears upon the face of the contract which is the basis of his cause of action.

Lange v. *Werk*, and *Lufkin Rule Co.* v. *Fringeli, supra;* 4 Enc. Pl. & Pr. p. 952; 1 Enc. Pl. & Pr. p. 844; 2 Beach, Modern Law of Contracts, § 1443; *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Emery* v. *Ohio Candle Co. supra; Field Cordage Co.* v. *National Cordage Co.* 6 Ohio C. C. 615.

The covenants in restraint of commerce were not ancillary.

Davis v. *A. Booth & Co.* 65 C. C. A. 269, 131 Fed. 37; *Tuscaloosa Ice Mfg. Co.* v. *Williams.* 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669.

The question of the illegality of the contract was presented to the circuit court of Lawrence county.

Weaver v. *Columbus, S. & H. Valley R. Co.* 55 Ohio St. 491, 45 N. E. 717.

If the Federal or jurisdictional question is raised for the first time in the assignments of errors in the supreme court of the state, the question is presented in time.

Farmers' & M. Ins. Co. v. *Dobney,* 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *San José Land & Water Co.* v. *San José Ranch Co.* 189 U. S. 179, 47 L. ed. 766, 23 Sup. Ct. Rep. 487; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 231, 232, 41 L. ed. 979, 982, 983, 17 Sup. Ct. Rep. 581; *Rothschild* v. *Knight,* 184 U. S. 334, 339, 46 L. ed. 573, 579, 22 Sup. Ct. Rep. 391; *Furman* v. *Nichol* (*Green* v. *Nichol*) 8 Wall. 44, 56, 19 L. ed. 370, 375.

Mr. **Joseph Spencer Graydon** argued the cause, and, with *Mr. Lawrence Maxwell, Jr.,* filed a brief for defendants in error:

The contract is valid under the laws of Ohio and at common law.

Lange v. *Werk,* 2 Ohio St. 520; *Thomas* v. *Miles,* 3 Ohio St. 274; *Morgan* v. *Perhamus,* 36 Ohio St. 517, 38 Am. Rep. 607; *Lufkin Rule Co.* v. *Fringeli,* 57 Ohio St. 596, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030; *Oregon Steam Nav. Co.* v. *Winsor,* 20 Wall. 64, 22 L. ed. 315; *California Steam Nav. Co.* v. *Wright,* 6 Cal. 258, 65 Am. Dec. 511; *Dunlop* v. *Gregory,* 10 N. Y. 241, 61 Am. Dec. 746; *Fowle* v. *Park,* 131 U. S. 88, 97, 33 L. ed. 67, 74, 9 Sup. Ct. Rep. 658; *Harrison* v. *Glucose Sugar Ref. Co.* 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; *Fisheries Co.* v. *Lennen,* 116 Fed. 217; *Hursen* v. *Gavin,* 59 Ill. App. 66, Affirmed in 162 Ill. 377, 44 N. E. 735; *Hedge* v. *Lowe,* 47 Iowa, 137; *Nordenfelt* v. *Maxim Nordenfelt Guns & A. Co.* [1894] A. C. 535; *S. Jarvis Adams Co.* v. *Knapp,* 58 C. C. A. 1, 121 Fed. 34; *United States* v. *Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271.

In this case it is immaterial whether the separate covenant of the plaintiff in error to maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, is legal or illegal. The suit is not on that covenant, but on the covenant to pay $3,600. The other covenant is not mentioned in the pleadings.

Pigot's Case, 11 Coke, 27*b; Bank of Australasia* v. *Breillat,* 6 Moore, P. C. C. 152; *State ex rel. Laskey* v. *Board of Education,* 35 Ohio St. 519; *Lange* v. *Werk, supra;* Harriman, Contr. 134; *Thomas* v. *Miles, supra; Oregon Steam Nav. Co.* v. *Winsor,* 20 Wall. 64, 70, 71, 22 L. ed. 315, 319.

The contract is not illegal under the Sherman antitrust act.

United States v. *Joint Traffic Asso.* 171 U. S. 505, 568, 43 L. ed. 259, 287; *Anderson* v. *United States,* 171 U. S. 604, 615, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *Hopkins* v. *United States,* 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 360, 48 L. ed. 679, 709, 24 Sup. Ct. Rep. 436; *E. Bement & Sons* v. *National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Brett* v. *Ebel,* 29 App. Div. 256, 51 N. Y. Supp. 573; *Whitwell* v. *Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; *Phillips* v. *Iola Portland Cement Co.* 61 C. C. A. 19, 125 Fed. 593; *Davis* v. *A. Booth & Co.* 65 C. C. A. 269, 131 Fed. 31.

On a petition in error in the supreme court of Ohio to reverse the judgment of a circuit court affirming the judgment of the court of common pleas, the court is not required to consider objections to the judgment of the common pleas that were not assigned for error in the circuit court.

Pollock v. *Cohen,* 32 Ohio St. 514; *Union Ins. Co.* v. *McGookey,* 33 Ohio St. 555; *Springfield, J. & P. R. Co.* v. *Western R. Constr. Co.* 49 Ohio St. 681, 32 N. E. 961.

The writ of error should be dismissed for want of jurisdiction.

Caro v. *Davidson,* 197 U. S. 197, 49 L. ed. 723, 25 Sup. Ct. Rep. 428; *Fullerton* v.

Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; *Chicago, I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200.

The court will not assume facts to make the contract illegal; on the contrary, the presumption, in the absence of allegation or proof, is in favor of its validity.

Herpolsheimer v. *Funke*, 1 Neb. (Unof.) 304, 95 N. W. 687; *C. F. Jewett Pub. Co.* v. *Butler*, 159 Mass. 517, 22 L.R.A. 253, 34 N. E. 1087; *Mills* v. *Dunham* [1891] 1 Ch. 576.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the supreme court of the state, although the petition in error to that court set up that the contract was illegal under the act of Congress of July 2, 1890, chap. 647. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. No opinion was delivered, but a certificate that this objection was relied upon, and that it necessarily was considered, was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised, and the certificate shows that it was not treated as having been raised too late under the local procedure,— a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the state. *Farmers' & M. Ins. Co.* v. *Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

The contract was an indenture between the Portsmouth & Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy, & Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats, and $500 in the stock of the Coney Island Wharf Boat Company, for $30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays $3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until [183] the opposition has ceased. It is *further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last-mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal, as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the states. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214,—a case of a state attempting to fix rates over a railroad route passing outside its limits,—that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding* v. *Meyler*, 192 U. S. 573, 48 L. ed. 570, 66 L. R. A. 833, 24 Sup. Ct. Rep. 322. *A contract is not to be assumed [184] to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the supreme court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning

does not meet the realities of the case. We will suppose, then, that the contract does not leave commerce among the states untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract, and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the states. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last-mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone, but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presum-
[185] ably all that there was to sell, beside *certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from anyone, we believe that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute (*United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 329, 41 L. ed. 1007, 1023, 17 Sup. Ct. Rep. 540; *United States* v. *Joint Traffic Asso.* 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25), and it was so decided in the case of a patent (*E. Bement & Sons* v. *National Harrow Co.* 186 U. S. 70, 92, 46 L. ed. 1058, 1069, 22 Sup. Ct. Rep. 747). It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller, necessary in order to give the sale effect, were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 22 L. ed. 315; *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. C. 152, 201; *Pigot's Case*, 11 Coke, 26*b*, 27*b*. The plaintiff in error did business between *Cincinnati and Syracuse, Ohio, and the [186] rates referred to must be assumed to be rates within those points. If the covenant had any direct bearing on commerce with another state, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

JOHN W. BALLMANN, *Appt.*,

v.

VIVIAN J. FAGIN, United States Marshal for the Southern District of Ohio. (No. 240.)

JOHN W. BALLMANN, *Plff. in Err.*,

v.

UNITED STATES. (No. 308.)

(See S. C. Reporter's ed. 186–196.)

Witness — privilege — self-incrimination.— The possibility that the cash book whose production was sought by a Federal grand jury engaged in investigating the criminal liability of a national bank employee for a disappearance of cash from the bank vaults might show dealings likely to lead to a charge that its owner, then being proceeded against in the civil courts of the state as party to a

NOTE.—*On the privilege of witness as to criminating questions*—see notes to Cooper v.

"bucket shop," was an abettor of the guilty person, or might disclose a violation of the criminal laws of the state against that form of gambling, justifies his refusal, under the claim of his privilege against self-incrimination, either to produce the book, or to answer questions manifestly intended to prove possession or control as a preliminary to calling for the book.

[Nos. 240, 308.]

No. 240 argued May 8, 1905. Decided January 2, 1906. No. 308 submitted November 27, 1905. Decided January 2, 1906.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio to review a judgment denying a writ of habeas corpus to inquire into a detention under a commitment for a contempt in the District Court for that District. *Affirmed.* Also

IN ERROR to the District Court of the United States for the Southern District of Ohio to review such commitment. *Reversed.*

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, Jr.,** argued the cause, and, with *Messrs. Thomas F. Shay* and *Miller Outcalt,* filed a brief for appellant in No. 240:

If Ballmann was protected by the 5th Amendment from answering the questions, the order committing him for refusing to answer is void, and he is entitled to be released on habeas corpus.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Counselman* v. *Hitchcock,* 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Re Ayers,* 123 U. S. 443, 485, 31 L. ed. 216, 223, 8 Sup. Ct. Rep. 164.

There was no evidence and there were no circumstances before the district court to justify it in rejecting the sworn statement of the witness that an answer to the questions might criminate him.

People ex rel. Lewisohn v. *O'Brien,* 176 N. Y. 253, 68 N. E. 353; *People ex rel. Taylor* v. *Forbes,* 143 N. Y. 219, 38 N. E. 303; *Janvrin* v. *Scammon,* 29 N. H. 280; *Counselman* v. *Hitchcock,* 142 U. S. 547, 580, 35 L. ed. 1110, 1120, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Re Kanter,* 117 Fed. 356; *Chamberlain* v. *Willson,* 12 Vt. 491, 36 Am. Dec. 356; *Warner* v. *Lucas,* 10 Ohio, 336; *Lamson* v. *Boyden,* 160 Ill. 613, 43 N. E. 781.

A witness who claims the privilege of silence is not required to admit that he is guilty. The protection of the Constitution is for the innocent as well as for the guilty, and he may require and claim and be accorded protection from the peril of indictment, although protesting his innocence.

People ex rel. Taylor v. *Forbes, supra.*

A witness or party in a Federal court is entitled to protect himself against self-crimination under a law of the state in which the court is sitting.

United States v. *Saline Bank,* 1 Pet. 100, 7 L. ed. 69.

There was no legal evidence to sustain the conviction for contempt for failing to produce a cash book.

Re Watts, 190 U. S. 1, 35, 47 L. ed. 933, 944, 23 Sup. Ct. Rep. 718.

In order to convict the defendant it was necessary for the government to prove that a book answering the description of the subpœna, containing transactions with A. Smith or A. Johnson, was in existence and under his control on April 7. There was no evidence of this fact or of the existence or possession of any cash book after April 3.

Iasigi v. *Brown,* 1 Curt. C. C. 401, Fed. Cas. No. 6,993; Langdell, Eq. Pl. § 211; *Hall* v. *Young,* 37 N. H. 134; *Baggott* v. *Goodwin,* 17 Ohio St. 76.

Since the proceeding in the district court was a criminal case, the government was bound to establish the guilt of the defendant beyond a reasonable doubt.

Bessette v. *W. B. Conkey Co.* 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; *New Orleans* v. *New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354; *Bullock Electric & Mfg. Co.* v. *Westinghouse Electric & Mfg. Co.* 63 C. C. A. 607, 129 Fed. 105.

The presumption of the innocence of the accused has relation to every fact that must be established to prove guilt beyond a reasonable doubt.

Kirby v. *United States,* 174 U. S. 55, 43 L. ed. 894, 19 Sup. Ct. Rep. 574.

The presumption is evidence in favor of the accused.

Coffin v. *United States,* 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.

The district court and the circuit court have allowed conjecture and suspicion to take the place of proof. Their error is similar to that which was so severely condemned in *Chaffee* v. *United States,* 18 Wall. 516, 21 L. ed. 911.

Whenever a witness is excused from giving testimony upon the ground that an answer might criminate him, he cannot be

State, 4 L.R.A. 766; Rice v. Rice, 11 L.R.A. 531; and *Re* Buskett, 14 L.R.A. 407.

On constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Court, 29 L.R.A. 811.

As to sufficiency of a statutory immunity to satisfy the constitutional guaranty against self-incrimination—see notes to United States v. James, 26 L.R.A. 418; and Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

compelled to produce books or papers which would have that effect.

Lamson v. *Boyden, supra; Boyle* v. *Smithman,* 146 Pa. 255, 23 Atl. 397; *Boyd* v. *United States,* 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; 3 Wigmore, Ev. § 2264.

Solicitor General **Hoyt** argued the cause and filed a brief for appellee in No. 240:

Will the judgment in contempt of a court of competent jurisdiction, so far as resting upon the determination of a fact alone, be reviewed at all by this court?

Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; *Ex parte Davis,* 112 Fed. 139; *Ex parte Terry,* 128 U. S. 289, 305, 32 L. ed. 405, 409, 9 Sup. Ct. Rep. 77.

So far as the contention is addressed to the merits of the case, and not to the jurisdiction of the lower court (*O'Neal* v. *United States,* 190 U. S. 38, 47 L. ed. 946, 23 Sup. Ct. Rep. 776), an erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided.

Louisville Trust Co. v. *Comingor,* 184 U. S. 18, 26, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293; *Ex parte Gordon,* 104 U. S. 515, 26 L. ed. 814.

And while proceedings in contempt may be said to be *sui generis,* the present judgment is, in effect, a judgment in a criminal case, over which this court has no jurisdiction on error.

Re Chetwood, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; *Tinsley* v. *Anderson,* 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.* 187 U. S. 427, 428, 47 L. ed. 244, 245, 23 Sup. Ct. Rep. 211.

The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify.

Brown v. *Walker,* 161 U. S. 595, 40 L. ed. 820, 16 Sup. Ct. Rep. 644. See also 3 Wigmore, Ev. pp. 2967, 2968; Stephen, History of Crim. Law, p. 3102.

It is for the court to determine whether a direct answer may criminate the witness.

Best, Ev., § 128, pp. 175, 180; Greenl. Ev. § 451; *United States* v. *Miller,* 2 Cranch, C. C. 247, Fed. Cas. No. 15,772; *Sanderson's Case,* 3 Cranch, C. C. 638, Fed. Cas. No. 12,297; *United States* v. *McCarthy,* 21 Blatchf. 469, 18 Fed. 87; *Stevens* v. *State,* 50 Kan. 712, 32 Pac. 350; *Ford* v. *State,* 29 Ind. 541, 95 Am. Dec. 658; *Minters* v. *People,* 139 Ill. 363, 29 N. E. 45; *People* v. *Mather,* 4 Wend. 229, 21 Am. Dec. 122; *Com.* v. *Willard,* 22 Pick. 476; *Com.* v. *Kimball,* 24 Pick. 366; *Ex parte Senior,* 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *Richman* v. *State,* 2 G. Greene, 532; *Printz* v. *Cheeney,* 11 Iowa, 469; *La Fontaine* v. *Southern Underwriters Asso.* 83 N. C. 132; *Floyd* v. *State,* 7 Tex. 215; *Miskimmins* v. *Shaver* (*Ex parte Miskimins*) 8 Wyo. 392, 49 L.R.A. 831, 58 Pac. 411; *Wyckoff, Seamans, & Benedict* v. *Wagner Typewriter Co.* 99 Fed. 158; *Foot* v. *Buchanan,* 113 Fed. 156; *Ex parte Irvine,* 74 Fed. 954.

In nearly all, if not all, the cases in which the privilege was claimed and allowed, it was apparent from the question asked, as pointed out by Chief Justice Marshall in *United States* v. *Burr,* Fed. Cas. No. 14,692*e*, that a direct answer would criminate the witness. These cases contain no discussion of the question whether it is for the court or the witness to determine if an answer would criminate him, but it is apparent that it was regarded as a matter for the court.

King v. *Gordon,* 2 Dougl. K. B. 593; *Paxton* v. *Douglas,* 19 Ves. Jr. 224; *Maloney* v. *Bartley,* 3 Campb. 210; *Cates* v. *Hardacre,* 3 Taunt. 424; *Rex* v. *Pegler,* 5 Car. & P. 521; *Fisher* v. *Ronalds,* 16 Eng. L. & Eq. 417; *Emery's Case,* 107 Mass. 172, 9 Am. Rep. 22; *Re Graham,* 8 Ben. 419, Fed. Cas. No. 5,659; *Bank of Salina* v. *Henry,* 2 Denio, 155; *People ex rel. Taylor* v. *Seaman,* 8 Misc. 152, 29 N. Y. Supp. 329; *Cullen* v. *Com.* 24 Gratt. 624; *Smith* v. *Smith,* 116 N. C. 386, 21 S. E. 196; *Lister* v. *Boker,* 6 Blackf. 439; *Johnson* v. *Goss,* 2 Yerg. 110; *Lea* v. *Henderson,* 1 Coldw. 146; *Ex parte Clarke,* 103 Cal. 352, 37 Pac. 230.

Messrs. **Lawrence Maxwell, Jr., Thomas F. Shay,** and **Miller Outcalt** submitted the cause for plaintiff in error in No. 308:

In a criminal proceeding based on written charges, the inquiry is confined to those charges.

In proceedings in contempt for disobedience of an injunction, the proofs "must be limited to the particular offenses alleged against the defendant."

Parkhurst v. *Kinsman,* 2 Blatchf. 76, Fed. Cas. No. 10,759.

Ballmann purged the contempt as to the book, under oath.

King v. *Sims,* 12 Mod. 511; 4 Bl. Com. 286; Rapalje, Contempt, § 119; *United States* v. *Dodge,* 2 Gall. 313; Fed. Cas. No. 14,975; *Re Pitman,* 1 Curt. C. C. 186, Fed. Cas. No. 11,184; *Boyd* v. *Glucklich,* 53 C. C. A. 451, 116 Fed. 131.

Solicitor General **Hoyt** submitted the cause for defendant in error in No. 308:

The findings of fact of the trial court are conclusive.

Davis v. *Schwartz*, 155 U. S. 636, 637, 39 L. ed. 291, 293, 15 Sup. Ct. Rep. 237; *Grayson* v. *Lynch*, 163 U. S. 472, 473, 41 L. ed. 231, 232, 16 Sup. Ct. Rep. 1064.

Mr. Justice **Holmes** delivered the opinion of the court:

One of these cases is a writ of error issued by this court to the United States district court upon a judgment committing the plaintiff in error for contempt; the other, an appeal from the circuit court for the same district upon a judgment denying the writ of habeas corpus, which was applied for on the ground that the same commitment was void.

The case, so far as material to our deci-
[193] sion, is as follows: On *April 7, 1905, Ballmann was served with a subpœna to appear before the grand jury, and to bring with him "cash book, ledger, letter-press copy book, and all sheets showing transactions under the name of A. Smith and A. Johnson during the months of December, 1904, and January and February, 1905." He appeared before the grand jury, and on the same day the grand jury reported his failure to produce the books and papers called for by the subpœna. The court entered an order as of that day, April 7, that he should produce all books and papers pertaining to his business. On April 8 the grand jury filed charges of contempt against him, in that "being required by said subpœna to produce a certain cash book in use in his business" he refused to do so, and also that he refused to answer the following questions: (*a*) "State what, on account No. 140, sheet No. 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to wit: No. 349, 349, 349, 349, 349, and 351, refer to." (*b*) "Do not these figures '349,' in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?" On the same day, April 8, the court, after hearing evidence, ordered Ballmann to produce the said cash book and to answer the above questions at noon on April 10, or to be committed to jail until compliance or discharge by due process of law.

On April 10 Ballmann appeared and made the following answers: "I have not now, and neither at the time of, nor at any time since, the service of the first subpœna upon me in this matter, have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the names of A. Smith or A. Johnson, and am unable to produce the same." "I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me; and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer, in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pending *against me." The petition referred to [194] charged Ballmann and others with conducting a scheme of gambling known as a "bucket shop,"—criminal conduct under the laws of Ohio, the state where the case was being tried.

Thereupon, upon the same day, the court, without hearing further evidence, reciting its former order and Ballmann's failure to comply with it, ordered him to be imprisoned in accordance with the same. Afterwards a bill of exceptions was allowed, which set forth the proceedings of April 8. It appears that on that day the foreman of the grand jury testified that Ballmann was inquired of with reference to the cash book, and said that there was no such book. (It is fair to read the statement as meaning the same as his formal answer on the 10th, and no more.) Other witnesses gave evidence tending to prove the existence of a cash book, although not, or at least not except by very remote inference, a cash book showing transactions under the name of A. Smith or A. Johnson. It also appears that Ballmann's counsel said to the court: "As to the book, we say to your honor that we haven't got it;" and also handed the court a paper from Ballmann, reading: "As to the questions asked, I refuse to answer, as they might tend to criminate me."

It appears to us, and it hardly is denied, that the charge of contempt in failing to produce a book is confined, as it was taken by Ballmann's answer to be confined, to a failure to produce a cash book showing transactions under the name of A. Smith or A. Johnson. We assume that the commitment was upon the charge and the order of April 8, not upon the order entered as of April 7. Upon that assumption it might be enough to say that the court was not warranted in finding Ballmann guilty by any evidence which it had before it. There was nothing to show that his answer was not literally true. *Re Watts*, 190 U. S. 1, 35, 36, 47 L. ed. 933, 944, 23 Sup. Ct. Rep. 718. But we need not stop there. Suppose that Ballmann had in his possession a book which he was privileged from producing, and which he wished not to produce. Suppose, also, that he were summoned as he was in this case, and that the book did not show

[195] the dealings *described,—he could not be criticised very severely for avoiding, if possible, the discrediting claim of privilege, by an answer literally exact. If, then, he should be asked in general terms to produce his cash book, he would not be debarred from pleading his privilege by what he had said before. And without any inclination to enlarge a witness's rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object of which was to prove possession or control as a preliminary to calling for the book.

To determine whether the case which we have supposed is the case at bar we must consider whether we can see reasonable grounds for believing that the book was privileged, or that it was not,—it does not matter for our purposes in which form the question is put. The subject under investigation, according to the government's statement, was the criminal liability of some employee of a national bank from the vaults of which a large amount of cash had disappeared. The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a "bucket shop," dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, and no more bound to produce the book than to give testimony to the facts which it disclosed. *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524: *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another, less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a "bucket shop," and so subject to the criminal law of the state in which the grand jury was sitting. According to *United States* v. *Saline Bank*, 1 Pet. 100, 7 L. ed. 69, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See *Jack* v. *Kansas* (decided this term), 199 U. S. 372, *ante*, 234, 26 Sup. Ct. Rep. 73. One way or the other we are of

[196] opinion *that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him.

But it is said that he did not set it up, but, on the contrary, denied the existence of the book. We are not of that opinion. We think that he was giving an answer which, whether too sharp or not, might be true even if he had a cash book within his control. His denial was limited explicitly, and with no disguise in the form of statement, to a cash book showing transactions under the name of A. Smith or A. Johnson. It called attention to the limit by its form. And when thereupon he was asked questions, the manifest meaning of which was to fasten upon him an admission that there was a cash book, he at once declined to answer. Of course it may be that he declined because he knew that further answers would disclose the falsity of his first denial. But the natural explanation of the claim of privilege is that a cash book existed, that Ballmann knew it, and that he believed that if produced it would criminate him in one of the two ways which we have explained. Nothing more need be said about the questions as distinguished from the production of the book. See *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

We are aware that the courts below came to their conclusions upon the assumption that Ballmann denied generally the possession of a cash book, and that he was before the court for disobedience to an order to produce it. It may be that he now escapes liability as much by luck as by desert. But he is entitled to demand a judgment according to the record, and we are of opinion that, on the record, fairly construed, the judgment of the district court should be reversed. This decision makes any other than formal action upon the habeas corpus unnecessary, and therefore the judgment of the circuit court may be affirmed for the purpose of ending the case.

Judgment of the District Court reversed.
Judgment of the Circuit Court affirmed.

Mr. Justice **Harlan** and Mr. Justice **McKenna** dissent.

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[197] *UNITED STATES for the Use and Benefit of DANIEL H. HILL, and Howard H. Hill, Copartners Doing Business under the Firm Name of N. D. Hill & Sons, *Plffs. in Err.*,

v.

AMERICAN SURETY COMPANY OF NEW YORK.

(See S. C. Reporter's ed. 197–205.)

Principal and surety—extent of surety's liability—labor and materials used in public work.—Labor and materials used in the prosecution of a public work, whether furnished under the contract directly

to the contractor or to a subcontractor, must be deemed within the obligation of a surety company under a bond executed pursuant to the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), conditioned for the prompt payment by the contractor to "all persons supplying it labor or materials in the prosecution of the work provided for in said contract," in view of the manifest purpose of that statute to protect those whose labor or material has contributed to the prosecution of the work.

[No. 39.]

Submitted November 3, 1905. Decided January 2, 1906.

IN ERROR to the Superior Court of King County in the State of Washington to review a judgment sustaining a demurrer to, and dismissing, the complaint in an action by persons furnishing labor and materials to a subcontractor on a public work on the bond of a surety company, conditioned for the prompt payment by the contractor to all persons supplying it with labor or materials in the prosecution of such work. *Reversed* and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **Albert W. Buddress** submitted the cause for plaintiffs in error:

The principals and sureties are liable under similar state statutes for labor and material furnished to subcontractors.

Mullin v. *United States,* 48 C. C. A. 677, 109 Fed. 817; *George* v. *Washington County R. Co.* 93 Me. 134, 44 Atl. 377; *Branin* v. *Connecticut & P. Rivers R. Co.* 31 Vt. 214; *Kent* v. *New York C. R. Co.* 12 N. Y. 628; *Mundt* v. *Sheboygan & F. Du L. R. Co.* 31 Wis. 451; *Redmond* v. *Galena & S. W. R. Co.* 39 Wis. 426; *Mann* v. *Corrigan,* 28 Kan. 194; *Peters* v. *St. Louis & I. M. R. Co.* 24 Mo. 586; *Grannahan* v. *Hannibal & St. J. R. Co.* 30 Mo. 546; *French* v. *Powell,* 135 Cal. 636, 68 Pac. 92; *Gilmore* v. *Westerman,* 13 Wash. 390, 43 Pac. 345; *Abbott* v. *Morrissette,* 46 Minn. 10, 48 N. W. 416; *Sepp* v. *McCann,* 47 Minn. 364, 20 N. W. 246; *Bassett* v. *Mills,* 89 Tex. 162, 34 S. W. 93; *Garrison* v. *Borio,* 61 N. J. Eq. 236, 47 Atl. 1060; *Ferguson* v. *Despo,* 8 Ind. App. 523, 34 N. E. 575; 23 Am. & Eng. Enc. Law, 2d ed. p. 723.

The rule of *strictissimi juris* is a stringent one, and is liable at times to work practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute.

United States Fidelity & G. Co. v. *Golden Pressed & Fire Brick Co.* (*United States Fidelity & G. Co.* v. *United States*) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142.

The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty. That object could not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank.

Guarantee Co. of N. A. v. *Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124.

A remedial statute should be liberally construed with reference to the purpose of its enactment.

Bechtel v. *United States,* 101 U. S. 597, 25 L. ed. 1019.

The intent of the law must prevail over the letter of the statute.

Lionberger v. *Rouse,* 9 Wall. 468, 19 L. ed. 721; *Smythe* v. *Fiske,* 23 Wall. 374, 23 L. ed. 47; *Durousseau* v. *United States,* 6 Cranch, 308, 3 L. ed. 232; *United States* v. *Hodson,* 10 Wall. 395, 19 L. ed. 937; *Baltimore* v. *Root,* 8 Md. 95, 63 Am. Dec. 692; Broom, Legal Maxims, 611; *Rutledge* v. *Crawford,* 91 Cal. 526, 13 L.R.A. 761, 25 Am. St. Rep. 212, 27 Pac. 779; *United States* v. *Freeman,* 3 How. 556, 11 L. ed. 724; *Bell* v. *New York,* 105 N. Y. 139, 11 N. E. 495; *Bullock* v. *Horn,* 44 Ohio St. 420, 7 N. E. 737; *Tuttle* v. *Montford,* 7 Cal. 358; *Barnes* v. *Thompson,* 2 Swan, 313; Sedgw. Stat. & Const. L. 308.

Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction.

Patterson v. *The Eudora,* 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Smythe* v. *Fiske, Mundt* v. *Sheboygan & F. Du L. R. Co.*, and *Garrison* v. *Borio, supra.*

The state, when engaged in the construction of public buildings, is chargeable with a moral duty to protect persons furnishing labor and material therefor.

Korsmeyer Plumbing & Heating Co. v. *McClay,* 43 Neb. 649, 62 N. W. 50; *Knapp* v. *Swaney,* 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162; *Baker* v. *Bryan,* 64 Iowa, 561, 21 N. W. 83; *Philadelphia* v. *Stewart,* 195 Pa. 309; 45 Atl. 1056; *St. Louis use of Glencoe Lime & Cement Co.* v. *Von Phul,* 133 Mo. 564, 54 Am. St. Rep. 695, 34 S. W. 843.

The true spirit and merit of the statute is lost sight of in the contention that this

remedy is a mere substitute for the remedy by lien, and when the latter does not exist the former cannot exist.

Bates v. *Santa Barbara*, 90 Cal. 543, 27 Pac. 438; *Kent* v. *New York C. R. Co.* 12 N. Y. 628; *American Surety Co.* v. *Lawrenceville Cement Co.* 110 Fed. 717; *Garrison* v. *Borio*, *supra*.

Subcontractors are the implied agents of the original contractors in procuring labor and material.

Parker v. *Bell*, 7 Gray, 429; *Bates* v. *Santa Barbara*, *supra*.

Mr. **Henry C. Willcox** submitted the cause for defendant in error:

Decisions by the lower courts on the subject support the contention that the supplying of labor or materials by a third party to a subcontractor is not supplying labor and materials to the original contractor within the meaning of the latter's bond.

United States v. *Simon*, 38 C. C. A. 659, 98 Fed. 73; *Mullin* v. *United States*, 48 C. C. A. 677, 109 Fed. 817; *United States* v. *Farley*, 91 Fed. 474.

Mr. Justice **Day** delivered the opinion of the court:

This case was decided on demurrer in the court below. It was held that no cause of action was stated by the plaintiffs, and judgment was rendered accordingly. Plaintiffs brought action as partners against the American Surety Company upon a bond given in pursuance of the act of August 13, 1894. 28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523. The allegations of the petition, so far important as to be noticed here, are: The defendant is a corporation duly authorized to do a general insurance and bonding business. On February 14, 1891, the New Jersey Foundry & Machine
[200] Company *entered into a written contract with the United States, for the construction of four observation towers, for the agreed compensation of $2,575. That, among other things, it was stipulated in the contract "that the said New Jersey Foundry & Machine Company shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material," the work to be completed within seven months from date of contract. The United States required of the said New Jersey Foundry & Machine Company a bond, which was executed by the company and the American Surety Company as surety, on the 14th day of February, 1901, in the penal sum of $4,000, to be paid unto the United States of America, which bond contained the condition: "Now, therefore, if the above bounden New Jersey Foundry & Machine Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed and covenanted by said New Jersey Foundry & Machine Company to be observed and performed, according to the true intent and meaning of said contract, and as well during any period of extension of said contract that may be granted on the part of the United States, as during the original terms of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue." That afterwards the said New Jersey Foundry & Machine Company entered into a contract with the Richard Manufacturing Company for certain portions of the work, and said Richard Manufacturing Company entered upon the performance of the contract, and in the performance thereof between the 3d day of April and the 17th day of May, of the same year, Daniel H. Hill, and Howard H. Hill, the plaintiffs, at the special instance and request of the said Richard Manufacturing Company, scraped and painted the four observation towers, to be constructed under the contract with the said New Jersey Foundry & Machine Company, for which said *Richard Manufactur- [201]
ing Company agreed to pay the said plaintiffs the sum of $246.80, of which there is unpaid the sum of $141.80. That on the 11th day of August, 1903, plaintiffs made the affidavit required by the statute, and procured from the Secretary of War of the United States certified copies of the original contract and bonds; that the said New Jersey Foundry & Machine Company, the Richard Manufacturing Company, and the United States accepted the said scraping and painting so done and performed by the plaintiffs in the necessary prosecution of the work required by the original contract.

The statute under consideration is entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." It provides, in substance, that persons entering into formal contracts with the United States for the construction or repair of public buildings and works shall be required, before performing such work, to execute the usual penal bond with good and sufficient surety, with the additional obligation "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." The statute further provides for the furnishing of a copy of the contract and bond to persons furnishing an affidavit that labor and materials for the

prosecution of such work have been supplied by him or them, and giving a right of action in the name of the United States for the benefit and use of said person or persons against the contractor and his sureties.

We may remark, before considering the construction to be given this act, that it has been materially amended by the act of February 24, 1905. 33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1905, p. 493. The amended act makes provision for preference in payment in favor of the United States, limits the time in which actions may be brought, provides for bringing all the creditors into one action, and for the prosecution of the same in the name of the United States in the circuit courts of the United States in the district in which the contract was to be performed, and not elsewhere. In respect to the persons entitled to the benefit of the bond, [202] there has been *no material change in the act. While not governing the present action, the amended statute has some bearing in construing the act in question, as it shows the consistent purpose of Congress to protect those who furnish labor or material in the prosecution of public work.

In considering the statute and determining the scope of the bond, divergent views have been urged upon the court. Upon the one hand it is insisted that the bond is to be strictly construed, and a recovery limited to those who have furnished material or labor directly to the contractor, and, upon the other, that a more liberal construction be given, and a recovery permitted to those who have furnished labor and materials which have been used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor.

This statute was before this court in *United States Fidelity & G. Co.* v. *Golden Pressed & Fire Brick Co.* 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142, and while the question whether surety companies which are such for compensation are entitled to the same strict construction of their rights and obligations as is accorded to private sureties, who become such without reward or profit, was left open, it was nevertheless said: "The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, as was the case in *United States use of Heise* v. *American Bonding & T. Co.* 89 Fed. 921, 925, 32 C. C. A. 420, or to cases not otherwise within the scope of the undertaking."

The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for *the [203] construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials. *Flagstaff Silver Min. Co.* v. *Cullins*, 104 U. S. 176, 177, 26 L. ed. 704, 705. And the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties. *Ulster County Sav. Inst.* v. *Young*, 161 N. Y. 23, 30, 55 N. E. 483.

As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual. The purpose of the law is, as its title declares: "For the protection of persons furnishing materials and labor for the construction of public works." If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end.

Statutes are not to be so literally construed as to defeat the purpose of the legislature. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." *United States* v. *Freeman*, 3 How. 556, 11 L. ed. 724. "The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." Chief Justice Marshall, in *Durousseau* v. *United States*, 6 Cranch, 308, 3 L. ed. 232.

Looking to the terms of this statute in [204]its original form, and *as amended in 1905, we find the same congressional purpose to require payment for material and labor which have been furnished for the construction of public works. The affidavit to be filed with the head of the department under the direction of which the work has been prosecuted requires the affiant to state that labor or materials for the prosecution of such work has been supplied by him, for which payment has not been made, and such persons are given the right of action on the bond in the name of the United States. Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work. There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be "supplied" to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors, and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated.

We cannot conceive that this construction works any hardship to the surety. The contractor gets the benefit of such work or material. It is distinctly averred in this case that the original contractor received the benefit of the work done, and it was used in part performance of his contract. It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish [205]*work or labor to go into the structure. In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is "to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract." This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfil the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfilment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.

We reach the conclusion that the labor and materials furnished in this case were within the obligation of the surety company on the bond, and in that view *the judgment of the Superior Court is reversed* and the cause remanded for further proceedings not inconsistent with this opinion.

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*ALABAMA GREAT SOUTHERN RAIL- [206]
WAY COMPANY
v.
H. C. THOMPSON, Administrator of Florence James, Deceased.

(See S. C. Reporter's ed. 206-220.)

Removal of causes—separable controversy.—A case in which plaintiff, in good faith, has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not—even though such joinder may be improper—present a separable controversy between plaintiff and the corporation, which,

NOTE.—*As to removal of causes in cases of separable controversy*—see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co. 35 C. C. A. 153; Sloane v. Anderson, 29 L. ed. U. S. 899; Merchants Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

Joint liability of master and servant for latter's negligence.

Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745, is the leading authority for the proposition that a joint action against master and servant for the servant's negligence cannot be maintained, where the negligent act was not committed at the master's direction, and he was not present, actively co-operating with the servant in the commission of the tort.

On the authority of this decision the liability

under the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), as amended by the acts of March 3, 1887 (24 Stat. at L. 553, chap. 373), and August 13, 1888 (1 U. S. Rev. Stat. Supp. 611, U. S. Comp. Stat. 1901, p. 509), can be removed from a state to a Federal circuit court without regard to the citizenship of the individual defendants.

[No. 58.]

Argued and submitted November 9, 1905. Decided January 2, 1906.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit presenting the question whether master and servant can be joined in actions for negligence, and whether such an action presents a separable controversy which justifies removal from a state to a Federal circuit court. Answered by holding that, for the purpose of determining the right of removal, the cause of action must be deemed to be joint.

The facts are stated in the opinion.

Mr. **Edward Colston** argued the cause, and, with *Messrs. Judson Harmon, A. W. Goldsmith,* and *George Hoadly,* filed a brief for the Alabama Great Southern Railway Company:

The decided weight of authority is in favor of the proposition that a joint action will not lie against the master and servant for an injury caused solely by the want of care of the servant in the course of his employment.

Pom. Code Remedies, 4th ed. § 208; Bliss, Code Pl. 3d ed. § 83; 17 Am. & Eng. Enc. Law, p. 602; *Parsons* v. *Winchell,* 5 Cush. 592, 52 Am. Dec. 745; *Mulchey* v. *Methodist Religious Soc.* 125 Mass. 487; *Bailey* v. *Bussing,* 37 Conn. 349; *Sellick* v. *Hall,* 47 Conn. 260; *Page* v. *Parker,* 40 N. H. 47; *Clark* v. *Fry,* 8 Ohio St. 377, 72 Am. Dec. 590; *Bennett* v. *Fifield,* 13 R. I. 139, 43 Am. Rep. 17; *Cole* v. *Lippitt,* 22 R. I. 31, 46 Atl. 43; *Campbell* v. *Portland Sugar Co.* 62 Me. 552, 16 Am Rep. 503; *Trowbridge* v. *Forepaugh,* 14 Minn. 133, Gil. 100; *Brinkerhoff* v. *Brown,* 6 Johns. Ch. 154; *Warax* v. *Cincinnati, N. O. & T. P. R. Co.* of the principal and agent for the latter's negligence was held, in Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503, not to be joint, but several.

So it is held in Mulchey v. Methodist Religious Soc. 125 Mass. 487, that members of a committee, who, as agents of a religious society, make a contract for the building of staging to be used in painting a church, and accept the staging, which afterwards falls and causes injury to a workman engaged in painting the church for another contractor, if liable for negligence, cannot be sued jointly with the society for which they acted.

A recovery cannot be had in a joint action against a railroad company and its engineer for the wilful and reckless trespass of the latter in running his train past a danger signal and recklessly dashing into another train on the track, injuring its occupants. Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85.

A master cannot be joined as defendant in an action against his servant for negligence, where the master is not personally concerned in such negligence, either by his presence or express direction. Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745.

Where the master's liability arises solely from the negligence of a servant, he cannot be sued jointly with such servant. Landers v. Felton, 73 Fed. 311; Gableman v. Peoria, D. & E. R. Co. 82 Fed. 790; Doremus v. Root, 94 Fed. 760; Herman Bergnoff Brewing Co. v. Przbylski, 82 Ill. App. 361 (Overruling Johnson v. Magnuson, 68 Ill. App. 448); McNemar v. Cohn, 115 Ill. App. 31.

And this is especially true where the liability of the master could not exist except for the statutory abrogation of the fellow servant rule. Helms v. Northern P. R. Co. 120 Fed. 389.

To constitute a joint liability of master and servant there must be actual negligence, as contradistinguished from imputed negligence. of the master, concurring with the act negligently committed by the servant. Shaffer v. Union Brick Co. 128 Fed. 97; McIntyre v. Southern R. Co. 131 Fed. 985.

Where the negligent act of the servant was committed at the master's direction, a joint action may be maintained. Michael v. Alestree 2 Lev. 172, 3 Keble, 650.

One who gratuitously superintended the work of opening the walls of a sewer, and replaced the earth around it so loosely that water escaped to the damage of the neighboring proprietor, was held in Hawkesworth v. Thompson, 98 Mass. 77, 93 Am. Dec. 137, to be jointly liable with the owner of the premises for whom the work was done, and who participated in doing it, on the ground that both were negligent in respect to directing the workmen.

So a joint action may be brought against a railroad company and two of its employees for their concurrent negligence in killing a person at a railroad crossing. Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67. The court said that the petition did not set forth the specific act of negligence complained of. It was stated that the negligence of the corporate defendant was done by and through its servants then and there in its employment, and that such negligence was the joint negligence of all the defendants. Assuming this averment to b inconsistent with the charge of direct action by the company, it might, nevertheless, said the court, be held to amount to a charge of concurrent action when coupled with the previous averment that the decedent was killed while crossing the track at a turnpike crossing by the negligence of the company and other defendants in charge of the train. The court added that the negligence may have consisted in that the train was run at too great speed and that proper signals of its approach were not given, and that if the speed was permitted by the company's rules, or not forbidden,

72 Fed. 637; *Beuttel* v. *Chicago, M. & St. P. R. Co.* 26 Fed. 50; *Fergason* v. *Chicago, M. & St. P. R. Co.* 63 Fed. 177; *Hartshorn* v. *Atchison, T. & S. F. R. Co.* 77 Fed. 9; *Doremus* v. *Root,* 94 Fed. 760; *Helms* v. *Northern P. R. Co.* 120 Fed. 389; *Davenport* v. *Southern R. Co.* 124 Fed. 983; *Gustafson* v. *Chicago, R. I. & P. R. Co.* 128 Fed. 87; *Shaffer* v. *Union Brick Co.* 128 Fed. 99; *McIntyre* v. *Southern R. Co.* 131 Fed. 985.

Where the injury is caused by mere neglect or omission of the servant the master alone is liable. By the rule *respondeat superior* the act of the servant, in cases of mere negligence, is absorbed in the master's liability.

Lane v. *Cotton,* 12 Mod. 472; Wharton, Agency & Agents, §§ 535, 536; *Cameron* v. *Reynolds,* 1 Cowp. 403; *Williams* v. *Cranston,* 2 Starkie, 82; 1 Bl. Com. *431; 1 Shearm. & Redf. Neg. 5th ed. § 243; 20 Am. & Eng. Enc. Law, 2d ed. p. 52; Story, Agency, 9th ed. § 308, p. 378; *Denny* v. *Manhattan Co.* 2 Denio, 115; *Colvin* v. *Holbrook,* 2 N. Y. 129; *Murray* v. *Usher,* 117 N. Y. 546, 23 N. E. 564; *Van Antwerp* v. *Linton,* 89 Hun, 417, 35 N. Y. Supp. 318; *Feltus* v. *Swan,* 62 Miss. 415; *Steinhauser* v. *Spraul,* 127 Mo. 541, 27 L.R.A. 441, 28 S. W. 626, 30 S. W. 102; *Delaney* v. *Rochereau,* 34 La. Ann. 1128, 44 Am. Rep. 456; *Henshaw* v. *Noble,* 7 Ohio St. 226; *Kelly* v. *Chicago & A. R. Co.* 122 Fed. 289; *Davenport* v. *Southern R. Co.* 124 Fed. 984.

Joint liability is the test of a separable controversy.

Nelson v. *Hennessey,* 33 Fed. 113; *Collins* v. *Wellington,* 31 Fed. 244; *Gableman* v. *Peoria, D. & E. R. Co.* 179 U. S. 337, 45 L. ed. 221, 21 Sup. Ct. Rep. 171; *Chesapeake & O. R. Co.* v. *Dixon,* 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67.

In tort the action is not joint merely because the plaintiff chooses to name a number of persons defendants. To have that effect it is necessary that the pleading show a right to make them defendants.

Powers v. *Chesapeake & O. R. Co.* 169 U. S. 96, 42 L. ed. 674, 18 Sup. Ct. Rep. 264.

Messrs. Edmund F. Trabue and *Edward*

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though dangerous, the negligence in that particular and in the omission of signals would be concurrent.

Other cases hold the liability of the master and servant to be joint, even if the master's liability arises solely out of his relation to the servant, who alone was guilty of the actual negligent act.

Thus, for negligence in conducting a railroad train the engineer and fireman who were negligent are held liable with the railroad company for an injury thereby caused, such as the killing of a cow on the track. Suydam v. Moore, 8 Barb. 358.

So, in Martin v. Louisville & N. R. Co. 95 Ky. 612, 26 S. W. 801, a negligent railroad engineer and the company which employed him were held liable for his negligence, in the same action.

So, the owner of a team of horses which his son was driving in his father's employment is jointly liable with the son for the latter's negligent driving, whereby he ran over and injured another person. Phelps v. Wait, 30 N. Y. 78.

The liability of master and servant to a joint action for the servant's negligence is also sustained in Montford v. Hughes, 3 E. D. Smith, 591, in which it is said that the masters were not present nor in any wise concerned in the injury complained of except in virtue of the responsibility for his negligence.

And a superintendent in charge of the work of building a bridge for a contractor is liable for his negligence in the construction of a scaffolding, whereby a laborer, subject to his direction and control, is injured, and in such a case an action will lie against the superintendent or master, or both jointly. Fort v. Whipple, 11 Hun, 593.

In Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507, while the liability of the owner of a team for the wilful act of the driver, injuring a third person, is denied, the court says: "In a case of strict negligence by the servant while employed in the service of his master, I see no reason why an action will not lie against both jointly."

So, it was held in Wright v. Compton, 53 Ind. 337, that a servant as well as his master is liable for his own carelessness and neglect, and in an action therefor both master and servant may be joined.

Such joint liability is also upheld in case of a corporation and one of two officers whose negligence created the liability, in Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L. R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93.

A master and servant are jointly liable for the wilful tort or the negligence of the servant while acting for the master within the scope of the agency. Schumpert v. Southern R. Co. 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813; Gardner v. Southern R. Co. 65 S. C. 341, 43 S. E. 816.

A joint action may be brought to recover damages for a death caused by the negligence of an agent of a railroad company, under a statute providing that whenever death shall result from an injury inflicted by negligence, damages may be recovered from the corporation or corporations, their agents or servants causing the same. Winston v. Illinois C. R. Co. 111 Ky. 954, 55 L.R.A. 603, 65 S. W. 13; Cincinnati, N. O. & T. P. R. Co. v. Cook, 113 Ky. 161, 67 S. W. 383.

The abolition by statute of the distinction between case and trespass was held, in Johnson v. Magnuson, 68 Ill. App. 448, to remove the technical objection to joining master and servant in an action for the latter's negligence.

But this case was overruled and the contrary doctrine declared in Herman Berghoff Brewing Co. v. Przbyiski, 82 Ill. App. 361.

And see note to Mayer v. Thompson-Hutchison Bldg. Co. 28 L.R.A. 433, on *Liability of an agent or servant to third person for his own negligence or nonfeasance.*

Colston also filed a brief for the Alabama Great Southern Railroad Company:

A controversy between two persons, citizens of different states, may exist in any suit, and be separable from the rest of the suit, and determinable between those two persons of diverse citizenship, and in so determining no account whatever is taken of whether, in the state court, such controversy would be regarded as separable from the rest of the suit, or as determinable between the petitioner for removal and his adversary in the controversy alone.

Removal Cases, 100 U. S. 457, 468, 25 L. ed. 593, 598; *Blake* v. *McKim,* 103 U. S. 336, 337, 26 L. ed. 563, 564; *Evers* v. *Watson,* 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430; *Barney* v. *Latham,* 103 U. S. 205, 26 L. ed. 514.

Federal jurisdiction cannot be abridged or modified by any state statute.

Hyde v. *Stone,* 20 How. 173, 15 L. ed. 875; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The right of removal is as immune from regulation by state statute as is the right of resort to Federal equity jurisdiction.

Wabash Western R. Co. v. *Brow,* 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

Mr. **E. S. Daniels** submitted the cause for Thompson, Administrator. *Messrs. J. V. Williams* and *John O. Benson* were on the brief:

Under the practice and laws of Tennessee, the supreme court of such state recognizes the right to jointly sue the master and servants under like circumstances as those existing in this case, and this being true, the Federal courts in most, if not all, the cases in which the question of the state law and practice were involved, have unreservedly held that they will follow the practice and adjudications of the state court on such questions.

Connell v. *Utica, U. & E. R. Co.* 13 Fed. 241; *Charman* v. *Lake Erie & W. R. Co.* 105 Fed. 449; *Chesapeake & O. R. Co.* v. *Dixon,* 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Southern R. Co.* v. *Carson,* 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; *Swain* v. *Tennessee Copper Co.* 111 Tenn. 433, 78 S. W. 93; *Jones* v. *Ducktown Sulphur, Copper, & I. Co.* 109 Tenn. 375, 71 S. W. 821.

While the authorities are in conflict as to the right of joinder under the facts certified in this case, still, we believe the authorities, both in numbers and reasoning, largely preponderate in favor of the right of joinder.

Charman v. *Lake Erie & W. R. Co. supra; Riser* v. *Southern R. Co.* 116 Fed. 215; *Chesapeake & O. R. Co.* v. *Dixon,* and *Southern R. Co.* v. *Carson, supra; Wright* v. *Compton,* 53 Ind. 337; *Schumpert* v. *Southern R. Co.* 65 S. C. 335, 95 Am. St. Rep. 802, 43 S. E. 813; *Wright* v. *Wileox,* 19 Wend. 343, 32 Am. Dec. 507; *Phelps* v. *Wait,* 30 N. Y. 78; *Cincinnati, N. O. & T. P. R. Co.* v. *Cook,* 113 Ky. 161, 67 S. W. 383; *Winston* v. *Illinois C. R. Co.* 111 Ky. 954, 55 L.R.A. 603, 65 S. W. 13; *Schaefer* v. *Osterbrink,* 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; *Newman* v. *Fowler,* 37 N. J. L. 89; 1 Shearm. & Redf. Neg. 5th ed. § 248; Cooley, Torts, 1st ed. 142; Wood, Mast. & S. 2d ed. § 325; 1 Estee, Pl. § 1834; 15 Enc. Pl. & Pr. p. 560.

The rule that there can be no contribution between joint tort feasors has no application in cases where the master is held liable for the negligence of the servant under the rule of *respondeat superior.*

Gray v. *Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; Story, Partn. § 220; *Betts* v. *Gibbins,* 2 Ad. & El. 57; *Wooley* v. *Batte,* 2 Car. & P. 417; *Bailey* v. *Bussing,* 28 Conn. 455; 7 Am. & Eng. Enc. Law, pp. 364–366.

When the removal is based upon the allegation of a separable controversy, the whole suit goes to the Federal court.

Barney v. *Latham,* 103 U. S. 205, 26 L. ed. 514.

There must exist, therefore, as shown by the pleading, two or more distinct controversies, or there must exist in the suit a separate and distinct cause of action, or the case must be one capable of separation into parts.

Geer v. *Mathieson Alkali Works,* 190 U. S. 428, 432, 47 L. ed. 1122, 1124, 23 Sup. Ct. Rep. 807.

Mr. Justice **Day** delivered the opinion of the court:

This case is here on a certificate from the United States circuit court of appeals for the sixth circuit. The certificate states the facts and propounds the questions as follows:

"This was an action in tort, brought by the administrator of Florence James for the negligent killing of the intestate by the defendant railroad company.

"The suit was started in a circuit court of the state of Tennessee, and a declaration was there filed.

"The plaintiff was a citizen of Tennessee.

"The defendants were the Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and William H. Mills and Edgar Fuller, both citizens of the state of Tennessee.

"The case was then removed into the court below upon petition of the railroad company alone, upon the ground that a separable controversy, involving more than $2,000, exclusive of interest and costs, ex-

isted between the petitioner and the plaintiff, as to whom diversity of citizenship existed, which could be tried out without the presence of either of the individual codefendants of petitioner.

[212] *"A motion to remand to the state court because no removable separable controversy appeared was overruled.

"Thereupon an issue was made and the case heard by court and jury, and a judgment rendered in favor of the plaintiff, and against the railroad company alone.

"From this judgment the railroad company sued out this writ of error.

"Upon the hearing in this court, the court raised the question as to whether the court below had rightfully acquired jurisdiction by the removal proceedings referred to, the removal being grounded only upon the question of separable controversy appearing upon the face of the declaration of the plaintiff at the time of the application for removal.

"That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully, and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was, at the time, under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer.

"Entertaining grave doubt as to whether a joint right of action was stated against the railroad company and the two individual defendants, who were servants of the railroad company, it is ordered that the foregoing statement be certified to the Supreme Court, and that the instruction of that court be requested for the proper decision of the following questions which arise upon the record:

"1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not per-

[213] sonally *present or directing, and not charged with any concurrent act of negligence?

"2 Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?"

A question certified must be one the answer to which is to aid the court in determining a case before it. *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266, 37 L. ed. 445, 13 Sup. Ct. Rep. 594. And it is evident that the matter to be determined in the case pending, desiring which the opinion of this court is asked, is the removability of the case brought in the state court against the railroad company and the individual defendants. We shall answer the questions in that view.

The right to remove the controversy is founded upon § 2 of the act of March 3, 1887 [24 Stat. at L. 553, chap. 373], as corrected August 13, 1888 (1 U. S. Rev. Stat. Supp. 611, U. S. Comp. Stat. 1901, p. 509). It is therein provided, among other things, "and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The case was removed upon the theory that it contains a separable controversy between the nonresident railroad company and the plaintiff. The removal act of 1875 [18 Stat. at L. 470, chap. 137], as amended in 1887–88, in the part quoted above as to separable controversies, has been the subject of frequent adjudication in this court. Independent of statute, there is much conflict in the authorities as to whether a corporation whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct directly *caused the injury. In a leading [214] case in this court (*Chesapeake & O. R. Co.* v. *Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67), many of the cases were reviewed by the chief justice who delivered the opinion, and it was shown that in a number of English and American cases it has been held that, as to third persons, the master is responsible for the negligence of his servant in a joint action against both, to recover damages for an injury. In the case of *Warax* v. *Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, a case which has been much cited and sometimes followed in the Federal courts, it was held that a joint action could not be sustained against master and servant for acts done without the master's concurrence or direction, when his responsibility arises wholly from the policy of the law, which requires that he shall be

held liable for the acts of those he employs in the prosecution of his business. And it was held that the petition against the engineer and the company presented a case of misjoinder, and could be removed on the application of the nonresident company.

In the case of *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, 265, suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision [215]*in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Pirie* v. *Tvedt*, 115 U. S. 41, 43, 29 L. ed. 331, 332, 5 Sup. Ct. Rep. 1034, 1161; *Sloane* v. *Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Little* v. *Giles*, 118 U. S. 596, 600, 601, 30 L. ed. 269–271, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Torrence* v. *Shedd*, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; *Connell* v. *Smiley*, 156 U. S. 335, 340, 39 L. ed. 443, 444, 15 Sup. Ct. Rep. 353."

After thus stating the rule, the justice commented on the *Warax Case*, 72 Fed. 637, as a departure from the former ruling of the circuit court. And while the *Powers Case* was decided on the ground of the right to remove after the local defendants had been dismissed from the action by the plaintiff, it is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the nonresident defendant to remove the action to the Federal court.

And in *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599, 600, 33 L. ed. 474, 475, 10 Sup. Ct. Rep. 203, the same eminent judge, speaking for the court, said:

"It often has been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the circuit court of the United States, under the act of March 3, 1875, chap. 137, § 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. 18 Stat. at L. 471, U. S. Comp. Stat. 1901, p. 508; *Pirie* v. *Tvedt*, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; *Sloane* v. *Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Plymouth Consol. Gold Min. Co.* v. *Amador & S. Canal Co.* 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535, 30 L. ed. 1235, 7 Sup. Ct. Rep. 1265.

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made *joint defendants for the purpose of pre- [216] venting a removal into the Federal court."

The language quoted by Mr. Justice Gray in the *Powers Case* was used by Chief Justice Waite in delivering the opinion of the court in *Louisville & N. R. Co.* v. *Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735. The Chief Justice said: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith* v. *Rines*, 2 Sumn. 348, Fed. Cas. No. 13,100. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." It is true, as suggested by counsel, that Mr. Justice Gray used the word "seeks" instead of "elects;" but we do not perceive that this change deprives the doctrine announced of its force and effect.

The language is used of a action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer, and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for

removal (*Wilson* v. *Oswego Twp.* 151 U. S. 56, 66, 38 L. ed. 70, 75, 14 Sup. Ct. Rep. 259), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. *Louisville & N. R. Co.* v. *Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; *Graves* v. *Corbin*, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; *Little* v. *Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *East Tennessee, V. & G. R. Co.* v. *Grayson*, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; *Torrence* v. *Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; *Chesapeake & O. R. Co.* v. *Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Southern R. Co.* v. *Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248, an action was brought by Smithson in a state court of Minnesota against the Chicago Great Western Railway Company and Whitcomb
[217] and Morris, receivers of the Wisconsin Central Company, to recover for personal injuries while serving the Chicago Great Western Railway Company as a fireman, as the result of a collision between the locomotive upon which he was at work and one operated by the receivers, who were officers of the Federal court. The railway company answered, and the receivers filed a petition for removal to the United States circuit court. The case was thereafter remanded by the Federal court, that court holding there was no separable controversy, and that the joinder was in good faith. Upon the trial in the state court a verdict was directed by the court in favor of the railway company. Thereupon the receivers asked permission to file a supplemental petition for removal, and upon proffer of a petition and bond the application was denied, and a verdict was returned against the receivers only. Of this feature of the case the Chief Justice, delivering the opinion of the court, said:

"The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the circuit court. This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. But that is not this case. The joint liability was insisted on here to the close of the trial, and the nonliability of the railway company was ruled *in invitum*."

In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right, in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action.

*The fact that by answer the defendant [218] may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to remembered that we are not now dealing with joinders which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.

In the present case there is nothing in the questions propounded which suggests an attempt to commit a fraud upon the jurisdiction of the Federal courts.

As shown in the opinion of the Chief Justice in the *Dixon Case* (179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67), the cases are in difference as to whether a common-law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action.

Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint,—the only pleading filed in the case,—the action is joint. It may be that the state court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the

action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a
[219] separable controversy *wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court.

As early as 1816 this court, in determining a question of jurisdiction, was governed by the character of the suit brought by the plaintiff. In *New Orleans* v. *Winter*, 1 Wheat. 91, 4 L. ed. 44, it was held that a citizen of a territory could not sue in a Federal court by joining with himself a citizen of another state. The opinion was delivered by Chief Justice Marshall, who said (p. 95, L. ed. 45): "In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

It is urged with much earnestness by the learned counsel for the company that this view works a surrender of the right of determination of Federal rights in the Federal courts, and deprives nonresident citizens of their rights to appeal to those tribunals. The decision of a state court that such actions as the present might be joint at common law would have no controlling effect in the Federal courts in determining the question in causes properly before them. And the question here is not what is the rule of the Federal courts in similar cases, but is, What controversies has Congress made removable in the act under consideration? Congress has not said, whatever it might do, that controversies between citizens of different states shall be removable wherein it is sought, contrary to the law as administered in the Federal courts, to hold the citizens of another state to joint liability in tort with a citizen of the state where the action is brought. The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal.

The Federal courts in some states hold a
[220] different rule as to *the doctrine of fellow-servants from that administered in the state courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the state permits an action to be prosecuted jointly which would be held to be several only in the courts of the United States. The applicant for removal has been duly summoned into a cause in course of prosecution in the state court. All of the defendants not being nonresidents, it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of Congress.

We answer the first question: That, for the purpose of determining the right of removal, the cause of action must be deemed to be joint. The views herein expressed lead to an answer to the second question in the negative.

In this opinion we have taken no account of the peculiar statute of Tennessee as to the liability of railroads for injuries to persons on the tracks, as its effect is not presented in the questions propounded, nor is it stated that the injury was received in the state of Tennessee.

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*CINCINNATI, NEW ORLEANS, & TEX- [221]
AS PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.
GEORGE BOHON, Administrator of Edward Cook, Deceased, and Fred Milligan.

(See S. C. Reporter's ed. 221-226.)

Removal of causes—separable controversy.— An action to recover damages for a death from negligence, in which plaintiff has, in good faith, exercised his right under the state laws to proceed jointly against a railway company and its employee whose negligence caused the accident, cannot be converted into a separable controversy for the purpose of removal to a Federal circuit court because of diversity of citizenship be-

NOTE.—*As to removal of causes in cases of separable controversy*—see notes to Robbins v. Ehlenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co. 35 C. C. A. 153; Sloane v. Anderson, 29 L. ed. U. S. 899; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

On the joint liability of master and servant for the latter's negligence—see note to Alabama Great Southern R. Co. v. Thompson, *ante*, 441.

tween the plaintiff and the railway company.

[No. 177.]

Argued December 15, 1905. Decided January 2, 1906.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Mercer County, in that state, in favor of plaintiff in a joint action against a railway company and its employee to recover damages for a death caused by negligence, in which the railway company unsuccessfully sought to remove the case, as presenting a separable controversy, to the United States Circuit Court for the Eastern District of Kentucky. *Affirmed.*

See same case below (Ky.) 83 S. W. 580.

The facts are stated in the opinion.

Mr. **John Galvin** argued the cause, and, with *Mr. Edward Colston*, filed a brief for plaintiff in error:

For their contentions see the briefs filed on behalf of Alabama Great Southern Railway Company, in support of right of removal, as reported in *Alabama Great Southern R. Co.* v. *Thompson, ante,* 441.

Mr. **John W. Yerkes** argued the cause, and, with *Mr. Robert Harding*, filed a brief for defendant in error:

The question involved must be determined by the record in the state court at the time the petition for removal was filed, taken in connection with the allegations of the petition for removal.

Crehore v. *Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

The Kentucky court of appeals but followed the rule of law laid down by this court in *Chesapeake & O. R. Co.* v. *Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67, in affirming the action of the Mercer circuit court in denying the application to transfer this cause to the Federal court.

See also *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Southern R. Co.* v. *Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; *Powers* v. *Chesapeake & O. R. Co. supra.*

Under the Constitution and the statutes of Kentucky and the decisions of that state the company and its engineer, Milligan, are jointly liable for the negligent act resulting in Cook's death, and the cause of action is entire.

Winston v. *Illinois C. R. Co.* 111 Ky. 954, 55 L.R.A. 603, 65 S. W. 13; *McCabe* v. *Maysville & B. S. R. Co.* 112 Ky. 861, 66 S. W. 1054; *Louisville & E. Mail Co.* v. *Barnes*, 25 Ky. L. Rep. 2038, 64 L.R.A. 574, 79 S. W. 261.

Mr. Justice **Day** delivered the opinion of the court:

This case was considered by this court at the same time with *Alabama G. S. R. Co.* v. *Thompson* (just decided) 200 U. S. 206, *ante*, 441, 26 Sup. Ct. Rep. 161, and we need not repeat the discussion therein had as to the construction of the removal act of 1887 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508], under the decisions of this court. This case has an additional feature which we shall proceed to notice. The action was brought by *the defendant in error as [222] administrator of Edward Cook, deceased. The petition charged that the plaintiff's intestate was engaged in the yards as a brakeman and switchman and was uncoupling and giving attention to the cars of the defendant company, which cars and an engine attached thereto were in charge of the defendant Milligan, as engineer, engaged in operating, managing, and controlling the same for the defendant company, and, while plaintiff's intestate was thus engaged, the defendant company and the defendant Milligan caught and crushed said Cook's body between the cars of the train, by and through the gross negligence of Milligan and of defendant company, in the operation, management, and control of the engine and train; that the injuries to the plaintiff resulted in his death a few minutes thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as brakeman to the defendant company; the death of said Cook was caused as aforesaid by the gross negligence and carelessness of defendant company and Milligan. The railroad company filed its petition in the state court for the removal of the cause to the United States circuit court for the eastern district of Kentucky, upon the ground that there was a separable controversy between the petitioner, a resident and citizen of Ohio, and the plaintiff below, who was a citizen and resident of Kentucky. The circuit court of Mercer county refused to remove the case, and a verdict and judgment were rendered for the plaintiff below. Upon appeal to the court of appeals of Kentucky, the judgment was reversed for errors occurring at the trial. At a second trial the verdict and judgment were rendered for the plaintiff below, which was again reversed and remanded. On the third trial the verdict and judgment were again rendered for the plaintiff below, which judgment was affirmed by the court of appeals of Kentucky. The sole question argued here is as to the correctness of the state court in refusing to order the

removal of the cause, which judgment was affirmed by the Kentucky court of appeals.

The action for death by negligence is reg-
[223] ulated by the Kentucky *Constitution and statutes. Section 241 of the Constitution provides:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same."

Section 6 of the Kentucky statutes reads as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

This statute undertakes to give an action for negligence against the companies or corporations responsible therefor and their agents or servants causing the same. The statute has been before the court of appeals of Kentucky, and in the case of *Winston* v. *Illinois C. R. Co.* 111 Ky. 954, 957, 55 L. R. A. 603, 604, 65 S. W. 13, that court said of the state Constitution and this statute:

"The Constitution and statutes of this state, as construed by the repeated adjudications of this court, make the railroad company liable for the acts of the agents and servants in charge of its trains. If a servant is guilty of such negligence, while acting for his master, as will make the master responsible, then, in such a case, the servant is personally and equally responsible with the master for the damages resulting from the negligent act. The mere fact that the master may be responsible for the wrongful act of the servant does not relieve the servant from a joint liability with the master for the wrongful act which produced the injury and damage."

In the case under consideration, in the opinion of the court upon the question of right of removal, while it expressed the
[224] *view that the weight of authority was in favor of the right to join the master and servant in actions for negligence, it reiterates its former view of the Kentucky statutes, citing *Cheaspeake & O. R. Co.* v. *Dixon*, 104 Ky. 608, 47 S. W. 615, and the *Winston Case*, above referred to, and quoted from that case with approval:

"By the terms of this section, where death results from the negligent act, a recovery may be had therefor against the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. . . . The plaintiff has a right to proceed severally or jointly against those who are liable for the injury inflicted resulting in death."

We then have a case in which the extent of the right to recover damages for negligence is prescribed by the Constitution and statutes of the state of Kentucky, and which the courts of that state have construed to give a joint cause of action against the corporation and its agents or servants causing the same. In a recent case this court had occasion to deal with the question of removal under the separable controversy clause (*Southern R. Co.* v. *Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609), on a writ of error to the supreme court of South Carolina. An action had been jointly brought in the state court against the Southern Railway Company, a corporation of Virginia, and Arwood, conductor, and Miller, the engineer, residents of Greenville county, South Carolina, charging the joint and concurrent negligence of the servant and the company, because of a defective coupler and the careless management of the train, and the railroad company claimed to have been deprived of the right of removal by the allegation of a joint and concurrent tort, unless the state court would charge that no recovery could be had unless a joint liability was shown, which it refused to do. After commenting upon the action, the Chief Justice, who delivered the opinion of the court, stated that the right of removal depends upon the act of Congress, that the company, upon the face of the pleadings, did not come within the act, and had made no effort to assert this right, and, citing the passage in *Powers* v. *Chesapeake & O.* [225] *R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, quoted in the *Alabama G. S. R. Co.* v. *Thompson*, 200 U. S. 206, *ante*, 441, 26 Sup. Ct. Rep. 161, said:

"The view thus expressed was reiterated in *Chesapeake & O. R. Co.* v. *Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67, where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. *Schumpert* v. *Southern R. Co.* 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813. In that case it was held that, under the state Code of Civil Procedure, in actions *ex delicto*, acts of negligence and wilful tort might be commin-

gled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant, committed within the scope of his employment, and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution was without merit, as the rule was, as laid down by Mr. Cooley (Torts, p. 145), that: 'As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' And see *Gardner* v. *Southern R. Co.* 65 S. C. 341, 43 S. E. 816. In *Rucker* v. *Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40, and *Skipper v. Clifton Mfg. Co.* 58 S. C. 143, 36 S. E. 509, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the state deprived the company of its property by the rulings of the supreme court calls for no remark."

While the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that if the action was properly joint in the forum in which it was being prosecuted, it could not be removed as a separable controversy under the act of Congress. We have under consideration an action for tort which, by
[226] the Constitution and *laws of the state, as interpreted by the highest court in the state, gives a joint remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff elects to make joint. See cases cited in *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, *ante*, 441, 26 Sup. Ct. Rep. 161. A state has an unquestionable right by its Constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff, in due course of law and in good faith, has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein, properly joined in the action under the Constitution and laws of that state wherein it is conducting its operations, and is duly served with process.

Judgment affirmed.

ARMOUR PACKING COMPANY, *Plff. in Err.*,
v.
B. R. LACY, Treasurer of the State of North Carolina.

(See S. C. Reporter's ed. 226-238.)

1. **Error to state court—questions reviewable—statutory construction.**—A decision of the supreme court of North Carolina that the provision of N. C. Pub. Laws 1903, chap. 247, imposing a tax on "every meat-packing house doing business in this state," does not apply to the interstate business of a foreign corporation, but only to its local business, such as the sale within the state of products already stored there, on orders received after the products are thus stored, is conclusive on the Federal Supreme Court in determining, on writ of error to the state court, whether the tax is an interference with interstate commerce.
2. **Commerce—state taxation as affecting interstate commerce.**—The tax imposed by N. C. Pub. Laws 1903, chap. 247, as construed by the state courts, upon such local business of a foreign meat-packing house as its sales within the state of products already stored there, on orders received after these products are thus stored, is not invalid as an interference with interstate commerce.
3. **Constitutional law—equal protection of the laws—state taxation of meat-packing houses.**—The equal protection of the laws is not denied a foreign meat-packing house by the tax imposed on its local business, under N. C. Pub. Laws 1903, chap. 247, taxing "every meat packing house doing business in this state," although, at the points where such local business is carried on, persons selling meat-packing house products, but not doing a meat-packing house business either in North Carolina or elsewhere, are not subjected to the tax.

NOTE.—*On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts*—see note to State *ex rel.* Hill v. Dockery, 63 L.R.A. 571.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Security Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

State licenses or taxes as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 866; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

4. **Constitutional law—equal protection of the laws—state taxation on meat-packing houses.**—Meat-packing houses are not denied the equal protection of the laws by the tax imposed on their business by N. C. Pub. Laws 1903, chap. 247, because houses packing vegetables and the like are not included in the same classification and subjected to the same tax.

5. **Error to state court—questions reviewable—statutory construction.**—The conclusion of a state court that a tax is uniform, within the meaning of the requirement of the state Constitution, when it is equal upon all persons belonging to the described class on which it is imposed, is not open to review upon writ of error from the Supreme Court of the United States to the state court.

[No. 53.]

Argued November 8, 1905. Decided January 8, 1906.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Buncombe County, in that state, sustaining the validity of a tax on a foreign meat-packing house. *Affirmed.*

See same case below, 134 N. C. 567, 47 S. E. 53.

Statement by Mr. Chief Justice **Fuller:**

This was "a controversy without action," submitted in accordance with the laws of North Carolina in that behalf, in the superior court of Buncombe county, that state, in which B. R. Lacey, treasurer of North Carolina, was plaintiff, and Armour Packing Company was defendant.

By the revenue law of North Carolina of March 9, 1903 (N. C. Public Laws, p. 323, chap. 247), it is provided in schedule B:

"Sec. 26. *Defining taxes under this schedule.* Taxes in this schedule shall be imposed as license tax for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule."

"Sec. 56. *Packing houses.* Upon every meat-packing house doing business in this state, $100 for each county in which said business is carried on."

"Sec. 88. *Unless prohibited, county may levy same license tax as state.* In case where a specific license tax is levied for the privilege of carrying on any business, trade, or profession, the county may levy the same tax, and no more: *Provided*, no provision to the contrary is made in the section levying the specific license tax."

[228] *Section 107 of chapter 251 of Public Laws of 1903 (p. 407) reads:

"Sec. 107. *State treasurer to sue for taxes.* Upon failure to pay to the state treasurer within thirty days after the same shall have become due, any tax which by law is made payable direct to the state treasurer, it shall be his duty to institute an action to enforce the same in the county of Wake, or in the county in which the property taxed is located."

The 3d section of article 5 of the Constitution of North Carolina provides:

"Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; . . . The general assembly may also tax trades, professions, franchises, and incomes."

It appeared from the facts agreed, as in substance stated by the supreme court of North Carolina, that the Armour Packing Company was incorporated in New Jersey, but has its principal office and place of business in Kansas, that business being "a meat-packing house business," and that it has property in North Carolina; that "a meat-packing house is a place where the business of slaughtering animals, and dressing and preparing the products of their carcasses for food and other purposes, is carried on; the products thus prepared consist of fresh and cured meats, such as hams, dry salt sides, bacon, lard, beef extracts, glue, blood, tankage, etc." That the Armour Packing Company "does not, anywhere within the state of North Carolina, slaughter, dress, cure, pack, or manufacture any products hereinbefore set forth, of any animal, for food, or for commercial use, or for other purposes;" but that after the animals are slaughtered, dressed, and prepared for food or other commercial purposes in Kansas, such product is shipped in bulk to Wilmington, Greensboro, Asheville, Charlotte, and Fayetteville, North Carolina, where the company has cold storage plants and warehouses, and sold from such storage plants, some of such product to parties in North Carolina and some to parties outside of that state; that part of said products shipped to *the cold storage warehouse in Asheville, Buncombe county, remain there until disposed of in due course of trade on orders taken and received after said products have been stored or placed in said warehouse or cold storage plants. At each of said five points in North Carolina, where the company maintains a warehouse and cold storage plants, it has one or more employees, *i. e.*, bookkeepers, stenographers, shipping clerks, salesmen, drivers, laborers who box said meats and who wrap and crate goods for delivery as they are sold. There are, in Wilmington and other cities of said state, commission

merchants, brokers, and butchers who sell by wholesale and retail in competition with the Armour Packing Company, who are not engaged in a meat-packing house business in North Carolina or elsewhere, fresh, cured, and salt meats and other products that have been manufactured from the carcasses of slaughtered animals for food and commercial purposes, and, under the laws of North Carolina, said commission merchants, brokers, and butchers are not amenable to the tax levied under § 56 of said revenue act of 1903. At all points in North Carolina where the Armour Packing Company is engaged in business, and at various other places in said state, there are engaged in business, as the Armour Packing Company is engaged, packing houses which pack articles of food other than meat, and offer them for sale in said state, such as peas, beans, tomatoes, corn, pumpkins, fruit, fish, oysters, etc. The products of said packing houses are articles of food and commerce, and are sold in the state of North Carolina through agents, brokers, wholesale and retail merchants, just as the products packed by the Armour Packing Company are sold.

The ruling of the court was invoked on certain points stated, all of which were adjudged adversely to defendant, and judgment was rendered against it for the tax and costs, which was affirmed by the supreme court of North Carolina. 134 N. C. 567, 47 S. E. 53.

Mr. **Thomas B. Felder, Jr.,** argued the cause and filed a brief for plaintiff in error:

It is well settled that corporations are persons within the provisions of the 14th Amendment to the Constitution of the United States.

Santa Clara County v. *Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania,* 125 U. S. 181, 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co.* v. *Herrick,* 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minneapolis & St. L. R. Co.* v. *Beckwith,* 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Charlotte, C. & A. R. Co.* v. *Gibbes,* 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Covington & L. Turnp. Road Co.* v. *Sandford.* 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called "corporations," any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

A tax on the privilege of selling goods is in effect a tax on the goods themselves.

Kehrer v. *Stewart,* 117 Ga. 969, 44 S. E. 854; *Welton* v. *Missouri,* 91 U. S. 275, 23 L. ed. 347.

It is well-established and sound law that, where the burden of a tax falls on the thing which is the subject of taxation, the tax is to be regarded as laid on the thing, rather than on the individual who is charged with the duty of paying it into the treasury.

Brown v. *Maryland,* 12 Wheat. 419, 6 L. ed. 678.

The prohibitions of the 14th Amendment protect the citizen against a denial of the equal protection of the law, and against taking property without due process of law, under the power of taxation.

Nashville, C. & St. L. R. Co. v. *Taylor,* 86 Fed. 185.

It may be true that the proposition that a tax statute, or the tax laid under a statute, is in violation of the Constitution of the state, is not of itself necessarily sufficient to constitute a violation of the 14th Amendment; but when, in addition to the violation of the state Constitution, the statute results in an arbitrary and oppressive discrimination in regard to a large class of citizens, or a large species of property, it is such class legislation and such denial of the equal protection of the laws as renders it obnoxious to the 14th Amendment. And the state Constitution is important in determining what the rights of the citizen are, and whether equal protection of the law is being denied.

Nashville, C. & St. L. R. Co. v. *Taylor,* 86 Fed. 186.

Taxation on business or occupation in the state of North Carolina, to be constitutional, must be uniform upon all business of the same class of subjects.

State v. *Moore,* 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342; *Worth* v. *Wilmington & W. R. Co.* 89 N. C. 291, 45 Am. Rep. 679; *Puitt* v. *Gaston County,* 94 N. C. 709, 55 Am. Rep. 638; *State* v. *Powell,* 100 N. C. 525, 6 S. E. 424. See also Tiedeman, Pol. Power, p. 101; Cooley, Taxn. p. 403; *Re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; Cooley, Const. Lim. 201, 494, 574; *Kansas City* v. *Grush,* 151 Mo. 135, 52 S. W. 286; *St. Louis* v. *Sternberg,* 69 Mo. 289; *St. Louis* v. *Spiegel,* 75 Mo. 145; Dill. Mun. Corp. § 768; *Ward* v. *Maryland,* 12 Wall. 418, 20 L. ed. 449.

If an act shows a discrimination upon its face, or in its practical administration, it will be declared obnoxious to the 14th Amendment to the Constitution of the United States, which guarantees to all citizens the "equal protection of the laws."

Kehrer v. *Stewart*, 197 U. S. 69, 49 L. ed. 668, 25 Sup. Ct. Rep. 403.

It has been frequently held that the state has the right to classify occupations and to impose different taxes upon different occupations, but all belonging to a natural class must be assigned to it by the act making the classification.

Cook v. *Marshall County*, 196 U. S. 261, 275, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and remedies. Great diversities may and do exist. All that a citizen can demand under the last clause of the 14th Amendment is that he shall not be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances.

Missouri v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 22, 25 L. ed. 989.

The denial must be the result of the Constitution or laws of the state.

Williams v. *Mississippi*, 170 U. S. 219, 42 L. ed. 1013, 18 Sup. Ct. Rep. 583.

If the law is fairly administered as to plaintiff in error he cannot complain.

New York v. *Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121.

Errors of the state court in the mere administration of the tax law do not deny due process of law.

Lent v. *Tillson*, 140 U. S. 331, 35 L. ed. 426, 11 Sup. Ct. Rep. 825.

If the case is fully heard and decree rendered, there is due process of law.

Central Land Co. v. *Laidley*, 159 U. S. 112, 40 L. ed. 94, 16 Sup. Ct. Rep. 80.

A person is not denied equal protection of the laws as to tax assessment where notice is given and opportunity to be heard allowed.

Fallbrook Irrig. District v. *Bradley*, 164 U. S. 158, 41 L. ed. 388, 17 Sup. Ct. Rep. 56.

This section does not apply so much to the administration of the law as it does to the law itself. Nor is the amendment intended to interfere with the police power of the state.

10 Rose's Notes, 950.

The section applies to state action, and not that of individuals (*Virginia* v. *Rives* [*Ex Parte Virginia*] 100 U. S. 318, 25 L. ed. 669; *Civil Rights Cases*, 109 U. S. 17, 27 L. ed. 841, 3 Sup. Ct. Rep. 18), but extends to all acts of state,—legislative, executive, or judicial (*Scott* v. *McNeal*, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 233, 41 L. ed. 983, 17 Sup. Ct. Rep. 581).

The privileges and immunities guaranteed are the fundamental ones,—protection by government; right to acquire and possess property of every kind; pursue and obtain happiness and safety, subject to the restraints exacted for the general good; of national citizenship; right to go to seat of government and transact business with it; free access to its seaports; care and protection of the government on the high seas and in foreign states.

Slaughter-House Cases, 16 Wall. 76, 21 L. ed. 408.

The guaranty of the equal protection of the laws does not apply to special privileges.

Paul v. *Virginia*, 8 Wall. 180, 19 L. ed. 360.

Special legislation is not repugnant to this clause if all persons subject to it are treated alike under the same conditions (*Williams* v. *Norris*, 12 Wheat. 128, 6 L. ed. 575; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250), but they must be placed on all alike (*Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609), and a higher license tax cannot be imposed upon non-resident traders than on resident (*Ward* v. *Maryland*, 12 Wall. 429, 20 L. ed. 453).

This is so whether it results from the law itself or from its practical administration. *Kehrer* v. *Stewart*, *supra*.

The rates may be varying, but there must be no discrimination between members of a class (*Home Ins. Co.* v. *New York*, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; *Giozza* v. *Tiernan*, 148 U. S. 662, 37 L. ed. 601, 13 Sup. Ct. Rep. 721), and the states have the power of classification (*Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 158, 41 L. ed. 669, 17 Sup. Ct. Rep. 255), subject only to the rule that the classification be made on reasonable grounds, and must not be arbitrary (*Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 298, 42 L. ed. 1044, 18 Sup. Ct. Rep. 594).

It cannot make purely arbitrary classification, and impose upon a class special burdens. *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 106, 43 L. ed. 913, 19 Sup. Ct. Rep. 609.

An exception to this rule seems to be made in the case of *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 469, 45 L. ed. 627, 21 Sup.

Ct. Rep. 423, where it was held that a license may be required of warehouses situated on a railroad, although none be required of warehouses not so situated, but it seems that this classification was permitted on the ground that it was a regulation of a quasi public highway.

The construction placed upon the act by the supreme court of North Carolina did violence to the legislative intent; the purpose of the legislature was to impose a tax upon the entire volume of business done by plaintiff in error, and not alone upon the domestic business, and if the tax had been intended to apply to the domestic business alone, the amount thereof would, of necessity, have been very much smaller, inasmuch as the proportion of the domestic business to the foreign business is infinitesimal.

Allen v. *Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39.

Mr. **Robert D. Gilmer** argued the cause and filed a brief for defendant in error:

The case at bar is covered by *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403.

Classification statutes will not contravene the rule of uniformity when the tax is imposed alike upon all of a class.

Gatlin v. *Tarboro*, 78 N. C. 119; *State* v. *Stevenson*, 109 N. C. 730, 26 Am. St. Rep. 595, 14 S. E. 385; *State* v. *Moore*, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342; *Worth* v. *Wilmington & W. R. Co.* 89 N. C. 291, 45 Am. Rep. 679; *Puitt* v. *Gaston County*, 94 N. C. 709, 55 Am. Rep. 638; *Albertson* v. *Wallace*, 81 N. C. 479; *State* v. *Cohen*, 84 N. C. 771; *State* v. *Powell*, 100 N. C. 525, 6 S. E. 424; *State* v. *French*, 109 N. C. 722, 26 Am. St. Rep. 590, 14 S. E. 383; *Cobb* v. *Durham County*, 122 N. C. 307, 30 S. E. 338; *State* v. *Green*, 126 N. C. 1032, 35 S. E. 462; *State* v. *Carter*, 129 N. C. 560, 41 S. E. 11; *State* v. *Hunt*, 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216; *State* v. *Roberson*, 136 N. C. 587, 48 S. E. 595; *Kansas City* v. *Grush*, 151 Mo. 128, 52 S. W. 286; *St. Louis* v. *Spiegel*, 75 Mo. 145, 90 Mo. 587, 2 S. W. 839.

The general assembly of North Carolina had the power to create, as a classification for taxation, "meat-packing houses" as a separate and distinct class.

Ford v. *State*, 112 Ind. 373, 14 N. E. 241; *Stewart* v. *Atlanta Beef Co.* 93 Ga. 12, 18 S. E. 981; *Stewart* v. *Kehrer*, 115 Ga. 184, 41 S. E. 680; *State* v. *Stevenson*, *supra*.

It is as specific and identic as the business of a physician or a lawyer.

Stewart v. *Atlanta Beef Co. supra*.

The decision of the state court that the act in question does not contravene the Constitution of North Carolina is conclusive.

Re Duncan (*Duncan* v. *McCall*) 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *O'Neil* v. *Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *McNulty* v. *California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Lambert* v. *Barrett*, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; *Bergemann* v. *Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Howard* v. *Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; *License Cases*, 5 How. 618, 12 L. ed. 307; *Matthews* v. *Zane*, 7 Wheat. 206, 5 L. ed. 435; *Home Ins. Co.* v. *Augusta*, 93 U. S. 123, 23 L. ed. 826; *Raymond* v. *Thomas*, 91 U. S. 716, 23 L. ed. 435; *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592, 26 L. ed. 845; *Presser* v. *Illinois*, 116 U. S. 269, 29 L. ed. 620, 6 Sup. Ct. Rep. 580; *Mobile* v. *Watson*, 116 U. S. 306, 29 L. ed. 626, 6 Sup. Ct. Rep. 398.

While a foreign corporation may sell its goods in a state or solicit sales in the transaction of interstate commerce as a right, it can only establish itself in a state and do business therein as a privilege granted by the state.

Paul v. *Virginia*, 8 Wall. 177, 19 L. ed. 359; *Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. ed. 451; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 10 L. ed. 274; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Cable* v. *United States L. Ins. Co.* 191 U. S. 288, 307, 48 L. ed. 188, 193, 24 Sup. Ct. Rep. 74.

As the state has the right to exclude foreign corporations, it necessarily has involved therein the right to impose conditions on their admission into its jurisdiction; and if the state has the right to impose conditions, it necessarily follows that it has the right to classify.

This court has sought by its utterances to impress the view that taxes imposed for revenue should be equal, and that there should be no discrimination. The court, however, has not laid down that principle in the matter of license taxation, and has not decided that provisions for equality are applicable to license taxes.

See *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Cook* v. *Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L.

ed. 619, 21 Sup. Ct. Rep. 423; *Savannah, T. & I. of H. R. Co.* v. *Savannah*, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; *Kidd* v. *Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401.

Certainly the principle of uniformity and of "the equal protection of the laws" secured by the 14th Amendment are not violated so long as the tax rests alike upon all persons or corporations belonging to the particular class as classified by legislative enactment.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

To hold that the statute is void as denying the equal protection of the laws to meat-packing houses because pumpkin-packing houses are not amenable to the same tax, one would certainly have to enter the realm of fiction.

Cook v. *Marshall County*, 196 U. S. 275, 49 L. ed. 477, 25 Sup. Ct. Rep. 233.

The Armour Packing Company is exercising in North Carolina some of the functions for which the corporation was created, and is therefore doing a packing-house business in North Carolina.

Stewart v. *Kehrer*, 115 Ga. 184, 41 S. E. 680.

With the disposition of state questions by the appropriate state authorities it is not the province of this court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States, the denial of due process of law, or deprivation of any right, privilege, or immunity secured by the Constitution or laws of the United States.

Lambert v. *Barrett*, 157 U. S. 698, 699, 39 L. ed. 865, 866, 15 Sup. Ct. Rep. 722.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The supreme court of North Carolina stated the contentions of the Armour Packing Company thus:

"1. That it is not engaged in doing a packing-house business in this state; . . . (2) that the tax is an interference with interstate commerce; (3) that the tax contravenes § 3 of article 5 of the Constitution of North Carolina, which requires taxation 'by uniform rule;' (4) that the tax is forbidden by the 14th Amendment to the Constitution of the United States; (5) that singling out 'meat-packing houses' for taxation is arbitrary or class legislation, and prohibited by both state and Federal Constitutions."

The court said:

"If the business of the defendant was solely that of shipping food products into this state, consigned directly to purchasers, on orders previously obtained, it is, clear that this would be interstate commerce, and a tax laid by the state upon such business would be illegal. But the defendant does a large business within the state,—the selling of products already stored here on orders received after these products are thus stored. The tax is laid upon every meat-packing house 'doing busines in this state.' The evident meaning of the legislature is to *tax the agency 'doing business' [234] within this state, and not to lay any tax upon the interstate commerce of shipping products into the state, to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped."

And, after recapitulating from the agreed statement the particulars of the business transacted in North Carolina, the court applied the rule that the legislature could prescribe such conditions as it saw fit on the transaction of business by a foreign corporation within the state, and held that the license tax was the condition upon which defendant was permitted to do the business so described; and cited *Osborne* v. *Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214, as decisive on the question that the license tax applied only to business within the state, and not to that which was interstate in its character; and added: "The defendant doing business in this state, and the license tax being exacted only by virtue of its intrastate business, the first two grounds of objection are overruled."

As was said in *Osborne* v. *Florida*, this construction of a state statute by its highest court is not open to review; and, accepting it, the case plainly comes within *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403. That was a writ of error to the supreme court of Georgia (115 Ga. 184, 41 S. E. 680), involving the constitutionality of a statute imposing a tax upon packing house agents, and the liability of an agent of Nelson Morris & Company, a meat-packing firm of Chicago, to pay it. It was contended that Morris & Company did not slaughter, dress, cure, pack, or manufacture the products of animals for food anywhere in the state of Georgia, and that therefore the firm was not doing a packing-house business within the state; that the statute violated the commerce clause of the Constitution, and that it was invalid, in that it denied the equal protection of the laws. These contentions were overruled by the supreme court of Georgia, and this court affirmed the judgment. And among other things it was there said:

"The act in question does not deny to the petitioner the *equal protection of the [235]

laws, as the tax is imposed alike upon the managing agent both of domestic and of foreign houses. . . . There is no discrimination in favor of the agents of domestic houses, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* state houses, there is no discrimination upon the face of the act, and none, so far as the record shows, upon its practical administration. As we have frequently held, the state has the right to classify occupations, and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook* v. *Marshall County*, 196 U. S. 261, 275, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233. What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here." 197 U. S. 69, 49 L. ed. 668, 25 Sup. Ct. Rep. 403.

This practically disposes of the fourth and fifth contentions, since the classification of meat-packing houses cannot be said to be an arbitrary selection or not to rest on reasonable grounds, and the 14th Amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways, or, through the undoubted power of classification, to impose different taxes upon different trades and professions.

"A tax may be imposed only upon certain callings and trades; for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling, unless, at the same time, it taxed all property or all callings." *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431, 440.

And see *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Kidd* v. *Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Savannah, T. & I. of H. R. Co.* v. *Savannah*, 198 U. S. [illegible], 49 L. ed. 1097, 25 Sup. Ct. Rep. 690;
[236] *Minnesota Iron Co.* v. *Kline*,* 199 U. S. 593, *ante*, 322, 26 Sup. Ct. Rep. 159; *Cable* v. *United States L. Ins. Co.* 191 U. S. 307, 48 L. ed. 193, 24 Sup. Ct. Rep. 74.

By the act under consideration the tax is levied upon every packing house doing business in the state, which includes by its terms both domestic and foreign meat-packing houses. It is true that it appears that where the Armour Packing Company does business certain persons sell, both by wholesale and retail, packing-house products, and yet are not subjected to this tax, but also that those parties are not doing, either in North Carolina or elsewhere, a packing-house business. And so it appears that in North Carolina, at the points where the Armour Packing Company is engaged in business, and at other places in the state, there are establishments engaged in business, which pack articles of food other than meats, such as peas, beans, pumpkins, etc., and offer them for sale; but we cannot accept the suggestion that the statute is void as denying the equal protection of the laws to meat-packing houses because houses packing vegetables and the like are not included in the same classification, and subject to the same tax.

As to the contention that the act is in violation of § 3 of article 5 of the state Constitution, the state supreme court held that this tax, although not a property or ad valorem tax, was controlled, even if the requirement of uniformity were applicable, by the rule that "a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed." And with that conclusion it is not our province, nor are we disposed, to interfere.

Judgment affirmed.

Mr. Justice **Brown** (with whom was **Mr. Justice Peckham**), dissenting:

The main, and practically the only, question in this case is whether the Armour Packing Company was a "meat-packing house doing business" in the state of North Carolina within *the meaning of the statute. [237
The seventh and eighth items of the stipulation of facts are as follows:

"7. A meat-packing house is a place where the business of slaughtering animals, and dressing and preparing the products of their carcasses for food and other purposes, is carried on. The products thus prepared consist of fresh and cured meats, such as hams, dry salt sides, bacon, lard, beef extracts, glue, blood, tankage, etc.

"8. Said Armour Packing Company does not anywhere, within the state of North Carolina, slaughter, dress, cure, pack, or manufacture any products hereinbefore set forth, of any animal, for food, or for commercial use, or for other purposes."

As one article of the findings defines the meat-packing business to consist in doing certain things, and the very next article declares that none of these things are done within the state, it is difficult to say that,

notwithstanding these findings of fact, there is a conclusion of law that the company is doing a meat-packing business in that state. The packing company doubtless falls within the letter of the statute. It does a meat-packing business in Kansas City. It does a business in North Carolina. But, as we have said in numerous cases, a thing may be within the letter of a statute, and not be within its spirit. *United States* v. *Babbit*, 1 Black, 55, 17 L. ed. 94. The letter of the statute in this case would be satisfied if the packing company did a furniture or dry goods business in North Carolina, yet it would clearly not be within the intent of the statute. If, for instance, the tax were upon breweries, and the beer were all manufactured out of the state, and then shipped into the state for sale and distribution, is it possible that the defendant would be liable for doing business as a brewer? So if the tax were imposed upon the manufacturers of carriages, and all the manufacturing were done in Chicago, and the carriages shipped into North Carolina, and there sold, the defendant would be liable as a dealer in carriages, but certainly not as a manufacturer. The business done at the five cold storage plants, which consists in packing the meats
[238] and wrapping them for delivery as *they are sold, *is not mentioned* in the seventh finding, even as an incidental part of the packing business. Much less even is the business of selling meats at retail, as ordinary butchers do. Yet, in the opinion of the court, the company was doing a meat-packing house business within the state. In the view of the minority, the business done within the state must be a meat-packing business, and not the business of selling meats, either at wholesale or retail; and when the meat-packing house is accurately defined in the stipulation, and no part of the business thus defined appears to have been done within the state, it is impossible to support the tax.

The case resembles that of *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403, in many particulars, but with the vital difference that the law of Georgia imposed a tax upon "all *agents* of packing houses doing business within this state, $200, in each county where said business is carried on." As the tax was imposed upon agents of packing houses, and not upon the packing houses themselves, the court was unanimously of the opinion that the managing agents of foreign packing houses were subject to the tax. But in this case the act attempts to reach out and tax packing houses doing business *as such* exclusively in another state.

With the utmost deference to the opinion of the court, we are constrained to dissent from its view.

Mr. Justice **White** and Mr. Justice **McKenna** also dissented upon other grounds.

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*AXEL W. HALLENBORG and J. Edward [239] Addicks, *Appts.*,

v.

COBRE GRANDE COPPER COMPANY, E. B. Gage, W. M. Adamson, John H. Costello, J. Henry Wood, and Con. O'Keefe, its Directors; William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona Territory; Cananea Consolidated Copper Company, and Greene Consolidated Copper Company.

(See S. C. Reporter's ed. 239-248.)

Corporations—contracts of officers—rights of minority stockholders.—A sale of nearly the entire stock in a corporation by its president, with whom it was pooled for that purpose, made, on the advice of the directors, to the person offering the best terms, and subsequently formally ratified by the directors and by a majority vote of the stockholders, is not in fraud of the rights of minority stockholders because the purchaser's object may have been to stop litigation brought against him by the corporation, and to quiet his possession to the property claimed by it, where the issues presented by such litigation, so far as tried, had been decided against the corporation, and where not decided, in the opinion of its attorney, would also be decided against it; nor can fraud be deduced from the provisions in the contract of sale for the payment of compensation to such president and attorney, and for the surrender of a note due the corporation, where it is manifest that these provisions constituted no inducement to the contract.

[No. 87.]

Argued November 29, December 1, 1905. Decided January 8, 1906.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Yavapai County, in that territory, denying the relief sought in a minority stockholder's suit. *Affirmed.*

See same case below (Ariz.) 74 Pac. 1052.

Statement by Mr. Justice **McKenna:**

This is a minority stockholder's suit. It

NOTE.—*On the liability of the directors of a corporation to the corporation*—see notes to Bosworth v. Allen, 55 L.R.A. 751; Koehler v. Black River Falls Iron Co. 17 L. ed. U. S. 340; and McGourkey v. Toledo & O. C. R. Co. 36 L. ed. U. S. 1079.

was brought originally by Axel W. Hallenborg as owner of 8,617 shares of the Cobre Grande Copper Company, an Arizona corporation, and also as creditor of that corporation for advances to the amount of $50,005. The appellant Addicks owned 5,000 shares and was allowed to intervene at the trial, and adopted Hallenborg's complaint.

In November, 1898, defendant (appellee) Greene owned certain mining properties in Sonora, Mexico, and had an option on other properties. He gave an option on these properties to defendant Mitchell. It was provided in the option that $12,500 should be paid in cash, and $237,500, as follows: $37,500 on or before November 26, 1899; $100,000 on or before November 26, 1900; $100,000 on or before November 26, 1901.

[240] *In April, 1899, Greene, Mitchell, and other parties, under the laws of Arizona, organized the Cobre company. One hundred and ninety-nine thousand, nine hundred and ninety-five shares of the stock were turned over to Mitchell in consideration of his option from Greene, which option was assigned to the Cobre company, subject to Greene's rights. The Cobre company went into possession, and was in possession in September, 1899. In October of that year controversies arose between Greene and the company over the option and the right to possession of the properties, and Greene entered into possession of them. Thereupon the company instituted suits in the courts of Mexico to gain possession of the properties, and also instituted a suit in the district court of Maricopa county, Arizona, to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell, which had been assigned to the Cobre company. In the latter suit an injunction was granted, restraining Greene from demanding or receiving the deeds. A suit was also brought in New York and one in Texas to recover the product of the mines. In the suit in Arizona the Cobre company alleged, among other things, in substance, all the facts set forth in paragraph three of the original complaint in the present suit, and prayed that Greene be required to account for the proceeds of the products of the mines and other property alleged to have been appropriated by him. Issue was joined by the defendants therein, the case tried, and a judgment entered dismissing the complaint. The judgment was not appealed from. At the time of the judgment the plaintiffs were stockholders of the Cobre company.

While the litigation was pending, the stockholders of the Cobre company, or a majority of them, comprising stockholders to the number of 115,049 shares, entered into a pooling arrangement, whereby all of their stock was delivered to defendant Gage, with power to vote the same at all meetings of the stockholders. Subsequently Gage was granted the right to dispose of and sell the stock at his discretion. Several attempts were made by Gage to sell the stock at $2.50 a share, which *failed on [241] account of the other contracting parties not complying with their contracts. The plaintiff Hallenborg and John H. Costello opened negotiations with Gage for the stock at $2.50 a share. This also failed on account of objection by Costello to the contract which was drawn, although negotiations were kept up until December, 1900. Then Gage opened negotiations with Greene, who offered to buy the stock, upon better terms than anybody else had offered. Gage consulted the directors, and they urged him to enter into a contract with Greene. The stock represented by Gage represented the entire stock of the company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties. Gage entered into a contract with Greene, December 12, 1900, and it was ratified in its entirety by the directors and by a majority vote of the stockholders. Hallenborg was present by attorney at the meeting, and protested against the ratification. The contract was complied with by Greene, and he paid the full purchase price for the shares, and they were delivered to him and the Greene Copper Company. All of the stockholders accepted the money so paid except Hallenborg, who returned the money sent him, and declined to be bound by the contract.

The court finds that the contract was made with Greene in good faith, with full knowledge and consent of the directors, and upon the advice of counsel of the Cobre company, that the company could not successfully maintain the suit brought in Arizona, and with the full belief on the part of Gage that the contract was for the best interest of the company and its stockholders. And the court further finds that no agreement was made between Gage or other persons, whereby the directors—Adamson, Wood, O'Keefe, or any of them—were to derive benefit, or did derive any benefit whatsoever, except such as they derived from the sale of their stock.

The contract of December 12, between Gage and Greene, provided for the payment of the stock in certain instalments. Greene was to pay to Gage $25,000 in cash in addition to the $2.50 *per share, and also pay [242] to Gage $30,000, and in addition 3,000 shares of the capital stock of the Greene Consolidated Copper Company, or, in lieu thereof, $30,000 in cash. Gage was given

the privilege of taking, instead of $2.50 per share for shares of stock in the Cobre company, stock in the Greene Consolidated Copper Company,—four of the former for one of the latter,—the option to be exercised before payment of the second instalment on the stock of the Cobre company. Five thousand shares of the Greene Consolidated Copper Company were provided to be paid to Gage for his own use and benefit, and 5,000 shares for the use and benefit of L. H. Chalmers, Baker & Bennett, and Herndon & Norris, attorneys at law in Arizona.

It was also agreed that a certain promissory note given by J. H. Costello to the Cobre company, amounting to $23,000, was to be surrendered to Costello. This note was conditioned upon the Cobre company obtaining possession of its property in Mexico, and was not to be paid until ninety days after such recovery. It was also agreed that the suits brought by the Cobre company in New York, Texas, and Arizona should be dismissed. The other provisions of the contract are but incident to those before given, and may be omitted. The suits in New York are still pending. All the other suits were dismissed or otherwise disposed of by final judgment prior to this suit. The $25,000 mentioned in the contract of December 12 was for the purpose of taking up and discharging certain notes due by the Cobre company. It was so paid. The $30,000 mentioned was to be, and it was, turned into the treasury of the company to pay its debts. The 3,000 shares in the Greene Consolidated Company, or the alternative $30,000, was also for the purpose of paying the debts of the Cobre company outside of the $25,000 before mentioned. It was paid into the treasury. The 5,000 shares of stock in the Greene Consolidated Company was intended by all parties as compensation to Gage as president of the Cobre company, and for the time, labor, and trouble given to the com-
[243] pany's business, and for *money advanced for it, and expenses paid in attending to its affairs. Instead of shares, as provided, a cash payment of $50,000 was made to him. The shares paid to Chalmers and Baker & Bennett, Herndon & Norris, were intended to be paid as compensation as attorneys for the company for their services in various litigations. Instead of the shares, a cash payment of $50,000 was made, and it is found that their services were reasonably worth that sum. The note against Costello was surrendered to him.

The court also finds that the only property in possession of the Cobre company within the jurisdiction of the court is the money paid into the treasury of the company in pursuance of the contract of December 12. And, finally, the court finds "that the temporary restraining order granted in this action, enjoining defendants from carrying out the terms and provisions of the contract of December 12, 1900, and dismissing any and all of the actions then pending in behalf of the Cobre Grande, and enjoining defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow, evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint, was modified, and the part of it enjoining the Phœnix National Bank was dissolved upon the ground that the district court in and for Maricopa county had rendered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that, as a part of the judgment of said court, the Phœnix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that, as this case now stands, there is nothing before the court except an application for the appointment of a receiver."

Mr. **Alfred B. Cruikshank** argued the cause and filed a brief for appellants:

The parties to these pooling contracts, including plaintiff, had a right to rely on the trustee, Gage, that the pool or combination would be used to benefit, not to defeat or destroy, the interests and prospects of the corporation. For the stockholders who became a party to this combination, controlling a majority of its stock, became, to some extent and for some purposes, the corporation itself, and assumed the trust relation of the corporation to its other stockholders. They were bound to act for its best interests; and such a combination or its managers could not, any more than its formally elected trustees, do any act whereby a profit should be made out of the corporation at the expense of the minority stockholders; and any such act would be a constructive fraud upon such minority stockholders.

Ervin v. *Oregon R. & Nav. Co.* 23 Blachf. 517, 27 Fed. 630.

That a majority combination of stockholders becomes a trustee for the minority is well settled.

Meeker v. *Winthrop Iron Co.* 17 Fed. 48; *Jackson* v. *Ludeling*, 21 Wall. 616, 22 L. ed. 492; *Farmers' Loan & T. Co.* v. *New York & N. R. Co.* 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; *Barr* v. *New York, L. E. & W. R. Co.* 96 N. Y. 444; *Gamble* v. *Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201;

Menier v. *Hooper's Teleg. Works*, L. R. 9 Ch. 350.

The agreement of December 12, 1900, showed on its face a breach of trust.

Hallenborg v. *Greene*, 66 App. Div. 590, 73 N. Y. Supp. 403; *Saranac & L. P. R. Co.* v. *Arnold*, 167 N. Y. 368, 60 N. E. 647; *Bennett* v. *St. Louis Car Roofing Co.* 19 Mo. App. 349; *Menier* v. *Hooper's Teleg. Works*, *supra*; *Farmers' Loan & T. Co.* v. *New York & N. R. Co.* 150 N. Y. 411, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; *Jackson* v. *Ludeling*, and *Ervin* v. *Oregon R. & Nav. Co. supra*; *Rogers* v. *Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299; *Eldred* v. *American Palace-Car Co.* 96 Fed. 59; *De Neufville* v. *New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10; *Henshaw* v. *Salt River Valley Canal Co.* 6 Ariz. 154, 54 Pac. 577; *Sage* v. *Culver*, 147 N. Y. 241, 41 N. E. 513, Affirming 71 Hun, 42, 24 N. Y. Supp. 514; *Barr* v. *New York, L. E. & W. R. Co. supra*; *Wright* v. *Oroville Gold, S. & C. Min. Co.* 40 Cal. 20; *Smith* v. *Dorn*, 96 Cal. 73, 30 Pac. 1024; *Goodin* v. *Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95; *Rogers* v. *Lafayette Agri. Works*, 52 Ind. 297; *Pearson* v. *Concord R. Corp.* 62 N. H. 537, 13 Am. St. Rep. 590; *Higgins* v. *Lansingh*, 154 Ill. 301, 40 N. E. 362; *Forrester* v. *Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 544, 55 Pac. 229, 353; *Mason* v. *Harris*, L. R. 11 Ch. Div. 97.

The bartering of the offices provided for in the agreement was illegal.

Fennessy v. *Ross*, 90 Hun, 298, 35 N. Y. Supp. 868: *Guernsey* v. *Cook*, 120 Mass. 501; *Wilbur* v. *Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724; *Sugden* v. *Crossland*, 3 Smale & G. 192; *McClure* v. *Law*, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388; *Gaskell* v. *Chambers*, 26 Beav. 360; Cook, Corp. § 650; Perry, Tr. § 427.

The contract is illegal because it dissipates the assets of the corporation.

Thomp. Corp. § 4014; *Graham* v. *La Crosse & M. R. Co.* 102 U. S. 148, 161, 26 L. ed. 106, 111; *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; *Chicago, M. & St. P. R. Co.* v. *Third Nat. Bank*, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Wabash, St. L. & P. R. Co.* v. *Ham*, 114 U. S. 587, 594, 29 L. ed. 235, 238, 5 Sup. Ct. Rep. 1081; *Morgan County* v. *Allen*, 103 U. S. 498, 509, 26 L. ed. 498, 502; 2 Story, Eq. Jur. § 1252; 1 Perry, Tr. § 242.

Mr. **Aldis B. Browne** argued the cause, and, with *Messrs. Ben Goodrich* and *Alexander Britton*, filed a brief for appellees.

If the agreement of December 12, 1900, was constructively fraudulent, it had been ratified by the directors and by a majority of the stockholders, and there can be no question but what the acts constituting constructive fraud can always be ratified, except in the few instances where the statutes make certain acts conclusively fraudulent.

Twin-Lick Oil Co. v. *Marbury*, 91 U. S. 589, 23 L. ed. 330; *Gamble* v. *Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201.

The rule deducible from the authorities that a trustee is prohibited from making a profit out of his trust relation means that he must not make a secret profit out of it. His duty is not to avoid, wholly, the doing of anything for his own benefit; his obligation to the beneficiaries in the trust is to make a full, fair, and complete disclosure of all the circumstances attending any transaction which will benefit himself in any manner different from the manner in which all the shareholders will be benefited.

3 Thomp. Corp. § 4025; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 23 L. ed. 329; *Illinois Pneumatic Gas Co.* v. *Berry*, 113 U. S. 322, 28 L. ed. 1003, 5 Sup. Ct. Rep. 525; *Oglesby* v. *Attrill*, 105 U. S. 605, 26 L. ed. 1186; *Roy & Co.* v. *Scott, H. & Co.* 11 Wash. 399, 39 Pac. 679.

A director or trustee is entitled to pay in a reasonable amount for such services as he may render outside of the duties of his office of director or trustee.

Bassett v. *Fairchild*, 132 Cal. 637, 52 L.R.A. 611, 61 Pac. 791, 64 Pac. 1082; *Corinne Mill, Canal, & Stock Co.* v. *Toponce*, 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632.

The ownership of nearly 94 per cent of the stock of this corporation could control its dissolution and as certainly properly control the proposition that doubtful and expensive litigation (the sole asset of the company) should cease. Otherwise an insignificant minority could compel the large majority to continue to sink money in a losing business, or, as here, demand that such majority imperil their entire holdings by the unsuccessful outcome of litigation, and incur further liability and expense in carrying it on.

5 Thomp. Corp. § 6686, p. 528; *Treadwell* v. *Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490.

Messrs. Norton Chase, Eugene S. Ives, and *M. E. Harvy* also filed a brief for appellees:

Upon proper evidence it is for the court to decide whether the contract alleged to be fraudulent is a fair one or not, with power to set it aside if it is manifestly unfair.

2 Cook, Corp. 5th ed. § 649, p. 1459.

And even though the boards of directors of two corporations are the same, and one buys out the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage.

2 Cook, Corp. 5th ed. § 658, p. 1512; *Smith* v. *Ferries & C. H. R. Co.* (Cal.) 51 Pac. 710.

If the minority stockholders object to the contract, the court will consider it, and will sustain it if fair, and set it aside if unfair.

Lyman v. *Kansas City & A. R. Co.* 101 Fed. 636.

In the absence of fraud and unfairness the minority may not defeat the whole body of associates respecting the security common to all.

Shaw v. *Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25 L. ed. 757.

It is well settled that a director may deal with his corporation. He may advance it money by way of loan or sell it property. Such contracts are voidable at the instance of the beneficiary, but are not void, and in order to avoid them injury must be shown.

Copsey v. *Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204.

The authorities are conclusive that even when a director makes a contract with a corporation, if such contract be approved by the stockholders, it is valid as against the dissent of a minority of the stockholders.

2 Cook, Corp. 5th ed, § 649, p. 1458.

The action of the stockholders validates the contract even where nine out of thirteen directors were personally interested.

Leavenworth County v. *Chicago, R. I. & P. R. Co.* 134 U. S. 688, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708; *Nye* v. *Storer*, 168 Mass. 53, 46 N. E. 402.

If it should be assumed that a majority of the stockholders of the lessor have adopted, or are willing to adopt, the act of the directors, notwithstanding they were also directors of the lessee, the complainant is without remedy and without equities, as, by permission of the statute, such lease is within the legitimate discretion of the corporation. It would not be equitable or just that a single stockholder, or a minority of the stockholders, should be permitted to defeat the wishes and thwart the interests of the majority. It is an implied condition of the association of stockholders in a corporation that the majority shall have authority to bind the whole body in any transaction within the corporate powers.

Bill v. *Western U. Teleg. Co.* 16 Fed. 14.

If the directors of the Cobre Grande Copper Company believed honestly and fairly, upon advice of counsel, that the Cobre Grande Copper Company would be defeated in its litigation, it was not only clearly within their right, but it was their absolute duty, to effect the compromise which they did.

Gamble v. *Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201.

This litigation the directors of the company would be entitled to compromise and settle upon any fair and honest terms, and no protest or objection upon the part of minority shareholders would avail to prevent this.

Cook, Corp. § 750; *Donohoe* v. *Mariposa Land & Min. Co.* 66 Cal. 317, 5 Pac. 495; *Chambers* v. *McKee*, 185 Pa. 105, 39 Atl. 822.

*Mr. Justice **McKenna**, after stating the [244] case as above, delivered the opinion of the court:

Both of the lower courts held that the suit had become one for the appointment of a receiver. The supreme court said: "The purposes for which a receiver is asked are twofold, so far as the record is concerned: First, that he may take charge of the property of the company; second, that he may prosecute its litigation." [(Ariz.) 74 Pac. 1052.] After some comment the court further observed that the district court was well within the exercise of a sound discretion in refusing to appoint a receiver, and "that there was not any other relief which the court could properly grant the plaintiffs in this action." We do not find it necessary to decide whether, if plaintiffs' complaint were true, they would not be entitled to greater relief than the appointment of a receiver. We rest our judgment on the merits. In other words, we think the complaint has not been established.

The complaint charges a conspiracy between Greene and Mitchell, being at the time directors of the Cobre company, to deprive the company of its mines and property, and acquire it for themselves; and that, in pursuance of the conspiracy, they took possession of the company's property. No evidence was offered in the present suit to sustain the charge. Records of suits in which like charges were made cannot be regarded as such. The complaint also charges the contract of December 12, 1900, to be a "fraudulent and corrupt contract and conspiracy of Greene with Gage and other directors of the Cobre company, to stop the litigation against defendants, and to secure to them the undisputed possession of the mines" from which the Cobre company had been evicted. Both of the lower courts found against the charge. They found that Gage entered into the contract with the knowledge of the directors of the Cobre company, and in good

faith, upon the advice of counsel of the futility of further pursuing the litigation against Greene, and in the belief that "the contract was to the best interest of said company and its stockholders." It may be [245] admitted that *Greene's purpose was to stop the litigation against him, and quiet his possession of the property, but we cannot assume from this that he was guilty of fraud in making the contract of December 12, or that it was part of a conspiracy with the directors of the Cobre company to deprive the company of its property. Therefore any fraud in fact is out of the case.

Plaintiffs, however, contend that the contract is fraudulent on its face, and that it was decided so to be by the supreme court of New York in *Hallenborg* v. *Greene*, 66 App. Div. 590, 73 N. Y. Supp. 403. The pleadings are not set out in the report of the case. We may assume, however, that the complaint was, in most part, as that in the case at bar.

The case went to the supreme court on an appeal from an order granting a preliminary injunction and appointing a receiver. It was heard on the complaint and affidavits of the plaintiff. The affidavits of the defendants were, by stipulation, omitted from the record. Upon the showing thus made the court said:

"According to the complaint and affidavits, the Cobre company was not only a solvent corporation, but its assets were exceedingly valuable; and through conspiracy, fraud, and bribery the defendants Greene and Mitchell have obtained the management and control thereof to further their own schemes in hostility to the interests of the other stockholders, and have actually obtained a contract from the Cobre company to transfer to these rival companies, controlled and managed by Greene and Mitchell, all its property and property rights, without even a nominal consideration. This fraudulent contract was being consummated with despatch at the time of the commencement of this action and the granting of the injunction herein. These allegations must be taken as true for the purposes of this appeal, and it is evident that the inevitable consequence will be not only that the stock of the Cobre company, of which the plaintiff is a large holder,—owning one twenty-fifth of the entire stock,—will be rendered worthless, but that there [246] will *be no assets with which to pay the claims of creditors, of whom also the plaintiff is one for a substantial amount.

"It needs no refinement of the decisions to show that the cause thus presented is one for equitable cognizance."

The allegations of the plaintiffs were taken to be true; and, being so taken, the comments of the court may claim justification. In the case at bar the allegations of the complaint, as far as they are passed on, are found to be untrue. The opinion of the supreme court of New York, therefore, is of no value to plaintiffs' contention.

We are remitted, therefore, to the contract of December 12. What fraudulent element is there in that? It disposed of the shares of the stockholders, and it secured the payment of money to the corporation; it settled controversies which, as far as appears, the company had no means of prosecuting, and which, wherever they were tried, had been decided against the company; and where not decided, in the opinion of the company's attorney, would also be decided against the company. We may assume that the stockholders knew or could estimate the value of the properties. They deposited their stock with Gage to sell,—became, indeed, impatient at his delay. We may assume the price of the stock reflected the value of the properties,—Hallenborg bought his shares at $2.50. He had an option upon all that were in Gage's hands at that price. He let the option lapse, although negotiation was kept up with him from October to December. Gage then turned to Greene, who, it is found, offered to purchase the stock on better terms than anybody else ever offered. And there was no concealment. Gage was urged by the directors of the company and a large majority of the stockholders to make the contract. It was subsequently formally ratified by the directors and by a majority vote of the stockholders, at a stockholders' meeting.

But there were three other elements from which plaintiffs deduce fraud. Gage was given $50,000 as compensation as president of the Cobre company and other services and expenses paid by him; the attorneys of the company were paid *$50,000 [247] for legal services, and there was surrendered to Costello the note which he owed the company. There was no secrecy about these items, and it is manifest from the findings and the evidence that they constituted no inducement to the contract. Whether Gage can be compelled to pay to the Cobre company the money received by him, we need not decide. Its receipt by him did not make the whole contract fraudulent. It did not take from the stockholders the power to sell their stock, nor from the directors of the company the power to control the litigation in which the company was involved, to abandon that litigation, or to compromise it. In the exercise of their power they could have done those things directly. It was a mat-

ter of form and procedure that it was done in the manner provided by the contract of December 12.

It is deceptive to call or regard the action of the directors as a transfer of the property of the corporation without consideration, or for an inadequate consideration. The company had only a right to purchase the property, the conditions of which it had not fulfilled. It claimed legal excuse, and brought suits against Greene; but that it had legal excuse was disputed, and seems to have been doubted by all who were interested in the property but the plaintiffs. A jury in Texas had decided against the excuse; and the court in Arizona has also done so. That the latter was subsequent to the contract of December 12 does not militate against it as proof of good faith of the settlement.

This view of the merits of the case renders it unnecessary to pass upon the contention of the defendants that a court of equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person, under the circumstances presented by the complaint.

There are assignments of error upon the rulings of the trial court on the admissions of testimony, oral and documentary, which we do not think call for discussion. It is enough to say that they are not well taken.

[248] *There is also an assignment of error upon the refusal of the supreme court to make certain findings of fact. We think the findings made substantially cover those proposed; certainly to the extent necessary to the case as we have considered it.

Judgment affirmed.

T. A. GRAHAM, County Auditor for Greenwood County, and J. A. Marshall, County Treasurer of Greenwood County, South Carolina, *Plffs. in Err.*,

v.

S. ELLEN FOLSOM, Jennie F. Peck, and Nannie F. McCanless.

(See S. C. Reporter's ed. 248–255.)

1. Mandamus—to levy tax to pay judgment on township bonds.—Mandamus to compel the county authorities through whom taxes are assessed and collected to levy a tax to pay a judgment on township bonds cannot be denied on the theory that, because the legislature might, under S. C. Const. art. 9, § 8, have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers.

2. Constitutional law—impairment of contract obligations—state alteration or destruction of municipal corporation.—The exercise by a state of its right to alter or destroy its municipal corporations is ineffectual to impair the obligation of municipal contracts.

3. Mandamus—to levy tax to pay judgment on township bonds—effect of abolishing township.—County auditors and treasurers, who are the instruments employed by the state legislature to assess and collect taxes, may be compelled by mandamus to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the state Constitution, and its corporate agents removed.

4. Suits against state—mandamus to levy tax to pay judgment on township bonds.—Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the state, within the inhibition of the Federal Constitution, because such officers have been forbidden by the state legislature to exercise any such power.

[No. 108.]

Argued December 8, 1905. Decided January 8, 1906.

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment in mandamus, requiring a county auditor and county treasurer to assess and collect a tax to pay a judgment on township bonds. *Affirmed.*

See same case below, 131 Fed. 496.

The facts are stated in the opinion.

Mr. **F. Barron Grier** argued the cause, and, with *Mr. J. B. Park*, filed a brief for plaintiffs in error:

If the legislature had intended to make the county auditor and county treasurer corporate agents of the township it could and would have said so; and especially must this conclusion follow when, almost in the same sentence, and in the same section of

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NOTE.—*On mandamus to enforce payment of judgments against municipalities*—see notes to Davenport v. United States, 19 L. ed. U. S. 704; and Holt County v. National L. Ins. Co. 25 C. C. A. 475.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

On suits against the state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842; and Tindall v. Wesley, 13 C. C. A. 165.

the act, it proceeds to declare what officers shall be corporate agents of the township.

Denn v. *Reid*, 10 Pet. 527, 9 L. ed. 520.

What is termed the "policy" of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court on the interpretation of the statute.

Hadden v. *The Collector* (*Hadden* v. *Barney*) 5 Wall. 111, 18 L. ed. 519; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508.

That the bonds are valid, that the "corporate authorities" of the township may be vested with power to assess and collect a tax to discharge them, we admit. We do say, however, that the auditor and treasurer are not such "corporate authorities," that the power to assess and collect this tax has never been delegated to the "corporate authorities" of the township, that the general assembly of the state can so delegate it whenever it chooses to, and that the petitioners must go to that body, and not to the courts, to have that power delegated.

Heine v. *Levee Comrs.* 19 Wall. 655, 22 L. ed. 223; *Meriwether* v. *Garrett*, 102 U. S. 498, 26 L. ed. 197.

This is a proceeding against the state of South Carolina.

Christian v. *Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Hans* v. *Louisiana*, 24 Fed. 55; *Yale College* v. *Sanger*, 62 Fed. 177; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Rolston* v. *Missouri Fund Comrs.* (*Rolston* v. *Crittenden*) 120 U. S. 411, 30 L. ed. 728, 7 Sup. Ct. Rep. 599; *Hagood* v. *Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

A state has a reserved, indisputable right to repeal the charter of municipal corporations created by it, to destroy them; and this right is not restricted on account of any obligations which may have been contracted by the municipality.

Amy v. *Watertown*, 130 U. S. 319, 32 L. ed. 952, 9 Sup. Ct. Rep. 530; *Atkin* v. *Kansas*, 191 U. S. 220, 48 L. ed. 157, 24 Sup. Ct. Rep. 124; *Rogers* v. *Burlington*, 3 Wall. 654–663, 18 L. ed. 79–82; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Piqua Branch of State Bank* v. *Knoop*, 16 How. 369, 14 L. ed. 977; *Hill* v. *Memphis*, 134 U. S. 198, 33 L. ed. 887, 10 Sup. Ct. Rep. 562; *Barnett* v. *Denison*, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819; *Williams* v. *Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Shapleigh* v. *San Angelo*, 167 U. S. 654, 42 L. ed. 313, 17 Sup. Ct. Rep. 957; *New Orleans* v. *Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. ed. 197; *Wolff* v. *New Orleans* (*United States ex rel. Wolff* v. *New Orleans*) 103 U. S. 358, 26 L. ed. 395; *Mumma* v. *Potomac Co.* 8 Pet. 287, 8 L. ed. 948; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 335, 21 L. ed. 602; *Williamson* v. *New Jersey*, 130 U. S. 189, 32 L. ed. 915, 9 Sup. Ct. Rep. 453.

Mr. **Joseph A. McCullough,** also argued the cause and filed a brief for plaintiffs in error:

The plenary power of the state over municipal corporations cannot be restricted by contracts entered into by the municipality with private parties.

Shapleigh v. *San Angelo*, 167 U. S. 654, 42 L. ed. 313, 17 Sup. Ct. Rep. 957; 1 Dill. Mun. Corp. 4th ed. p. 172. See also *Tomlinson* v. *Jessup*, 15 Wall. 457, 21 L. ed. 205; *Atkin* v. *Kansas*, 191 U. S. 220, 48 L. ed. 157, 24 Sup. Ct. Rep. 124.

In examining the authorities upon this question, all the cases naturally divide themselves into three classes:

First. Where the corporation preserves its existence, and by subsequent legislation it is sought to restrict or repeal the power of taxation previously given and pledged for the payment of the debts of such corporation. All such subsequent legislation has been declared invalid as impairing the obligations of a contract.

Von Hoffman v. *Quincy* (*United States ex rel. Von Hoffman* v. *Quincy*) 4 Wall. 553, 18 L. ed. 409; *Louisiana ex rel. Nelson* v. *Police Jury*, 111 U. S. 720, 28 L. ed. 576, 4 Sup. Ct. Rep. 648; *Louisiana* v. *New Orleans*, 102 U. S. 206, 26 L. ed. 133; *Hicks* v. *Cleveland*, 45 C. C. A. 429, 106 Fed. 459.

The second class of cases is where the municipal corporation is legislated out of existence and its territory annexed to other corporations, or substantially the same territory and inhabitants are erected into another corporation, under a different name. In such instance, the new corporation will be liable for the debts of the old, unless the legislature otherwise provides.

Mt. Pleasant v. *Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Mobile* v. *Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; *Broadfoot* v. *Fayetteville*, 124 N. C. 478, 70 Am. St. Rep. 610, 32 S. E. 804.

Third. Where the legislature abolishes altogether a municipal corporation, and makes no provisions for the payment of its debts. In such case, the authorities uni-

formly hold that the court cannot enforce the remedy provided for by the act, since there is no longer in existence the corporation with its officers or agents, and the creditors' only remedy is to appeal to the legislature for relief, which legislature the courts must presume will do what is just and equitable.

Barkley v. *Levee Comrs.* 93 U. S. 258, 23 L. ed. 894; *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. ed. 197; 1 Dill. Mun. Corp. p. 250; Cooley, Taxn. 3d ed. p. 123.

In order to constitute a suit against a state, it is not necessary that the state should pledge the taxing power to the payment only of its own obligations; it is perfectly competent for her to pledge the taxing power to the payment of the obligations of one of her municipalities, and if she were to thereafter fail to carry out the pledge, an effort to compel her officers or agents to do so would, we submit, be none the less a suit against the state.

Hagood v. *Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Louisiana* v. *Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Hans* v. *Louisiana*, 24 Fed. 55; *Yale College* v. *Sanger*, 62 Fed. 177; *Smith* v. *Rackliffe*, 31 C. C. A. 328, 59 U. S. App. 427, 87 Fed. 966; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

Either we have here a case where the legislature itself has directly undertaken to levy a tax, and authorized its collection through its officers and agents to pay these bonds, which it now refuses to do, and this proceeding is an effort on the part of the bondholders to compel the state to perform this obligation, in which event it is in effect a suit against the state, and violative of the Federal Constitution, or it is a case where the state has delegated the power of taxation to one of its municipalities, to be exercised through its agents, which municipality has been extinguished, and there is therefore no longer in existence any officer or agent upon whom the court can lay its hands. In fact, it is an effort to compel a defunct corporation to levy and collect taxes, which is both a legal and physical impossibility.

Grantland v. *Memphis*, 12 Fed. 290; *First Nat. Bank* v. *Colby*, 21 Wall. 609, 22 L. ed. 687.

Messrs. **H. J. Haynsworth** and **R. E. L. Mountcastle** argued the cause and filed a brief for defendants in error:

The courts, always anxious to protect the rights of creditors, will resort to all means within their power to provide a remedy for the creditors of dissolved corporations if the legislature does not make some other provision.

Greenwood v. *Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961.

The right of the state to change these institutions is not founded on their being incorporated, but on their being instruments of government created for this purpose.

Dartmouth College v. *Woodward*, 4 Wheat. 638, 4 L. ed. 659.

The inhibition of the Constitution, which preserves against the interference of the state the sacredness of contracts, applies to liabilities of municipal corporations created by its permission.

Broughton v. *Pensacola*, 93 U. S. 266, 23 L. ed. 896.

When municipal corporations are empowered to take stock or otherwise aid in a railroad company, and they issue bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are, to that extent, deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Therefore the remedies for the enforcement of such obligations must be left unimpaired by the legislature, and if they are changed a substantial equivalent must be provided.

Mobile v. *Watson*, 116 U. S. 305, 29 L. ed. 626; 1 Dill. Mun. Corp. § 66.

The power of taxation is, in its nature, governmental or political. But it is well established that this power, when conferred upon a community for the purpose of enabling it to enter into contracts, cannot be impaired by the state.

On the other hand, corporate capacity in its nature is not a governmental or political function, but becomes so only when conferred for governmental or political purposes.

Dartmouth College v. *Woodward*, *supra*.

It follows, therefore, that corporate capacity conferred upon a community for the purpose of enabling it to enter into a contract cannot be withdrawn until the contract is satisfied.

Mandamus, like execution, can issue after the death of the judgment debtor. An action or an original proceeding may be abated by death, but mandamus is not an original proceeding, but is ancillary, and bears the same relation to the judgment that an execution does. The mandamus becomes a substitute for the ordinary process of execution, to enforce the payment of the same.

Riggs v. *Johnson County* (*United States ex rel. Riggs* v. *Johnson County*), 6 Wall. 166, 18 L. ed. 768.

When issued in such a case, it becomes a substitute for the ordinary process of execution to enforce the judgment.

Weber v. *Lee County* (*United States ex rel. Weber* v. *Lee County*), 6 Wall. 210, 18 L. ed. 781.

The writ performs the office, and is the legal equivalent, of an execution against an individual.

Lafayette County v. *Wonderly*, 34 C. C. A. 360, 92 Fed. 313; *McCullough* v. *Hicks*, 63 S. C. 542, 41 S. E. 761.

Where the duty of assessing and collecting a township tax to pay a township obligation is charged upon the county officers, corporate capacity in the township is not essential to the enforcement of such duty.

Jordan v. *Cass County*, 3 Dill. 185, Fed. Cas. No. 7,517; *Cass County* v. *Johnston*, 95 U. S. 360, 24 L. ed. 416; *Cass County* v. *Jordan*, 95 U. S. 373, 24 L. ed. 419; *Davenport* v. *Dodge County*, 105 U. S. 237, 26 L. ed. 1018; *United States ex rel. Chandler* v. *Dodge County*, 110 U. S. 162, 28 L. ed. 105, 3 Sup. Ct. Rep. 591; *Blair* v. *Cuming County*, 111 U. S. 367, 28 L. ed. 459, 4 Sup. Ct. Rep. 449; *Nemaha County* v. *Frank*, 120 U. S. 46, 30 L. ed. 586, 7 Sup. Ct. Rep. 395.

Where a statute authorizing municipal bonds provides for an annual tax for their payment, it is beyond the power of the state to repeal such provision until the bonds are paid.

Von Hoffman v. *Quincy* (*United States ex rel. Von Hoffman* v. *Quincy*), 4 Wall. 551, 18 L. ed. 409; *Galena* v. *Amy* (*Galena* v. *United States*), 5 Wall. 705, 18 L. ed. 560; *Meriwether* v. *Garrett*, 102 U. S. 516, 26 L. ed. 205; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S. 294, 30 L. ed. 1165, 7 Sup. Ct. Rep. 1190; *Scotland County Court* v. *United States*, 140 U. S. 41, 35 L. ed. 351, 11 Sup. Ct. Rep. 697; *Hicks* v. *Cleveland*, 45 C. C. A. 429, 106 Fed. 459.

Mr. Justice **McKenna** delivered the opinion of the court:

This writ of error brings up for review the judgment of the circuit court in mandamus, requiring plaintiffs in error to assess and collect taxes to pay a judgment recovered against Township Ninety-six, for certain bonds issued by it in aid of the Greenville & Port Royal Railroad Company. In *Folsom* v. *Township Ninety Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174, the bonds were declared valid obligations of the township. In accordance with the opinion in that case, judgment was entered in favor of the suing bondholders. Defendants in error are owners of that judgment. The legislation which authorized the issue of the bonds is recited in *Folsom* v. *Township Ninety Six*, and need not be repeated at length. We may say, however, that the act incorporating the railroad empowered townships interested in its construction to subscribe for its capital stock such sum as the majority of the voters, voting at an election held for that purpose, might authorize, and it was provided (§ 9) that "the county auditor or other officers discharging such duties, or city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of said county, city, town, or townships such per centum as may be necessary to pay said interest on said sum of money subscribed, which shall be known and styled on the tax books as railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns, or townships so subscribing." 19 S. C. Stat. 239, 241.

In 1895 South Carolina adopted a new Constitution, by which it was provided that the several townships of the state, with names and boundaries as then established, should continue, with power, however, in the legislature, to form other townships, or change the boundaries of those established. Art. 7. *This section, by an amend- [250]
ment finally adopted in 1903, was made inapplicable to certain townships, including Ninety-six. It was provided that "the corporate existence of the said townships be, and the same is hereby, destroyed, and all offices in said townships are abolished, and all corporate agents removed." 24 S. C. Stat. 3.

At the time of the execution of the bonds, Township Ninety-six was situated in Abbeville county, and in 1896 the county of Greenwood was organized out of portions of Abbeville and Edgefield counties, and Township Ninety-six was included in Greenwood county.

The officers of the latter county refuse to assess and collect the taxes, contending that they are not officers of the county, but officers of the state, appointed by the governor of the state, and are termed county officers because assigned to duty in that county, but cannot exercise any function of those offices except as authorized by the laws of the state; and that they have been forbidden, by an act of the general assembly of the state, to assess or collect taxes for the payment of subscriptions by townships to the building of roads which have not been built. 23 S. C. Stat. 78.

Against this defense defendants in error invoke the contract clause of the Constitution of the United States.

As we have seen, the validity of the bonds was decided in *Folsom* v. *Township Ninety Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; in other words, they were

decided to be the contracts of the township, and that the acts which authorized their issue constituted their obligation. In this the court announced and applied the principle of many cases which are too familiar to need especial citation.

Plaintiffs in error yield to the case of *Folsom* v. *Ninety Six*, but contend that it is open to inquiry what officers, under the act authorizing the bonds, were the corporate agents or officers of the township, and, answering the inquiry, say the county commissioners were such agents and officers, not the county auditor and county treasurer, and that, it is contended, the circuit court has so decided. The distinction that
[251] plaintiffs *contend for, based on the opinion of the court, is merely verbal. The court distinguished the duties of the commissioners from those of the auditor and treasurer, and expressed with emphasis the continuing duty of the latter. The court said: "If the contention that the legislature had the right to destroy the corporate existence of the township be true, we are nevertheless confronted with the fact that the instrumentalities and means employed by the legislature, in this instance, for the purpose of enforcing the collection of a tax, are still unimpaired." [131 Fed. 505.]

The purpose of the court, therefore, was to point out the temporary duties of the commissioners, and to emphasize the permanent duties of the auditor and treasurer as instrumentalities of the law, with a continuing power to give its remedy and protection to the bonds, "independent of the existence of the township." And there can be no doubt about this from the words of the statute.

It is further contended that the action of the court in issuing the writ disregarded article 9 of the Constitution of 1868, entitled "Finance and Taxation." Section 8 of the article provides "that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." And the further limitation of the power of municipal corporations to levy and assess taxes, expressed in § 6, article 10, of the Constitution of 1895, to wit, "for educational purposes, to build and repair public roads, buildings, and bridges, to maintain and support prisoners, pay jurors, county officers, and for litigation, quarantine, and court expenses, and for ordinary county purposes, to support paupers and pay past indebtedness."

The argument is that "the 'corporate authorities' of the county cannot be vested with power to assess and collect a tax for township purposes, nor *vice versa*. That power can only be delegated to the authorities of the body contracting, or about to contract, the debt." And this argument, it is contended, *is not opposed to *Folsom*
[252] v. *Ninety Six*. There, it is said, the validity of the bonds was established, but it was not decided that the "corporate authorities" of the township might be vested with power to assess and collect a tax to pay them. Here the question is, Can the auditor and treasurer, who are state officers, be made to assess and collect a tax which, under the Constitution and laws of the state, can only be done by the "corporate authorities" of the township?

Plaintiffs' construction of the case of *Folsom* v. *Ninety Six* is too limited. It takes from the case about all of its value. The case decided that the bonds were issued for corporate purposes, and established them as a valid indebtedness of the township. It proclaimed the validity of the laws under which the bonds were issued, and made those laws and every part of them the contract with the bondholders. It did not occur to any one to urge that, because the legislature might vest the township authorities with the power to assess and collect taxes, such power could not be vested in county officers. By clear implication the contrary is decided in *State ex rel. Charleston, C. & C. R. Co.* v. *Whitesides*, 30 S. C. 579, 3 L. R. A. 777, 9 S. E. 661; *State ex rel. Charleston, C. & C. R. Co.* v. *Harper*, 30 S. C. 586, 9 S. E. 664; *State ex rel. Dickinson* v. *Neely*, 30 S. C. 587, 3 L. R. A. 672, 9 S. E. 664. The offices of auditor and treasurer still exist, and through them taxes are assessed and collected in the state of South Carolina. The case at bar is not, therefore, like *Heine* v. *Levee Comrs.* 19 Wall. 655, 22 L. ed. 223; or *Meriweather* v. *Garrett*, 102 U. S. 498, 26 L. ed. 197. It is like *Von Hoffman* v. *Quincy* (*United States ex rel. Von Hoffman* v. *Quincy*) 4 Wall. 535, 18 L. ed. 403; *Galena* v. *Amy* (*Galena* v. *United States*) 5 Wall. 705, 18 L. ed. 560; *Seibert* v. *Lewis* (*Seibert* v. *United States*) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Mobile* v. *Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398, and many others.

But plaintiffs in error urge other defenses: (*a*) By an amendment of the Constitution in 1903 the corporate existence of Township Ninety-six was destroyed, its offices abolished and all its corporate agents were removed. (*b*) By an act of the legislature Township Ninety-six was included in Greenwood county. At the time the bonds were issued it was situated in Abbeville county. (*c*) Plaintiffs in error are forbidden by the laws of the state from assessing and collecting taxes for Ninety-

[253] six *Township and have no power to perform the acts enjoined upon them by the judgment of the circuit court.

These defenses differ only in form from those which this court held insufficient in the cases to which we have referred, and they acquire no sanctifying power because one of them, or all of them, may be said to rest upon the Constitution of the state. This, indeed, is not denied. It is asserted that the obligation of the contract is unimpaired; that the state has done nothing but exercise an unquestionable right,—the right to alter or destroy its corporations.

The power of the state to alter or destroy its corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships, or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire to closely into the motives of the state, but they will not ignore the effect of its action. The cases illustrate this. There may, indeed, be a limitation upon the power of the court. This was seen and expressed in *Heine* v. *Levee Comrs.* 19 Wall. 655, 22 L. ed. 223, and *Meriweather* v. *Garrett*, 102 U. S. 498, 26 L. ed. 197. There is no limitation in the case at bar. A tax has been provided for and there are officers whose duty it is to assess and collect it. A court is within the line of its duty and powers when it directs those officers to the performance of their duty; and their objects upon which the tax can be laid. It is the property within the boundaries of the territory that constituted Township Ninety-six.

Mt. Pleasant v. *Beckwith*, 100 U. S. 514, 25 L. ed. 699, and *Mobile* v. *Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398, are cases in which municipal corporations had incurred indebtedness, and afterward their municipal organization was destroyed and their territory added to other municipalities. It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental *divisions was a proper exercise of [254] legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a state from passing any law impairing the obligation of contracts. See also *Shapleigh* v. *San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957. And this is not a limitation, as plaintiffs in error seem to think it is, of the legislative power over subordinate municipalities, either over their change or destruction. It only prevents the exercise of that power being used to defeat contracts previously entered into.

It is further contended by plaintiffs in error that this is, in effect, a suit against the state. The argument to support this contention is that, if the auditor and treasurer are not corporate authorities, as it is insisted the circuit court decided, they are necessarily "state officers, and, being state officers, this proceeding is an attempt to require of the state the performance of her contract." The reasoning by which this is attempted to be sustained is rather roundabout. It is based in part on distinctions which, it is contended, were made by the circuit court, and on the assumption that the circuit court decided that the levy of taxes prescribed by § 9 of the statute under which the bonds were issued was a levy by the legislature, and the taxing officers state officers. This proceeding, hence, it is argued, becomes a proceeding against the state, and "the relief sought is to require of the state the performance of *her contract*" (italics ours) by the coercion of her officers to the performance of duties which she has, by a statute, forbidden. And, it is said, it may be admitted that such statute "is unconstitutional and therefore void;" nevertheless, the relief asked against the officers is " 'affirmative official action,' which the political body of which they are the mere servants has forbidden them to exercise," and it is not competent for a court to compel them to exercise, because of the immunity of the state from suit under the Constitution of the United States.

*To sustain these contentions an elaborate [255] argument is presented and a number of cases are cited. The most direct of the cases are *Louisiana* v. *Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Hagood* v. *Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Rolston* v. *Missouri Fund Comrs.* (*Rolston* v. *Crittenden*) 120 U. S. 411, 30 L. ed. 728, 7 Sup. Ct. Rep. 599; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699. It would make this opinion too long to review these cases. Nor is it necessary. It is enough to say that they do not sustain the contentions of plaintiffs in error.

Judgment affirmed.

JOSEPH O. CARTER, William F. Allen, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, *Plffs. in Err.*,

v.

TERRITORY OF HAWAII.

(See S. C. Reporter's ed. 255–257.)

Public lands—Hawaiian grant—fishery rights.—The grantees of land under a patent from the King of Hawaii, following an award of the Land Commission, are entitled to a fishery right in the adjoining sea which they and their predecessors in title had enjoyed from time immemorial, although the fishery is not described in the royal patent, and title thereto was not established before the Land Commission.

[No. 144.]

Argued and submitted December 13, 1905. Decided January 8, 1906.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment affirming a judgment of the Circuit Court of the First Judicial Circuit in that territory, in favor of defendant in a proceeding to establish a fishery right. *Reversed.*

See same case below, 14 Haw. 465.

The facts are stated in the opinion.

Mr. **Sidney M. Ballou** argued the cause, and, with *Messrs. Benjamin L. Marx* and *J. J. Darlington*, filed a brief for plaintiffs in error.

Messrs. Emil C. Peters and *Fred W. Milverton* submitted the cause for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding to establish the plaintiffs' rights to a several fishery of the kind described in *Damon* v. *Hawaii*, 194 U. S. 154, 48 L. ed. 916, 24 Sup. Ct. Rep. 617, and comes here under the same circumstances as that case did. The fishery in question is a sea fishery within the reef in Waialae Iki, island of Oahu, and is claimed by metes and bounds in the complaint. The plaintiffs are owners of the adjacent land under a royal patent following upon an award of the Land Commission, and the only difference between this case and the former one is that in this, the fishery is not described in the royal patent, and that, apart from the question of prescription, upon which we shall say nothing, the plaintiffs have to rely upon the statutes alone. They offered evidence at the trial that, before the action of the King in 1839, those under whom the plaintiffs claim title had enjoyed, from time immemorial, rights similar to those set out in the statutes, and also that they had been in continuous, exclusive, and notorious possession of the konohiki right for sixty years. They offered, in short, to prove that their predecessor in title was within the statutes, and therefore owned the fishery, it not being disputed that if he did, the plaintiffs own it now. The judge rejected the evidence, and entered judgment for the defendant, and, on exceptions, this judgment and that in *Damon* v. *Hawaii* were sustained at the same time, in one opinion, by the supreme court. 14 Haw. 465.

We deem it unnecessary to repeat the ground of our intimation in the former case, that the statutes there referred to created vested rights. We simply repeat that, in our opinion, such was their effect. The fact that they neither identified the specific grantees nor established the boundaries is immaterial when their purport as a grant or confirmation is decided. It is enough that they afforded the means of identification, and that presumably the boundaries can be fixed by reference to existing *facts [257] or the application of principles which have been laid down in cases of more or less similar kind.

The omission of the plaintiffs' predecessor in title to establish his right to the fishery before the Land Commission does not prejudice their case. See *Kenoa* v. *Meek*, 6 Haw. 63. That commission was established to determine the title to lands as against the Hawaiian government. In practice it treated the fisheries as not within its jurisdiction, and it would seem to have been right in its view. See *Akeni* v. *Wong Ka Mau*, 5 Haw. 91.

Judgment reversed.

(No. 89.)

BRAINARD H. WARNER, and Louis D. Wine, Trustees, *et al.*, *Appts.*,

v.

DAVID C. GRAYSON, Trustee, *et al.*

(No. 90.)

H. MAURICE TALBOTT and Frank I. Wood, *Appts.*,

v.

DAVID C. GRAYSON, Trustee, *et al.*

(No. 439.)

FRANK I. WOOD *et al.*, *Appts.*,

v.

DAVID C. GRAYSON, Trustee, *et al.*

(See S. C. Reporter's ed. 257–273.)

1. Mortgage—what property covered—

easement necessary to building subsequently erected.—The fact that there was no building upon the property when a deed of trust was executed conveying the described property "with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining" does not prevent an easement on the adjacent property of the grantor, made necessary to the use and enjoyment of an apartment house built flush upon the line of the property described, from passing under the deed, where it was within the knowledge and purpose of the parties that a building should be constructed which would be the principal security for a loan.

2. **Mortgage—transfer of equity of redemption—rights of purchasers.**—Purchasers of the equity of redemption from the grantor in a deed of trust, with knowledge that such deed covered the described property "with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining," and that the grantor had so erected a building thereon that an easement upon adjacent property owned by him was necessary to its use and enjoyment, and that he had attempted to obtain this easement by release from another deed of trust covering such adjacent property,—have no better standing than their grantor to claim that such easement did not pass under the deed.

3. **Mortgage—foreclosure—sale in entirety.**—A sale in entirety of two parcels of land covered by separate trust deeds should not be ordered unless the interests of the holders of the equity of redemption and of the encumbrancers require it.

4. **Appeal—finality of judgment.**—A decree of the court of appeals of the District of Columbia, directing that two parcels of land separately covered by trust deeds be sold as an entirety or in parts, in the discretion of the trustees, is not final for the purpose of an appeal to the Supreme Court of the United States.

[Nos. 89, 90, 439.]

Argued December 4, 5, 1905. Decided January 8, 1906.

TWO APPEALS from the Court of Appeals of the District of Columbia to review a decree affirming a decree of the Supreme Court of the District in a suit over the respective rights of the parties in property covered by certain trust deeds. *Modified* by holding that an easement necessary to the use and enjoyment of a building erected after one of the deeds was executed passed under such deed, and by directing that the property be sold in parcels, and as so modified *affirmed*. Also an

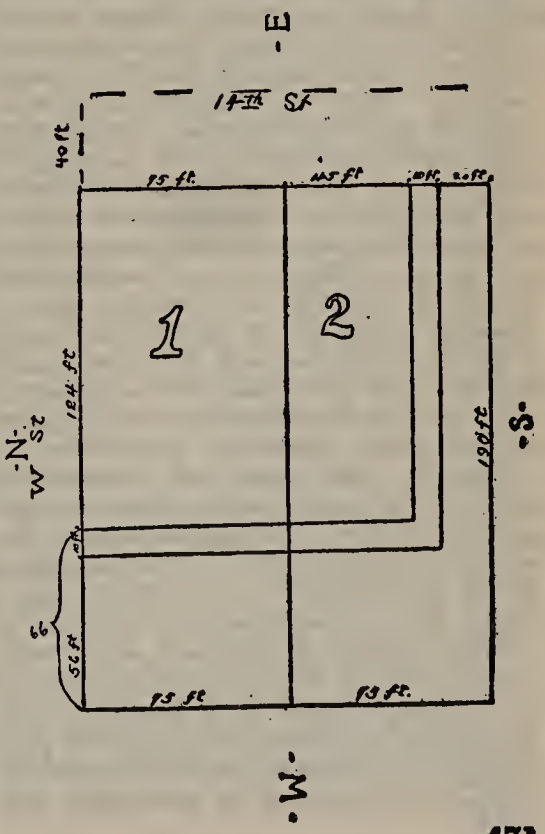
APPEAL from the Court of Appeals of the District of Columbia to review a decree entered on a prior appeal in the same suit, directing a sale of the property as an entirety or in parts, in the discretion of the trustees. *Dismissed* for lack of finality.

See opinion below, in No. 439, 22 App. D. C. 432; in Nos. 89, 90, 24 App. D. C. 55.

Statement by Mr. Justice **Day**:

These are appeals from a decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District. The bill in the original case was filed by Grayson and others against Wood, Talbott, Duke, and others, for the appointment of a receiver for certain property situated in Washington, known as the Victoria flats; also praying an injunction to restrain the sale of the property by the trustees of the first mortgage; to have an adjudication of the right of an easement alleged to be appurtenant to the property, and for the sale of the Victoria flats and certain property adjacent thereto, for the marshaling of encumbrances, and for general relief. The facts necessary to an adjudication of the case, as we view it, being principally those found in the court of appeals, are as follows: Mrs. Alice S. Hill was the owner of lots 1 and 2 in block 45 of Hill's subdivision, University park, city of Washington. A diagram of these lots is herewith given:

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NOTE.—*As to what judgments or decrees are final for purposes of review*—see notes to Brush Electric Light Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

These lots fronted 150 feet (75 feet each) on Fourteenth street, and 190 feet on Welling place (now Douglas street). On January 13, 1897, Mrs. Hill conveyed these lots to Nicholas T. Haller. Haller intended to erect an apartment house, which was subsequently placed thereon, and became known as the Victoria flats. To enable him to build this structure, Haller negotiated a loan of $75,000, and, on January 22, 1897, executed a deed of trust of that date to B. H. Warner and Louis D. Wine, as trustees, hereinafter called the Warner trust, describing in the deed the north 120 feet of the two lots, and running westwardly to the depth of 124 feet, as shown on the plat. At the same time Haller executed a deed of trust to McReynolds and Meriweather, as trustees, hereinafter known as the McReynolds trust, upon the remaining portion of said lots 1 and 2, to secure his notes to the amount of $12,315. There were no improvements on the lots 1 and 2 at the time of making these deeds of trust. Thereafter Haller erected the apartment house on the portions of lots 1 and 2 described in the deed of trust to Warner. In the erection of the building Haller had become indebted to mechanics and materialmen in the sum of $30,087.65, and in the further sum of $10,350 for borrowed money. To avoid mechanics' liens on the property, and to secure the borrowed money, a second deed of trust was placed on the property by the same description contained in the Warner deed, Grayson and Heald being the trustees
[260] named therein, hereinafter *known as the Grayson trust, and bears date December 20, 1897. These deeds of trust were duly recorded. When the Grayson trust was executed and delivered, the building had been erected by Haller, the mortgagor. The building contained, upon the south and west sides, in connection with which an easement is said to arise, a large number of doors, windows, and porches, the porches encroaching over the line of the property deeded in the McReynolds trust 4 feet and 9 inches; and it is averred in the bill, and not denied in the answers, that the areaways encroach 5 feet. There are thirty-six windows in the west wall, nineteen in the south wall, twenty-two doors in the west wall, five doors in the south wall, four cellar windows each in the west and south walls. It was stipulated in the case when it went back for final decree in the supreme court as follows:

"The areaways on the west, and south sides mentioned by the witness, William J. McClure, consist of excavations from the surface of the ground downwards, projecting into the cement walk, and protected by wooden platforms, on grade with and forming part of the said walk, and provided with interstices or openings admitting light to the windows below.

"On the south side of the building there is one doorway or entrance, and on the west side, four doorways or entrances opening out upon the said cement walk, and not otherwise accessible from the exterior of said building.

"On the said west wall, projecting out upon the said cement walk, there are three garbage chutes for collection of garbage from the building, and two openings into the cellar, through which the coal supply of the building is received, the said garbage chutes and coal cellars being accessible from the exterior only by means of the said cement walk."

In both deeds of trust, in addition to the conveyance of the parcels of ground described, there is the following language:

"Together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging, or in any wise appertaining, and all the estate, *right, title, interest, and [261]
claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to, or out of the said land and premises, to have and to hold the said land, premises, and appurtenances unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns."

A default having been made in the payment of interest due upon the notes secured by the deeds of trust, it was arranged that Warner and Wine were to collect the rents from the building, and afterwards Woods collected the rents of the building for a while. There is considerable testimony in the record tending to show an alleged combination on the part of Wood and Talbot, who had acquired the interest of Haller, to scale down the second, or Grayson and Heald, trust, and to prevent the property being sold advantageously, all of which we deem unnecessary to consider in determining the rights of the parties, and shall not undertake to state the details concerning the same. It appears that Haller originally intended to place the building so as to leave ample space on the west and south, between the building and the lines of the lot as covered by the trust deeds, but being notified that a space of 40 feet must be left on the east of the property and 20 feet on the north side, because of restrictions in the title of the property, the building was placed practically on the lines of the premises on the west and south, as described in the deeds of trust. The porches and areaways thus necessarily encroached on the adjoining property, as hereinbefore stated. In the

view we take of the case, it is important to state how Wood and Talbot acquired their interest in the property. In March, 1898, Wood obtained from Haller, in exchange for an equity of Wood's in another property, an undivided one-half interest in the flats property, and Haller conveyed the premises as described in the deed of trust to Warner, together with a 10-foot strip of ground on the south and west sides of the building (see plat), the deed being made for the same by Haller to one Duke, who executed a declaration (dated April 9,
[262] 1898) that he held the *property in trust for Haller and Wood, one half each. About the same time an arrangement was undertaken to be made by Haller, with the knowledge of Wood, by the terms of which, upon the payment of $4,000 upon the McReynold's trust, the 10-foot strip would be released therefrom, and $4,000 was borrowed from a bank upon the security of $4,000 of the McReynold's notes, which loan, not having been paid, the release has not been obtained. On the first of April, 1899, Talbot purchased Haller's remaining one-half interest in the Victoria flats property, and also one half interest in that covered by the McReynold's trust, and Wood purchased Haller's remaining one-half interest in the McReynold's equity. The purchase price paid by Talbot was $3,100, and by Wood, for the remaining one-half interest in the McReynold's equity, $250. Thus Wood and Talbot became the owners of the equities of redemption in both lots.

The supreme court gave the Warner trust a lien upon the 10-foot strip as part of the mortgage premises, a second lien to the Grayson trust, and ordered the property sold as an entirety, at the option of the trustees appointed to sell.

When the case was in the court of appeals, upon appeal from the original decree of sale, that court modified the decree below in so far as it gave the Warner trust any lien upon the 10-foot strip on the south and west sides, and ordered a decree in favor of the Grayson trust upon this strip as an easement, and that the property be sold as an entirety or in parts, according to the discretion of the trustees ordered to sell. 22 App. D. C. 432. When the case went back to the supreme court the modified decree of sale was entered, from which an appeal was taken to the court of appeals, which affirmed the decree of the supreme court (24 App. D. C. 55), and these appeals were sued out to this court.

Messrs. **John Ridout** and **Charles F. Carusi** argued the cause and filed a brief for Wood and Talbott:

In the United States the English doctrine of implied easements of light and air is repudiated.

Kennedy v. *Burnap*, 120 Cal. 488, 40 L.R.A. 476, 52 Pac. 843; *Hutchins* v. *Munn*, 22 App. D. C. 88; *Keiper* v. *Klein*, 51 Ind. 316; *Randall* v. *Sanderson*, 111 Mass. 114; *Keats* v. *Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Palmer* v. *Wetmore*, 2 Sandf. 316; *Meyers* v. *Gemmel*, 10 Barb. 537; *Shipman* v. *Beers*, 2 Abb. N. C. 435; *Mullen* v. *Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Haverstick* v. *Sipe*, 33 Pa. 368; 19 Am. & Eng. Enc. Law, p. 118.

Shepherd v. *Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438, was an ordinary case for the reformation of a deed on the ground of mutual mistake, and had nothing to do with easements by implication.

Mr. **B. W. Parker** argued the cause, and, with *Mr. R. Golden Donaldson*, filed a brief for Warner and Wine, trustees:

All improvements and betterments made upon real estate by the mortgagor or those claiming under him, after the execution of the mortgage, inure to the benefit of the mortgagee, and become a part of the security for the debt.

10 Am. & Eng. Enc. Law, p. 260; 16 Am. & Eng. Enc. Law, 2d ed. pp. 119, 120; *Owen* v. *Field*, 102 Mass. 102; 1 Jones, Mortg. § 681; *Scanlan* v. *Geddes*, 112 Mass. 17; *Snow* v. *Orleans*, 126 Mass. 456; *Martin* v. *Beatty*, 54 Ill. 100; *Rice* v. *Dewey*, 54 Barb. 455; *Union Water Co.* v. *Murphy's Flat Fluming Co.* 22 Cal. 621; *Booraem* v. *Wood*, 27 N. J. Eq. 371; *Childs* v. *Dolan*, 5 Allen, 319; *Holmes* v. *Morse*, 50 Me. 102; *Butler* v. *Page*, 7 Met. 40, 39 Am. Dec. 757; *Graeme* v. *Cullen*, 23 Gratt. 266; *Wharton* v. *Moore*, 84 N. C. 479; *Shepherd* v. *Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438; *Frizzell* v. *Murphy*, 19 App. D. C. 440; *Janes* v. *Jenkins*, 34 Md. 1, 6 Am. Rep. 300.

An implied grant of an easement will be sustained in cases of necessity.

Evans v. *Dana*, 7 R. I. 306; Washb. Easements & Servitudes, 4th ed. 664; *Powell* v. *Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Turner* v. *Thompson*, 58 Ga. 268, 24 Am. Rep. 497; *Rennyson's Appeal*, 94 Pa. 147, 39 Am. Rep. 777; *Sutphen* v. *Therkelson*, 38 N. J. Eq. 318; *Whitney* v. *Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Rosewell* v. *Pryor*, 6 Med. 116; *Palmer* v. *Fletcher*, 1 Lev. 122; *Buss* v. *Dyer*, 125 Mass. 287; *Collier* v. *Pierce*, 7 Gray, 18, 66 Am. Dec. 453; *Story* v. *Odin*, 12 Mass. 157, 7 Am. Dec. 46; *John Hancock Mut. L. Ins. Co.* v. *Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Lampman* v. *Milks*, 21 N. Y. 505; *Smyles* v. *Hastings*, 22 N. Y. 217; *Clawson* v. *Primrose*, 4 Del. Ch. 643; *Cave* v. *Crafts*, 53 Cal. 135; *Ray* v. *Sweeney*, 14 Bush, 1, 29 Am. Rep.

388; *Bank of British N. A.* v. *Miller*, 7 Sawy. 163, 6 Fed. 545; *Sheets* v. *Selden*, 2 Wall. 177, 17 L. ed. 822; *New-Ipswich W. L. Factory* v. *Batchelder*, 3 N. H. 190, 14 Am. Dec. 346; *Rogers* v. *Sinsheimer*, 50 N. Y. 646; *Havens* v. *Klein*, 51 How. Pr. 82; *Seibert* v. *Levan*, 8 Pa. 383, 49 Am. Dec. 524; *Reiners* v. *Young*, 38 Hun, 335; *Grace M. E. Church* v. *Dobbins*, 153 Pa. 294, 34 Am. St. Rep. 706, 25 Atl. 1120; *United States* v. *Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463.

Mr. **J. J. Darlington** argued the cause, and, with *Mr. Jesse E. Potbury*, filed a brief for Grayson, trustee:

Where the owner of both a quasi-dominant and a quasi-servient tenement conveys the former, retaining the latter, all such continuous and apparent quasi-easements as are reasonably necessary to the enjoyment of the property pass to the grantee, giving rise to an easement by implied grant.

Manogue v. *Bryant*, 15 App. D. C. 245; *Janes* v. *Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Frizzell* v. *Murphy*, 19 App. D. C. 440.

In *Shepherd* v. *Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438, the mortgagor was not the owner of the additional ground at the time of the mortgage, though his improvement encroached upon it. Later he gave a third trust to secure his promissory note to C, after he had acquired the quasi-servient tenement, so that, in fact, C's mortgage was the only encumbrance of record upon the additional ground. The court held that C took subject to the prior mortgages, not only upon the ground that, in the preliminary negotiation, C was informed that the loan would be secured by a second mortgage, but upon the wholly distinct and independent ground that the prior mortgages described the premises "together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to, or out of the said piece or parcel of land and premises."

It is true that in *Shepherd* v. *Pepper*, *supra*, Mrs. Gray was only a mortgagee, and not the grantee in fee of sublot A; but it cannot be contended that a grantee who obtains his deed not merely with constructive, but with actual, knowledge, full and complete in all respects, of the exact situation, and who takes it upon the avowed "process of reasoning" that, in his hands, the premises will not be subject to the legal and moral obligations of his grantor, stands upon a better footing than a mortgagee, or can claim to be considered an innocent purchaser without notice.

Upon the principle of construction that, where a man grants a thing, he grants it with everything necessary to its enjoyment, a grant by the owner of a tenement will pass to the grantee all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the property granted, and which are, at the time of the grant, used by the owner of the entirety for the benefit of the part granted, these being regarded as easements appurtenant to the land granted.

14 Cyc. Law & Proc. p. 1166.

In order that such an easement may pass by implication, it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent, and continuous use at the time of the grant (14 Cyc. Law & Proc. p. 1168; *Dunklee* v. *Wilton R. Co.* 24 N. H. 489), all of which conditions concur in the case at bar.

Open, visible ditches (14 Cyc. Law & Proc. pp. 1169, 1172, *et seq.*; *Thayer* v. *Payne*, 2 Cush. 327; *McElroy* v. *McLeay*, 71 Vt. 396, 45 Atl. 898; *Stuyvesant* v. *Early*, 58 App. Div. 242, 68 N. Y. Supp. 752; *Sanderlin* v. *Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Quinlan* v. *Noble*, 75 Cal. 250, 17 Pac. 69); a furnace flue (*Ingals* v. *Plamondon*, 75 Ill. 118); an alley way (*Cihak* v. *Klekr*, 117 Ill. 643, 7 N. E. 111; *Burns* v. *Gallagher*, 62 Md. 462); a water ditch and water rights (*Cave* v. *Crafts*, 53 Cal. 135); rights of way (*Ellis* v. *Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421, 27 N. E. 344; *McTavish* v. *Carroll*, 7 Md. 352. 61 Am. Dec. 353); stairways in a building (*Galloway* v. *Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616, 26 N. W. 262; *Geible* v. *Smith*, 146 Pa. 276, 28 Am. St. Rep. 796, 23 Atl. 437); a flow of water forced from vendor's premises, through pipes, to the premises of the vendee (*Toothe* v. *Bryce*, 50 N. J. Eq. 589, 25 Atl. 182); a portion of a building projecting upon the land retained by the vendor (*New York C. & H. R. R. Co.* v. *Needham*, 29 Misc. 435, 61 N. Y. Supp. 992),—have all been held to be subjects of implied easements.

Nor, according to the weight of authority, is a strict or indispensable necessity the condition of such implication; it is sufficient if the necessity be such as to render the easement necessary for the convenient and comfortable enjoyment of the property, and as it existed before the severance was made.

14 Cyc. Law & Proc. p. 1171.

In *Ingals* v. *Plamondon, supra,* reasonable necessity is held to be the proper rule; in *Cihak* v. *Klekr, supra,* that the easements shall be highly convenient and beneficial; in *Mitchell* v. *Seipel,* 53 Md. 264, 36 Am. Rep. 404, and in *Eliason* v. *Grove,* 85 Md. 226, 36 Atl. 844, that it shall be reasonably necessary; in *John Hancock Mut. L. Ins. Co.* v. *Patterson,* 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Irvine* v. *McCreary,* 108 Ky. 495, 49 L.R.A. 417, 56 S. W. 966; *Fremont, E. & M. Valley R. Co.* v. *Gayton,* 67 Neb. 263, 93 N. W. 163; and *Greer* v. *Van Meter,* 54 N. J. Eq. 270, 33 Atl. 794, that it shall be necessary to the beneficial enjoyment of the premises granted; and in *Havens* v. *Klein,* 51 How. Pr. 82, that it shall be necessary to the enjoyment, and clearly intended from the circumstances existing at the time when the conveyance was made.

Light and air are, under proper circumstances, proper subjects of implied easements.

Morrison v. *King,* 62 Ill. 30; *Cherry* v. *Stein,* 11 Md. 1; *Janes* v. *Jenkins, supra; Story* v. *Odin,* 12 Mass. 157, 7 Am. Dec. 46; *John Hancock Mut. L. Ins. Co.* v. *Patterson, Greer* v. *Van Meter,* and *Irvine* v. *McCreary, supra;* and see *Lampman* v. *Milks,* 21 N. Y. 505.

An implied grant of an easement of light will be sustained in cases of real necessity, though denied when it appears that the claimant may, at a reasonable cost, substitute other lights for his building.

Turner v. *Thompson,* 53 Ga. 273, 24 Am. Rep. 497; *Rennyson's Appeal,* 94 Pa. 147, 39 Am. Rep. 777.

Where necessary to the enjoyment, and clearly intended from the circumstances existing at the time the conveyance was made, an easement for light and air will pass by implication.

Havens v. *Klein, supra; Spies* v. *Damm,* 54 How. Pr. 293; *O'Neill* v. *Breese,* 3 Misc. 219, 23 N. Y. Supp. 526; *United States* v. *Appleton,* 1 Sumn. 492, Fed. Cas. No. 14,463; *Maynard* v. *Esher,* 17 Pa. 222; *Dill* v. *Board of Education,* 47 N. J. Eq. 421, 10 L.R.A. 276, 20 Atl. 739; *Powell* v. *Sims,* 5 W. Va. 1, 13 Am. Rep. 629; *Holloway* v. *Southmayd,* 139 N. Y. 390, 34 N. E. 1047, 1052.

Mr. Justice **Day,** after making the foregoing statement, delivered the opinion of the court:

These appeals raise practically three questions:

1st. Was the Warner trust entitled to an easement, and, if so, to what extent, in the lands on the south and west of the flats building?

2d. Was the Grayson trust entitled to a like easement in the same premises? and,

3d. Was the property properly authorized to be sold as an entirety, in the discretion of the trustees?

As to the first proposition, the supreme court was of opinion that the Warner trust was entitled to 10 feet on the south and west sides of the property. The court of appeals was of the opinion that, as the lots were not built upon at the time when the deed of trust was executed, and it was not then known that an easement would be necessary to the enjoyment of the property as constructed, the Warner trust took only the conveyances of the land by metes and bounds, without an easement, which that court held arose from the manner in which the building and its appurtenances were subsequently constructed and used.

The record discloses that the loan secured by the Warner trust was made for the purpose of erecting a hotel or apartment building. It is established that the first purpose of the proprietor was to construct the building so as to leave an adjacent space and way for its accommodation and use, between *its outer walls and the lot lands [268] adjacent on the west and south. This purpose was changed upon notification that restrictions in the title of the property required the building to be set back from the streets. The building was thereupon constructed by the mortgagor in the manner shown. The deed of trust was a mortgage security, and Haller continued to be the owner of the property to the full extent of the lots. The building was constructed in such wise that the use of some of the adjacent property, even independent of an easement for light and air, was absolutely necessary to the use and enjoyment of the building as constructed. It did not need the expert testimony which was introduced in the case to establish the fact that if another structure should be erected, practically even with the wall of the building, it would prevent access to, and greatly impair the use of, the south and west sides thereof. It would require the closing of the areaways, the shutting of the windows and doors, and must necessarily greatly depreciate the value of the property. The Warner trust contained the language (above quoted), conveying the described premises, with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, etc., to have and to hold, to the second party, their heirs and assigns. It is true that there was no building upon the property at the time when this deed of trust was executed, but it is equally true that it was

within the knowledge and purpose of the parties that a building should be constructed, which would be the principal security for the money loaned. And no one disputes that, when Haller constructed the building upon the property, it became immediately subject to the mortgage. He was the owner of the adjacent premises, and when he abandoned the design to leave sufficient space about the building for its proper use and enjoyment, and erected it in such manner, and so close to and overlapping upon other parts of his own property, as to require the use of an easement therein in order to occupy the building, and permit the enjoyment and use of it as [269] constructed, we *see no reason why the express language of the conveyance above quoted would not carry with the building thus constructed the improvements, ways, appurtenances, rights, and privileges necessary to the enjoyment of the same. The principle upon which subsequent buildings and fixtures annexed to the realty become a part thereof for the benefit of the mortgagee is thus stated in *Butler* v. *Page*, 7 Met. 40, 39 Am. Dec. 757:

"All buildings erected and fixtures placed on mortgaged premises, by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee, so far as they increase his security for his debt; and to the same extent they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor. *Winslow* v. *Merchants Ins. Co.* 4 Met. 306, 38 Am. Dec. 368. There is no necessity to adopt any liberal rule in regard to fixtures, to enable a mortgagor to remove what he has erected at his own expense; because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do, simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold becomes part of the realty, and passes with it, has its full effect in regard to things erected on the land by an owner who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage."

To the same effect is *Graeme* v. *Cullen*, 23 Gratt. 266. Had Haller not owned the surrounding premises, but acquired the adjacent 10-foot strip with a view of remedying the fault which he had committed in putting the building flush upon the line, and constructed his building so as to make the easement necessary to its use, we think there could be no question that the easement thus acquired would inure to the benefit of the mortgagee. Such is the principle stated in *Hankey* v. *Clark*, 110 Mass. 262. In that case, tenants in common owned two adjoining tracts of land on a river, the lower one *subject to a mortgage. [270] They sold the upper tract, reserving to themselves, their heirs and assigns, the right to draw water from a reservoir on the upper for the use of the lower (mortgaged) tract. The equity of redemption of one of them in the lower tract was sold and vested in A, who also acquired title in that tract through mesne conveyances under a foreclosure of the mortgages. The court held that A was vested with the title to draw water from the reservoir under the reservation. The court said: "Incorporeal rights of this description, acquired by the mortgagor subsequent to the date of the mortgage, for the permanent improvement of the estate, and annexed by the terms of the conveyance to the realty, may be considered as passing to the mortgagee by the foreclosure, to be exercised by him at his election. .There is no reason why incorporeal rights annexed to the realty should not inure to the benefit of the mortgage security in the same manner as improvements in the nature of fixtures inure. *Winslow* v. *Merchants Ins. Co.* 4 Met. 306, 310, 38 Am. Dec. 368. Until foreclosure the mortgage is deemed a lien or charge, subject to which the estate may be conveyed, improved, and in other respects dealt with as the estate of the mortgagor." We cannot see that it makes any difference in principle that the easement in the present case is annexed by the mortgagor by necessity, as the result of the manner in which he has improved the property. It is not contended that, as against the McReynolds trust, created at the same time with the Warner trust, and before the erection of the building, an easement was acquired in this strip, but we are now dealing with rights in the property as between Haller and the mortgagee; and we think the granting clause quoted above included not only the improvements, ways, and easements upon the property at the time, but such as became necessarily appurtenant thereto upon the adjacent property of the grantor, because of the structure which he has placed upon the premises, to the enjoyment of which these privileges and rights are essential. As to the extent of this easement, the conduct of the parties in undertaking to acquire 10 feet, for the obvious purpose of *this easement, the overhanging [271] porches, the encroaching areas, seem to us to make 10 feet a reasonable width, and no more than is properly necessary. The unloading of coal, the carrying away of garbage, and other necessary usages, could hardly be accomplished in a narrower space. In this view of the case we find it

unnecessary to treat this as an easement exclusively for light and air, or to enter upon a discussion of the doctrine of easements by implication. Nor is it an answer to the effect of this annexation to the property of the easement and rights resulting from the manner of improving the premises conveyed to say that Haller, as the owner, could not create an easement for himself in his own land. The question here is, What is the effect of his conveyance, and what has he added to the realty in favor of his grantee in the mortgage? We think he annexed not only the building, but the rights and privileges in his adjacent land, essential to its enjoyment.

2. As to the Grayson trust. In addition to the discussion already had as to the right of the Warner trust to have an easement in this strip, it is admitted that when the Grayson trust was executed the building was up, the easement was in actual use, and, it is apparent, had become necessary to the building as constructed. The purpose of Haller to use this part of the property for the purposes stated is manifested in what he had done, and the subsequent purchasers of the equity took with full notice, not only of the language of the recorded deed of trust, but had actual notice of the condition of the property. We think this feature of the case comes clearly within the doctrine ruled in *Shepherd* v. *Pepper*, 133 U. S. 626, 650, 33 L. ed. 706, 715, 10 Sup. Ct. Rep. 438. It is important to note in this connection that counsel for the Grayson trust do not dispute the right of the Warner trust to have a lien upon the easement in the 10-foot strip, and states that he does not desire to be heard upon that subject. The persons contesting that right (and as well the right of Grayson) in this court are Wood and Talbot, the successors of Haller, and, upon the facts shown, standing in his shoes, and with full notice of the necessity of this right of way
[272] or easement to the use of the *property, and Haller's attempt to obtain it by release from the McReynolds and Merriweather trust. It was subsequently specifically covered in the conveyance in trust for Haller and Wood to Duke, and it is admitted in the answer of Wood and Talbot that it was the original intent to so place the building as to give room about it; the rights of Wood and Talbot are no higher or better as against either Warner or Grayson than Haller's from the facts presented in this case.

Third. Was the decree right in ordering the sale of the property in its entirety, in the discretion of the trustees? Sales are thus ordered in entirety when the interests of the mortgagors and encumbrancers require it. *Shepherd* v. *Pepper*, 133 U. S. 626, 651, 33 L. ed. 706, 715, 10 Sup. Ct. Rep. 438, and the authorities there cited. In this case, counsel for the Grayson trust states in his brief that he does not insist upon such sale as an entirety, and, in the draft of a decree, as submitted by him, no such sale is provided for. In the view we have taken of this case, we cannot see that the first encumbrance, the Warner trust, requires such a sale to protect that interest. There is no dispute as to the lien of the McReynolds trust upon the property described in their deed; as against it no easement is claimed. We see no reason why, with adequate protection for the McReynolds trust, in a sum to be found sufficient in the court executing the decree, to be retained out of the purchase money of the flats property with an easement in the 10-foot strip, the flats may not be sold with the 10-foot strip as one piece, and the remainder of the property as another. Such a form of decree is suggested in the brief of the counsel for the Grayson trust, and no encumbrancer seems to object to it, and the holders of the equity of redemption insist upon a separate sale. We think it would be the fairer way to all concerned to order the sale of the property as herein indicated.

We therefore, upon the whole case, modify the decree of the court of appeals in respect to the Warner trust and the 10-foot strip, and as to the sale of the property as an entirety, as *hereinbefore stated. [273] In other respects *the judgment of the Court of Appeals is affirmed.*

This disposes of the appeals in Nos. 89 and 90, which were taken from the last and final decree in the court of appeals. The appeal in No. 439 was taken from the decree of the court of appeals remanding the case to the supreme court, which was not final, and it is therefore dismissed. The other appeals raise all the questions made in the case.

U. X. GUNTER, JR., Attorney General of the State of South Carolina, *et al.*, *Appts.*,

v.

ATLANTIC COAST LINE RAILROAD COMPANY.

(See S. C. Reporter's ed. 273–293.)

1. Suits against state—consent.—County

NOTE.—*On suits against a state*—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v.

treasurers sought to be enjoined from collecting state taxes because of an asserted contract exemption from taxation were endowed with the power to submit the rights of the state to judicial determination by a provision of the statute under which the taxes were levied, that if the state is interested in the revenue involved in actions against county auditors and treasurers for performing or attempting to perform their duties, the state auditor shall be informed, who shall, in turn, notify the attorney general, "who shall defend said action for and on behalf of the state."

2. **Judgment — res judicata — matters which might have been litigated.**—All defenses then existing to the contract exemption from state taxation, asserted in a suit in a Federal circuit court to enjoin the collection of the tax, whether brought to the attention of the court, or waived, were foreclosed by the decree establishing such exemption.

3. **Courts—state doctrine of res judicata as rule of decision in Federal courts.**—A decree of a Federal circuit court in a suit involving rights protected by the Constitution of the United States must be given, in the Federal courts, the force and effect to which it is entitled under the principles of *res judicata* as settled by the Supreme Court of the United States, although they may differ from the doctrine announced by the courts of the state in which the circuit court was sitting.

4. **Judgment—res judicata—taxes of other years.**—A decree enjoining the collection of taxes because of a contract exemption from taxation is as controlling on future taxes as on the particular taxes to which the suit related.

5. **Suits against state—enjoining proceedings in state courts.**—Ancillary relief in a Federal circuit court by way of injunction, in aid of a decree in a suit over the validity of state taxation, in which jurisdiction as to the state and its officers had been acquired as the result of the voluntary action of the state in submitting its rights to judicial determination, is not forbidden either by U. S. Const., 11th Amend., as a suit against a state, or by U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, forbidding the granting of the writ by any court of the United States, to stay proceedings in any state court, except in bankruptcy proceedings.

6. **Injunction—remedy at law.**—The existence of an adequate remedy at law cannot successfully be urged to defeat ancillary relief by way of injunction in aid of a decree enjoining the collection of state taxes, since that question was foreclosed by the original decree.

7. **Injunction—against illegal taxation—necessity of tender.**—The rule that tender of the valid portion of a tax is a condition precedent to relief by injunction against illegal taxation cannot be invoked to defeat injunctive relief in aid of a decree enjoining the collection of state taxes, where all questions concerning the part of the tax not covered by the original decree were eliminated from the controversy.

[No. 88.]

Argued December 1, 4, 1905. Decided January 15, 1906.

APPEAL from the Circuit Court of the United States for the District of South Carolina to review a decree granting injunctive relief in aid of a prior decree enjoining the collection of state taxes because of a contract exemption from taxation. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. F. Stevenson** argued the cause, and, with *Messrs. Stevenson & Matheson*, filed a brief for appellants:

Conferring the "powers, rights, and privileges" of the Northeastern Railroad Company upon the Cheraw & Darlington Railroad Company did not confer an exemption from taxation enjoyed by the former on the latter.

Phoenix F. & M. Ins. Co. v. *Tennessee*, 161 U. S. 175, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Tucker* v. *Ferguson*, 22 Wall. 527, 22 L. ed. 805.

There can be no contract without a consideration, and in this case there was no consideration.

Grand Lodge F. & A. M. v. *New Orleans*, 166 U. S. 145, 41 L. ed. 951, 17 Sup. Ct. Rep. 523; *Christ Church* v. *Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Tucker* v. *Ferguson, supra; West Wisconsin R.*

Louisiana, 33 L. ed. U. S. 842; and Tindall v. Wesley, 13 C. C. A. 165.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L. R. A. 577; Morrill v. Morrill, 11 L.R.A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

As to conclusiveness and effect of judgments as between Federal and state courts—see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; and Union & Planters' Bank v. Memphis, 49 C. C. A. 468.

As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson *ex dem.* St. John v. Chew, 6 L. ed. U. S. 583; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

On enjoining proceedings in state courts—see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; and Copeland v. Bruning, 63 C. C. A. 437.

On injunction against suit in foreign jurisdiction—see note to Thorndike v. Thorndike, 21 L. R. A. 71.

On the necessity of payment of tax due where injunction is sought against illegal taxation—see note to People's Nat. Bank v. Marye, 48 L. ed. U. S. 180.

Co. v. *Trempealeau County*, 93 U. S. 595, 23 L. ed. 814; *Newton* v. *Mahoning County*, 100 U. S. 548, 25 L. ed. 710; Cooley, Const. Lim. pp. 149, 335.

The case now made by appellants is on a new state of facts, not contested in *Humphrey* v. *Pegues*, 16 Wall. 244, 21 L. ed. 326, and hence, if the parties are the same, the questions in litigation are different, and, the causes of action being different, the former adjudication does not conclude them in the present case, in which they are proceeding to collect the taxes claimed, the causes of action being different from those taxes in litigation in the *Pegues Case*.

Phoenix F. & M. Ins. Co. v. *Tennessee*, 161 U. S. 175, 40 L. ed. 660, 16 Sup. Ct. Rep. 475.

When the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

Louisville, E. & St. L. R. Co. v. *Wilson*, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Nesbit* v. *Independent District*, 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Cromwell* v. *Sac County*, 94 U. S. 351, 358, 24 L. ed. 195, 200; *Willoughby* v. *Northeastern R. Co.* 52 S. C. 172, 29 S. E. 629; *Henderson* v. *Kenner*, 1 Rich. L. 474; *Hart* v. *Bates*, 17 S. C. 35; *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 424; *Jones* v. *Massey*, 14 S. C. 307; *Duren* v. *Kee*, 41 S. C. 174, 19 S. E. 492; *McMakin* v. *Fowler*, 34 S. C. 286, 13 S. E. 534.

A state can be bound only by a judgment rendered in a case where, by legislative authority, she submits to the jurisdiction; and no suit against an officer, and no submission by an executive officer of the sovereign's rights to a court, can result in a judgment binding on the state.

Anderson v. *Cave*, 49 S. C. 505, 27 S. E. 478; *United States* v. *Clarke*, 8 Pet. 444, 8 L. ed. 1004; *The Siren* (*The Siren* v. *United States*) 7 Wall. 152, 19 L. ed. 129; *The Davis* (*United States* v. *Douglas*) 10 Wall. 15, 19 L. ed. 875; *Carr* v. *United States*, 98 U. S. 433, 25 L. ed. 209; *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Public Accounts Comrs.* v. *Rose*, 1 Desauss. Eq. 461.

There is a plain and adequate remedy at law, there being the express provision that demand should be made, and, if the taxes were not paid, suit should be brought at law, which suit was brought, and to which suit the Atlantic Coast Line Railroad Company pleaded. Now, if the plea of former adjudication is good, it can be set up as a defense and fully availed of, and the court of equity cannot interfere.

Scottish Union & Nat. Ins. Co. v. *Bowland*, 196 U. S. 611, 49 L. ed. 619, 25 Sup. Ct. Rep. 345; *Phœnix Mut. L. Ins. Co.* v. *Bailey*, 13 Wall. 616–623, 20 L. ed. 501–503; *Grand Chute* v. *Winegar*, 15 Wall. 373, 21 L. ed. 174; *Deweese* v. *Reinhard*, 165 U. S. 386, 41 L. ed. 757, 17 Sup. Ct. Rep. 340.

Equity only interferes to prevent trespass on the property or interference with the operations of the party invoking its aid; and nothing of that kind was contemplated or possible here.

In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699, the court, specifying the class of cases in which injunctions are granted against state officials, says such suit in a proper case, where the remedy at law is inadequate to prevent such wrong and injury, is not, within the meaning of the 11th Amendment, an action against the state.

In *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, the court recognizes the rule that a plain and adequate legal remedy will prevent the resort to equity.

When the legal remedy is plain and adequate, no injunction will lie to prevent collection of taxes.

Indiana Mfg. Co. v. *Koehne*, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452; *People's Nat. Bank* v. *Marye*, 107 Fed. 570; *Douglas Co.* v. *Stone*, 110 Fed. 812; *First Nat. Bank* v. *Covington*, 103 Fed. 523.

It is admitted by the last decree that some of the taxes sued for are due; hence, no injunction can lie in the case, the part that is due not having been tendered.

First Nat. Bank v. *Covington*, 103 Fed. 524; *Western U. Teleg. Co.* v. *Missouri*, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 734.

To enjoin all the state's counsel from prosecuting her suit is to enjoin the state from so doing; and the court is without power to do so.

Chandler v. *Dix*, 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. Rep. 766; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820; *Diggs*

v. *Wolcott*, 4 Cranch, 179, 2 L. ed. 587; *Peck* v. *Jenness*, 7 How. 624, 12 L. ed. 846; *Watson* v. *Jones*, 13 Wall. 679, 20 L. ed. 666; *Haines* v. *Carpenter*, 91 U. S. 254, 23 L. ed. 345; *Dial* v. *Reynolds*, 96 U. S. 340, 24 L. ed. 644; *Belknap* v. *Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

The appearance of the attorney general in *Pegues* v. *Humphrey*, 16 Wall. 244, 21 L. ed. 326, did not bind the state.

Hand v. *Savannah & C. R. Co.* 8 S. C. N. S. 207; *State* v. *Corbin*, 16 S. C. 533.

Messrs. **Theodore G. Barker** and **P. A. Willcox** argued the cause, and, with *Mr. J. T. Barron*, filed a brief for appellee:

The conclusive presumption of the law always and universally prevails in favor of the justness and legal correctness of a final decree of a court of competent jurisdiction, affirmed by the appellate forum, and acquiesced in for a time sufficient to give to its decision the force and sanctity of a rule of property.

Van Fleet, Collateral Attack, ¶ 534, p. 7, ¶ 553, p. 5.

It is never necessary for the court to look into the consideration of a charter by a state, or to require proof of such consideration.

Home of the Friendless v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *New Jersey* v. *Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Gordon* v. *Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank* v. *Knoop*, 16 How. 369, 14 L. ed. 977; *Ohio Life Ins. & T. Co.* v. *Debolt*, 16 How. 416, 14 L. ed. 997; *Dodge* v. *Woolsey*, 18 How. 331, 15 L. ed. 401; *Mechanics' & T. Bank* v. *Thomas*, 18 How. 384, 15 L. ed. 460; *Mechanics & T. Bank* v. *Debolt*, 18 How. 380, 15 L. ed. 458; *McGee* v. *Mathis*, 4 Wall. 143, 18 L. ed. 314.

A decree, even if based upon a mistake of fact, cannot be set aside or impugned upon evidence *dehors* the record of that cause, or indirectly, or by a proceeding in any other forum or cause.

Van Fleet, Collateral Attack, ¶ 534, p. 7, ¶ 553, p. 5; *Morrill* v. *Morrill*, 20 Or. 96, 11 L.R.A. 155, 23 Am. St. Rep. 95, 25 Pac. 362; 12 Am. & Eng. Enc. Law, p. 1441.

A legal proceeding against persons who are using their official character as state officers in acting or attempting to act in the name of the state, by bringing a suit, under the pretended authority of an act of legislature, unconstitutional and void in its intent, cannot be held to be a suit against the state, in effect or in form. Such would be true if this were an original bill in equity, seeking to enjoin the parties so claiming to represent the state from bringing their suit in the state court. But it is not even such a case, and, on the contrary, is simply an application to the court, seeking the benefit of a decree already rendered, and asking the court to cause its own decree to be respected by executing the same, and is a proceeding auxiliary to such decree, and ancillary to the suit of *Humphrey* v. *Pegues*, 16 Wall. 244, 21 L. ed. 326, in which said decree was rendered.

Tindal v. *Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Pennoyer* v. *McConnaughy*, 140 U. S. 1–10, 35 L. ed. 363–365, 11 Sup. Ct. Rep. 699; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Davis* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *Litchfield* v. *Webster County*, 101 U. S. 773, 25 L. ed. 925; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 924; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. ed. 623; *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903. 962.

The statute forbidding the Federal courts to enjoin proceedings in state courts does not apply to proceedings incidental to jurisdiction properly acquired by a Federal court for other purposes than that of enjoining proceedings in a state court.

Garner v. *Second Nat. Bank*, 16 C. C. A. 86, 33 U. S. App. 91, 67 Fed. 833; *Central Trust Co.* v. *St. Louis, A. & T. R. Co.* 59 Fed. 385; *Terre Haute & I. R. Co.* v. *Peoria & P. Union R. Co.* 82 Fed. 943; *Fisk* v. *Union P. R. Co.* 10 Blatchf. 518, Fed. Cas. No. 4,830; *Wagner* v. *Drake*, 31 Fed. 849; *Sharon* v. *Terry*, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337; *French* v. *Hay* (*French* v. *Stewart*) 22 Wall. 250, 22 L. ed. 857; *Dietzsch* v. *Huidekoper* (*Kern* v. *Huidekoper*) 103 U. S. 494, 26 L. ed. 497; *Perry* v. *Sharpe*, 8 Fed. 24. See notes to Desty, Fed. Proc. 9th ed. § 240 (720), p. 802.

A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court.

Dietzsch v. *Huidekoper* (*Kern* v. *Huidekoper*) *supra*.

Where a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state, by its submission, allowed to be done; and if the law permits coercion of public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose.

Louisiana v. *Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Davis* v. *Gray*, *supra*.

Although the circuit court has no juris-

diction over the proceedings in a state court, yet the statute does not prevent it from releasing a defendant from process of a state court, violating its protection, or to prevent abuse of its privileges.

Bridges v. *Sheldon*, 18 Blatchf. 517, 7 Fed. 45; *Hurst's Case*, 4 Dall. 387, 1 L. ed. 878, Fed. Cas. No. 6,924.

So, a circuit court may restrain parties from taking out criminal process under a state law which impairs the obligations of contract.

Louisiana State Lottery Co. v. *Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541.

A Federal court may restrain proceedings in a suit in a state court, the injunction being merely an ancillary proceeding, and not forbidden by the statute.

Kern v. *Huidekoper*, 103 U. S. 485, 26 L. ed. 354.

Relief in equity has been granted where taxes are levied under a void law, contrary to the 14th Amendment, as against due process of law (*Coulson* v. *Portland*, Deady, 481, Fed. Cas. No. 3,275); again, in a case of a tax upon property exempt from taxation (*City Nat. Bank* v. *Paducah*, 2 Flipp. 61, Fed. Cas. No. 2,743).

Where an illegal tax upon personal property was imposed, the law imposing the tax being void, an injunction was issued.

Union P. R. Co. v. *Cheyenne* (*Union P. Co.* v. *Ryan*), 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601.

Injunctive relief will be granted against taxation of exempt property.

See note to *Odlin* v. *Woodruff*, 22 L.R.A. 703.

Mr. Justice **White** delivered the opinion of the court:

Before analyzing the facts particularly bearing upon the legal questions for decision, in order to a comprehension of those questions, we summarize, in their chronological order, matters which are undisputed concerning the origin and development of this controversy.

The legislature of South Carolina, in 1855, exempted the capital stock and property of the Northeastern Railroad Company from all taxation during its charter existence. In 1849 the Cheraw & Darlington Railroad Company was chartered by legislative act, and, by an amendment to the charter, adopted in 1863, the last-named company was endowed with all the powers, rights, and privileges granted by the charter of the Northeastern Railroad Company; it being besides provided that the charter should not be subject to the provisions of a general law, reserving the right to repeal, alter, and amend, except where otherwise specially provided.

Under the assumed authority of a law of South Carolina, providing for the assessment and taxation of property, passed in 1868 (14 S. C. Stat. pp. 27 to 69), the Cheraw & Darlington Railroad was assessed in the counties of Darlington and Chesterfield, through which the road ran. It became the duty of *the respective treasurers [278] of the counties named to collect the state and county taxes on the assessment thus made, and they proceeded so to do. Thereupon, in 1870, Thomas E. B. Pegues, a citizen of Mississippi, a stockholder of the Cheraw & Darlington Railroad, filed his bill in the circuit court of the United States for the district of South Carolina against the Cheraw & Darlington Railroad Company and the treasurers of Darlington and Chesterfield counties, seeking to enjoin the corporation from paying, and the county treasurers from collecting, the taxes referred to. The ground stated for the relief prayed was that the taxes in question impaired the obligation of the charter contract of exemption, and were, therefore, repugnant to the Constitution of the United States. Various provisions of a law of South Carolina, adopted in 1870, as an amendment to the act of 1868 under which the taxes were levied, restricting the right of the corporation to resist the collection of taxes, or to recover back an illegal tax, if paid, were alleged as justifying the interposition of a court of equity. An injunction *pendente lite* was allowed, restraining the collection of the disputed taxes. By its answer the corporation admitted the averments of the bill. A joint answer was filed for the two county treasurers, signed by "The Attorney General for the State of South Carolina, for defendants." This answer admitted the assessment, the steps taken to collect the taxes, and asserted their validity, and denied the existence of the alleged contract of exemption. It was averred that, if such an exemption ever existed, it was subject to the legislative power to repeal, alter, and amend, and such repeal was alleged to have been operated by constitutional and legislative provisions, which were referred to. Jurisdiction of the court in equity was challenged on the ground that there was an adequate remedy at law. A final decree passed in favor of the complainant, recognizing the alleged exemption, and perpetuating the injunction. An appeal was prosecuted to this court. The cause was decided at the December term, 1872. It was held that there was a contract of exemption, which would be impaired by enforcing the taxes *com- [279] plained of, and hence the decree below was affirmed. *Humphrey* v. *Pegues*, 16 Wall. 244, 21 L. ed. 326.

For at least twenty-five years following the decision in the *Pegues Case* no attempt

was made to tax the property of the Cheraw & Darlington Railroad Company. In the year 1897 an act was passed, directing the attorney general to proceed to test the right of any railroad company to exemption, and, under this act, that official sued the Cheraw & Darlington Railroad Company to recover $134,000, the sum of taxes, penalties, and interest for a period of twenty years, on the alleged ground that the company had been mistakenly treated as having a contract of exemption. The supreme court of the state, however, without passing upon the question of exemption, decided that the right to recover did not obtain, because, in any event, an assessment against the railroad, as provided by law, was a prerequisite to the levy and collection of taxes.

From a statement made in the argument of counsel, it is to be deduced that during the year 1898 the capital stock and property of the Cheraw & Darlington Railroad Company was acquired by the Atlantic Coast Line Railroad Company of South Carolina, and, as the result of a charter granted to that company by the state of South Carolina, in 1898, it is conceded that the property formerly belonging to the Cheraw & Darlington Railroad Company became taxable, and that the state has, since that time, levied and collected the taxes due on the property. It is, moreover, conceded that the appellee on this record, the Atlantic Coast Line Railroad Company, a Virginia corporation, acquired, in 1900, the property of the Cheraw & Darlington Railroad Company, as the successor of the South Carolina corporation which bore the same name.

In the year 1900 an act was passed in South Carolina, providing for the assessment for taxation of railroad property "which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due, and for the collection thereof."
[280] The act *created a board to make the assessment to which it referred, limited the taxes to be imposed to ten years back, provided that the assessment made by the board should be put upon the rolls separately for each of the back years, and that there should be levied upon such assessment state and county taxes for the years to which the back assessment related. The act caused the taxes for which it provided to become a lien against the property upon which they might bear, and directed a certification of the taxes as assessed and levied to the respective county treasurers, and made it their duty to collect the same. To this end such treasurers were directed to make a demand for payment upon the company in whose name the assessment was made, or, if it was found that the property assessed was "in the control of another company, demand should be made of the company . . . in possession of the property." By the act, in addition, the attorney general was directed, if the back taxes assessed were not paid within sixty days after demand, to bring a suit in the name of the state, with the co-operation of such counsel as the counties might employ, to enforce the collection of the back taxes against the company in whose name they were assessed, or against the company found in possession of the property assessed.

A meeting of the board appointed by this act was called in May, 1900, by the secretary of state, for the purpose of assessing the property formerly belonging to the Cheraw & Darlington Railroad Company, and in the control and possession of the Atlantic Coast Line Railroad, for a period of ten years back from 1898, on the ground that, during such period, the property in question had not been taxed for state or county purposes. The Atlantic Coast Line Railroad Company appeared and protested against the proposed assessment. In the protest it directed the attention of the board to the exemption act, to the injunction granted, and the decree rendered and affirmed by this court in the *Pegues Case*. The board overruled the protest and valued the property of the Cheraw & Darlington Railroad Company for a period of ten years back from 1898, *inclusive. The valuation [281] so made was certified to the officials of the counties of Chesterfield, Darlington, and Florence, respectively, these three counties embracing the territory included in the counties of Chesterfield and Darlington at the time the decree was rendered in the *Pegues Case*. The state and county taxes for the years covered by the assessments were placed upon the rolls, and the taxes were certified for collection to the county treasurers. These officers demanded payment of the Atlantic Coast Line Railroad, as the company in possession and control of the property taxed. The company refusing to pay, the attorney general of the state of South Carolina, and counsel associated with him, commenced, in the common pleas court in the respective counties, actions in the name of the state to enforce payment against the Cheraw & Darlington Railroad Company and the Atlantic Coast Line Railroad Company, as the corporation in possession of the property. Thereupon the Atlantic Coast Line Railroad Company, alleging itself to be a citizen of Virginia, commenced, in the circuit court of the United States for the district of South Carolina, the proceeding which is now before us against the attorney general of the state, the counsel associated with him in the suits

above referred to, and the treasurers of Chesterfield, Darlington, and Florence counties. The petition which initiated the proceeding was filed as ancillary to the original *Pegues Case*, and was entitled and numbered as of that cause. It referred to the prior proceedings in the cause, including the perpetual injunction therein issued, and to the decree of this court which affirmed the same. It alleged the assessment of back taxes as above stated, the asserted lien resulting therefrom, the demand of payment, and the suits brought to enforce payment, and charged that each and all of the acts done concerning the said assessment of the back taxes, including the bringing of the actions in the state court, were in direct violation and disregard of the injunction previously issued. The prayer was that the petitioner, as successor in interest of Pegues, be protected in the rights and privileges adjudged in the
[282] *Pegues* *Case, and be accorded the benefit of the injunction issued in that case, and to that end that the attorney general of the state and his associate counsel be enjoined from further prosecution of the actions commenced in the state courts in the name of the state, to enforce payment of the taxes, and that the respective county treasurers be enjoined from any further attempt to collect such taxes.

A preliminary injunction was granted, restraining the attorney general and his associate counsel from further prosecuting the actions brought in the state court, and also restraining the county treasurers from further proceeding to collect the taxes. In response to a rule to show cause why the preliminary injunction should not be made perpetual, the defendants answered, denying the right to the relief prayed upon grounds which, as far as now material, we shall hereafter state and consider. After hearing on petition and answers, accompanied by affidavits or admissions establishing the facts to be as we have previously stated them, a final decree was entered, perpetuating the preliminary injunction. Subsequently the court, reciting that its attention had been directed to the fact that its decree was interpreted as restraining the prosecution of suits for any tax which might have accrued from the 18th day of July, 1898, when the exemption had been surrendered, modified its decree so as to exclude from the operation of the injunction any act of the defendants looking to the collection, "by suit or otherwise, of any sum or sums of money which may be due or charged for taxes on said property of the Cheraw & Darlington Railroad Company after said 18th day of July, 1898, at which date it was admitted in argument the exemption established in *Humphrey* v. *Pegues* was surrendered." This appeal was then taken.

Although the errors assigned on the record are seventeen in number, in the argument at bar but six contentions were relied upon, and we shall therefore confine ourselves to their consideration.

All the propositions involved in the assignments will be disposed *of by determin- [283] ing first, whether all the defendants on this record, including the state, through its attorney general, were parties or privies to the decree in the *Pegues Case;* second, if they were, whether the decree in that case concluded against them the want of power to impose or collect the taxes in controversy; and, third, if it did so conclude them, whether the court below erred in granting the relief which it awarded.

First. We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the *Pegues Case*, since it is conceded in the argument at bar that that company, as the successor to the rights of Pegues, is entitled to the protection of the original decree rendered in his favor.

On the face of the record in the *Pegues Case*, the nominal defendants were the treasurers of the counties of Chesterfield and Darlington, in which counties the property of the railroad was situated. Those now holding the office of treasurer in each of the named counties are among the parties on this record, with the addition of the treasurer of Florence county, which county, as we have stated, consists of territory embraced in Chesterfield or Darlington county at the time of the entry of the Pegues decree. That, under these circumstances, the defendant treasurers, as the successors in office of the officials who were parties to the *Pegues Case*, are privies to that decree, is established. *Prout* v. *Starr*, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. Rep. 398.

In deciding whether the state and its attorney general were privies to the Pegues decree, some elementary propositions must be borne in mind.

a. In view of the prohibitions of the 11th Amendment to the Constitution of the United States, a state, without its consent, may not be sued by an individual in a circuit court of the United States.

b. A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a state, within the prohibition of the 11th Amendment. The doctrine announced in *many [284] previous cases on the subject was stated by Mr. Justice Harlan, delivering the opin-

ion of the court in *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, wherein, after holding that a suit against officers to prevent the doing of acts authorized by a state statute was not necessarily a suit against the state, or within the prohibitions of the 11th Amendment, it was said (pp. 518, 519, L. ed. p. 839, Sup. Ct. Rep. p. 423):

"It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state, within the meaning of that amendment."

And the subject was reviewed and restated in *Prout* v. *Starr*, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

c. Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily become a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment. *Clark* v. *Barnard*, 108 U. S. 436, 447, 27 L. ed. 780, 784, 2 Sup. Ct. Rep. 878.

As, then, the state was not a party *eo nomine* in the *Pegues Case* and as, although the suit was against officers, it was not, for that reason alone, a suit against the state, it must follow that the ascertainment of whether the state was a party to that cause depends upon determining whether the taxing officers, who were the nominal defendants, were endowed by the state with the power, in a suit brought against them assailing the validity of taxes levied, to represent the state in the controversy so as to conclusively establish the rights of the state against the plaintiff if decree passed against him, and, on the other hand, to establish, as against the state, the rights of the plaintiff in that cause if decree passed in his favor. Thus the inquiry reduces itself to this: Did the state of South Carolina become, in substance and effect, a party to the *Pegues Case?* In other words, Did the state, through the authority which it had conferred upon the defendant
[285] officers, voluntarily submit *to judicial determination the question raised in the *Pegues Case* concerning the alleged limitation of the taxing power of the state, arising from the contract on that subject which was asserted in that case?

As a prelude to the consideration of the question just stated, it is well to determine at once the interest which the state had in the controversy which was represented by the county treasurers, who were the nominal defendants in the *Pegues Case*. Coming to do so, it is plain that the controversy which that suit involved was one in which the state was directly interested, since the officers who were the nominal defendants were charged by the state law, not only with the duty of collecting the county, but also the state, taxes, the validity of which was assailed on grounds which challenged the power of the state to impose any tax upon the property of the corporation during the existence of its charter. The officers were, therefore, in a sense, state officers, charged with the performance of a duty imposed for the benefit of the state. And that those officers were considered as being *pro hac vice* state officers, for the purposes of the controversy which the *Pegues Case* involved, is shown by the statement of the case made by this court in delivering its opinion affirming the decree. Thus it was said (16 Wall. 245, 246):

"These different enactments above mentioned being in force, the state officers of counties in South Carolina, where the Cheraw & Darlington Railroad was situate, acting under the authority of the legislature of the state, imposed certain taxes on the stock and property of that company, and were proceeding to enforce payment of them, when one Pegues, a stockholder in Mississippi, filed a bill in the court below, praying an injunction to restrain the collection."

The question, then, is narrowed to this: Were the officers endowed with authority to stand in judgment for the state in suits brought against such officers, wherein the validity of the taxes was assailed?

The law of South Carolina under which the taxes were levied *was adopted in 1868. [286]
Now, by § 137 of that act (14 S. C. Stat. 65), the county auditors and county treasurers were authorized to employ counsel, and the counties were made liable for the fees of such counsel, as well as for any damages which might be awarded against such officials, resulting from a defense made by them of any action prosecuted against the officials "for performing or attempting to perform any duty enjoined upon them by this act, the result of which action will affect the interests of the county, if decided in favor of the plaintiff in such action." It follows from this provision that where a suit was brought against a county treasurer in respect to county taxes, that official was empowered to represent the county for the purpose of the defense of its interest, and a judgment rendered against such official was therefore made binding upon the county. It was further provided in the section that "if the state be interested in the revenue in said action,

the county auditor shall immediately, upon the commencement of said action, inform the auditor of state of its commencement, of the alleged cause thereof, and the auditor of state shall submit the same to the attorney general, who shall defend said action for and on behalf of the state."

We see no escape from the conclusion that the provision last quoted, where suit was brought concerning state taxes, made a county treasurer, who was the state tax collector, an agent for the state, and empowered him, "for and on behalf of the state," to defend the suit, and required him, in order fully to protect the interests of the state, to be represented by the highest law officer of the state,—the attorney general. And the power which we think the section referred to conferred upon the county officers to represent the state in suits or actions is, moreover, persuasively indicated by a consideration of the act of 1870, amending in certain particulars the act of 1868. 14 S. C. Stat. 366. Substantially, that amendment, whilst forbidding the taxpayer from enjoining the collection of taxes, created a remedial system, by which questions of asserted illegality were to be examined by the state auditor, and, [287] where that official *disallowed the claim of illegality, made it the duty of the taxpayer to pay, and, subject to certain conditions, gave a right of action to recover back the money paid. And by § 8, where such an action was brought, it was made "the duty of the attorney general of the state to defend any suit or proceedings against any tax collector or other officer who shall be sued for moneys collected, or property levied on, or sold on account of any tax, when the state auditor shall have ordered such collector to proceed in the collection of any such tax, . . . and any judgment against such collector or officer finally recovered shall be paid in the manner provided in § 81 of the act to provide for the assessment and taxation of the property aforesaid,"—that is, § 81 of the act of 1868. Now, by that section, where a judgment passed against a county official concerning state taxes which had been paid, the state was, in effect, made liable for the amount of the judgment. Thus, in such a case, as in cases provided for in § 137 of the act of 1868, the state, through its officials, was made the real defendant.

If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the *Pegues Case*, and by the action as well as nonaction which followed the decision of that case by the state government in all its departments through a long period of years.

The answer in the *Pegues Case*, which denied the existence of the alleged contract of exemption, and asserted the existing and continuing power of the state to tax, was signed, for the defendants, by the attorney general of South Carolina, who also, in his official capacity, verified such pleading. The word "defendants" cannot be construed as implying any other than the county officers empowered to represent the state, without imputing to the attorney general a failure to discharge the *duty [288] directly imposed upon him by the state. This must result from the command of the statute, that he should defend the suit, the state revenue being concerned, not merely for the county officers, but "for and on behalf of the state,"—a command which would have been wholly disregarded if the appearance of the attorney general be treated as having been made solely for the purpose of representing the defendants as individuals. And subsequent events show that the highest law officer of the state, when he filed the answer for the defendants in the *Pegues Case*, intended that answer to be what the statute caused it to be,—that is, an answer for the defendants, standing upon the record, for and in behalf of the state, in defense of the right of the state to collect the taxes. When the appeal was prosecuted from the final decree, perpetually enjoining the officials who were named as the defendants (and, as we have seen, their successors in office) from any attempt in the future to collect a tax upon the property of the Cheraw & Darlington Railroad Company, such appeal was prayed by the same counsel who had signed the answer as attorney general of the state, and who, upon the expiration of his term of office, was retained by his successor in office and the governor of the state (as shown by an official report made to the legislature of the state) to prosecute the appeal, and "to appear in behalf of the state." And when the appeal was heard in this court a printed argument was signed, not only by the counsel thus retained on behalf of the state by the governor and the attorney general, but also by the then incumbent of the office of attorney general of the state. That this court, in deciding the appeal in the *Pegues Case*, considered that the state was the real party appellant, is shown by the opinion, where it was said (p. 247, L. ed. p. 326):

"The state contends that the privileges thus granted were limited to those conferred upon the Northeastern by its orig-

inal charter or act of incorporation, passed in 1851."

When, to all these conclusive considerations, there is added the fact that we have not been referred to any legislative action [289] *repudiating the conduct of the governor and the attorney general in the defense of the Pegues suit for and on behalf of the state, and when, besides, we take into account the failure of the state government, in all its departments, for more than twenty-five years following the decision of the *Pegues Case*, to assert any right to tax in conflict with the contract exemption which the Pegues decree sustained, the binding efficacy of the decree in that case upon the state of South Carolina seems to us beyond the reach of serious controversy. Indeed, we are not left to conjecture that the inaction of the state was the result of what was deemed to be the conclusive effect on the state of the Pegues decree, since it is shown that in one or two instances after that decree was rendered, where preliminary steps were taken by the taxing officials of the state to impose taxes on the property of the railroad, such efforts were at once abandoned in consequence of the advice of attorneys general of the state that the decree in the *Pegues Case* was conclusive, and the property could not be taxed.

Concluding, as we do from the terms of the act of 1868, that the officers who were named as defendants in the *Pegues Case* were, for the purpose of that litigation, the agents voluntarily appointed by the state to defend its rights and submit them to judicial determination, we content ourselves with saying that it is unnecessary to review the case of *State* v. *Corbin*, 16 S. C. 533, and other decisions of the supreme court of South Carolina, pressed upon our attention, since those cases did not involve the statute of 1868 or statutes of like import. And, moreover, we must not be understood as holding that other provisions of the law of South Carolina, relied upon in argument, would be inadequate to bind the state by the action of its attorney general, if the provisions of the act of 1868 did not exist. Into that consideration we have not entered.

Second. The state of South Carolina and its attorney general, and his associate counsel, as the agents of the state, being, therefore, privies to and bound by the decree in the *Pegues Case*, we must determine [290] what was concluded by that decree. *That the issue in the case was the existence of a charter exemption from taxation in favor of the Cheraw & Darlington Railroad Company, and the consequent want of power of the state to tax the property of the railroad during the continuance of the exemption, is obvious. And that the decree rendered in the cause established the exemption embraced in the issues is also obvious. This being true, it unquestionably follows that the decree established as to the parties and their privies the very question in issue in this proceeding. Escape from this inevitable result is sought to be accomplished by several propositions, all of which we think are unsound.

a. The complaint in the *Pegues Case*, it is said, mistakenly averred that the Cheraw & Darlington Railroad had not been built at the time the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the attorney general, it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established, a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the *Pegues Case*, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. *United States* v. *California & O. Land Co.* 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300, 49 L. ed. 193, 210, 25 Sup. Ct. Rep. 58, *et seq.*, and cases cited. And although it be conceded for the sake of argument that the doctrine of *res judicata*, as announced in rulings of the supreme court of South Carolina, lend support to the contention made, our duty is to give to the decree of the circuit court of the United States in the *Pegues Case* the force and effect to which it is entitled under the principles of *res judicata* as settled by this court, especially in view of the fact that the controversy in the *Pegues Case* involved *rights protected by [291] the Constitution of the United States. *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

b. It is urged that as the taxes, the collection of which the court enjoined, were not for the same years as were the taxes with which the *Pegues Case* was concerned, the Pegues decree was, therefore, not *res judicata*, because it related to a different cause of action. This rests upon the assumption that a decree enjoining the collection of a tax for one year can never be the thing adjudged as to the right to collect taxes of a subsequent year. But the proposition entirely disregards the fact that

the decree in the *Pegues Case*, enjoining the collection of the taxes in controversy in that case, was rested upon the ground that there was a contract protected from impairment by the Constitution of the United States which was as controlling on future taxes as it was upon the particular taxes to which the Pegues suit related. The contention, therefore, simply asserts that a contract right of exemption was beyond the pale of judicial protection, because rights under such contract could never be sanctioned by final judicial action. Besides, the proposition is not open to controversy. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

Third. It is insisted that the court below had no power to restrain the attorney general of South Carolina and the counsel associated with him from prosecuting, in the state courts, actions authorized by the laws of the state, and hence that the court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the 11th Amendment and the provisions of § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581), forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted. *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statutes was originally adopted in
[292] 1793, *whilst the 11th Amendment was in process of formation in Congress for submission to the states, and long, therefore, before the ratification of that amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the 11th Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a state, with controversies between it and individuals. None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction, and its want of authority to entertain a controversy as to which jurisdiction is not possessed. From this it follows that, as in the *Pegues Case*, the court had acquired jurisdiction, with the assent of the state of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain. In other words, the proposition relied upon is disposed of by the conclusion which we have previously expressed concerning the persons who were parties and privies to the decree rendered in the *Pegues Case*. Indeed, the proposition that the 11th Amendment, or § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581), control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. *Dietzsch* v. *Huidekoper* (*Kern* v. *Huidekoper*) 103 U. S. 494, 26 L. ed. 497; *Prout* v. *Starr*, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; *Julian* v. *Central Trust Co.* 193 U. S. 93, 112, 48 L. ed. 629, 639, 24 Sup. Ct. Rep. 399.

And this reasoning disposes of the con-
[293] tention that the court *below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the state courts to the actions brought by the attorney general. That question was foreclosed by the decree in the *Pegues Case*. So also does the reasoning dispose of the assertion that, because a part of the tax for the year 1898 may have been due, therefore tender should have been made before invoking the power of the court to protect its jurisdiction and enforce the prior decree. The amendment of the decree made by the court eliminated from the controversy all question concerning the portion of the tax not covered by the decree in the *Pegues Case*. Having acquired by that decree a right which the petitioner was entitled to enforce, whatever might have been the rule of tender as applied to other cases, that rule could not rightly be invoked to deprive the court below, as a court of equity, of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court.

Affirmed.

Mr. Justice **Brown** dissents.

W. H. CARFER, Sheriff of Wood County, West Virginia, *Appt.*,
v.
C. T. CALDWELL.

(See S. C. Reporter's ed. 293–297.)

Habeas corpus—jurisdiction of Federal courts.—The Federal courts have no jurisdiction to release, by habeas corpus, a person held in the custody of the state authorities to answer for a contempt in refusing to appear and testify before a legislative investigating committee, either because such a committee cannot sit in vacation, or because the subject for investigation is excluded from the jurisdiction of the legislature by the provision of the state Constitution for the separation of legislative, executive, and judicial powers, since no question under the Federal Constitution or laws is involved.

[No. 360.]

Submitted January 8, 1906. Decided January 22, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of West Virginia to review an order discharging, on habeas corpus, a person held in the custody of the state authorities to answer for a contempt in refusing to appear and testify before a legislative investigating committee. *Reversed* and remanded, with directions to quash the writ and dismiss the petition.

See same case below, 138 Fed. 487.

The facts are stated in the opinion.

Messrs. **Lawrence Maxwell, Jr.,** and **William E. Chilton** submitted the cause for appellant:

The Federal courts have no authority to discharge a person held for contempt by a committee of the legislature of a state, acting in pursuance of a law of the state and a resolution passed by a branch of the legislature, on the ground that such law and resolution are repugnant to the Constitution of the state.

Re Burrus, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850; *Andrews* v. *Swartz*, 156 U. S. 272, 275, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; *Storti* v. *Massachusetts*, 183 U. S. 138, 142, 46 L. ed. 120, 124, 22 Sup. Ct. Rep. 72.

The committee was acting under a resolution duly passed by the house of delegates, and in pursuance of a law of the state, giving power to committees of either house, authorized to sit during recess, to enforce obedience to summonses issued by them; and if they did not have the power which they assumed to exercise, it was because the resolution or law or both were repugnant to the Constitution of the state, and not because they were in conflict with the Constitution or any law or treaty of the United States.

Dreyer v. *Illinois*, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28; *Reetz* v. *Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

Mr. **C. T. Caldwell,** *in propria persona*, submitted the cause for appellee. *Messrs. J. G. McClure, Reese Blizzard,* and *Caldwell & Watson* were on his brief:

"Due process of law" undoubtedly means in the due course of legal proceeding according to those rules and forms which have been established for the protection of private rights.

Cooley, Const. Lim. 6th ed. p. 433; Note to *Pearson* v. *Yewdall*, 24 L. ed. U. S. 436; *Portland* v. *Bangor*, 65 Me. 120, 20 Am. Rep. 681. See also *Hurtado* v. *California*, 110 U. S. 516, 536, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292.

In cases where the right of appeal seems inadequate by reason of its delay, the court may hold the person entitled to habeas corpus as a means of speedy determination of the question.

Ex parte Kieffer, 40 Fed. 399.

In general, the writ may be issued by Federal courts in every case where a party is restrained of his liberty without due process of law in the territorial jurisdiction of such court.

Ex parte Farley, 40 Fed. 66; *Re Neagle* (*Cunningham* v. *Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *New York* v. *Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Re Huse*, 25 C. C. A. 1, 48 U. S. App. 318, 79 Fed. 305.

There is no question as to the jurisdiction of the Federal court in proceedings involving the life, liberty, and property of the aggrieved citizen.

State v. *Sponaugle*, 45 W. Va. 424, 43 L.R.A. 727, 32 S. E. 283.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an appeal from a final order of the circuit court in habeas corpus, discharging Charles T. Caldwell, a citizen of West Virginia, from custody, taken on the ground that the circuit court was without jurisdiction, as a court of the United States, to issue the writ or discharge the petitioner,—the question of jurisdiction being certified. The case was heard on the petition, the return, and the exhibits attached. It appeared therefrom, in brief, that at a regular biennial session *of the legislature [296]

NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

of West Virginia, the house of delegates passed a resolution instructing the speaker of the house to appoint a committee of three members "to investigate fully and thoroughly" certain charges and matters set forth therein. The committee was instructed by the resolution to meet as soon as practicable and select one of its members chairman; was given leave to sit after the adjournment of the session; and was empowered "to compel the attendance of witnesses, and to send for persons and papers, to appoint a sergeant at arms, necessary stenographers and clerks, and to employ such counsel as may be necessary to conduct said investigation."

The committee organized, and summoned Charles T. Caldwell to appear before them "to testify, and the truth to speak, of and concerning the matters and things in said resolution to be inquired of." He refused to appear, and was taken into custody by W. H. Carfer, sheriff of Wood county, West Virginia, in pursuance of an order of attachment issued by the committee to bring him before them to answer for his contempt for failing to attend and testify. This writ was issued and Caldwell was discharged. 138 Fed. 487.

The jurisdiction of courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations. *Re Burrus*, 136 U. S. 586, 591, 34 L. ed. 500, 502, 10 Sup. Ct. Rep. 850; *Andrews* v. *Swartz*, 156 U. S. 272, 275, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; *Storti* v. *Massachusetts*, 183 U. S. 138, 142, 46 L. ed. 120, 124, 22 Sup. Ct. Rep. 72.

And it did not appear in this case that petitioner was restrained in violation of the Constitution or any law or treaty of the United States.

The circuit court held that the house of delegates had no power, under the Constitution of West Virginia, to appoint a committee for the purpose of investigating the matters set forth in the resolution, and to clothe it with power to sit and compel the attendance of witnesses in vacation, but took jurisdiction, nevertheless, on
[297] the ground that the condition was *so "extraordinary" as to "warrant the intervention of the first court, state or Federal, applied to." This view ignored the settled law that a circuit court of the United States has no jurisdiction to issue the writ to release a citizen from imprisonment by another citizen of the same state, merely because the imprisonment is wrongful. The committee was acting under a resolution of the house of delegates, and in pursuance of a law of the state, giving power to committees of either house, authorized to sit during recess, to enforce obedience to summonses issued by them; and if they did not have the power they assumed to exercise, it was because the resolution or law, or both, was or were repugnant to the state Constitution, and the courts of the state are the appropriate tribunals for the vindication of the state Constitution and laws.

The circuit court was of opinion that the subject which the committee was appointed to investigate was not within the jurisdiction of the legislature, as defined by article 5 of the Constitution of West Virginia, declaring that "the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." But that objection does not "present any question under the due process of law clause of the 14th Amendment." *Dreyer* v. *Illinois*, 187 U. S. 71, 83, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28; *Reetz* v. *Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

Viewed in any aspect, we perceive no ground on which Caldwell's case can be considered as arising under the Constitution and laws of the United States.

Final order reversed and cause remanded with a direction to quash the writ and dismiss the petition.

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*U. C. GUSS, J. W. McNeal, W. H. Gray, and Frank H. Greer, *Appts. and Plffs. in Err.*, [298]

v.

J. T. NELSON.

(See S. C. Reporter's ed. 298–303.)

1. **Appeal—distinction between appeal and writ of error.**—Writ of error, and not appeal, is the proper method of obtaining a review in the Supreme Court of the United States of a judgment of the Oklahoma supreme court, affirming a judgment of the trial court, in an action on a contract, tried by the court without a jury.

2. **Contracts—options.**—The option given by an agreement for a transfer of corporate stock, together with the owner's proxy as director, in consideration of a specified sum "to be considered an option," running until a given date, when an additional sum is to be paid, or, in lieu thereof, all the property

NOTE.—*On the distinction between appeals and writs of error*—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

As to the rights conferred by a refusal or option—see note to Litz v. Goosling, 21 L.R.A. 127.

delivered under the agreement is to be returned,—is not an option to purchase, but one to return; and, if not exercised at the time named, the sale is complete, and the promise to pay the purchase price becomes absolute.

[No. 124.]

Argued and submitted December 12, 1905. Decided January 15, 1906.

APPEAL from, and in error to, the Supreme Court of the Territory of Oklahoma, to review a judgment affirming a judgment of the District Court of Logan County, in that territory, in favor of plaintiff in an action to recover the purchase price named in an option contract, which was tried by the court without a jury. Appeal *dismissed.* Judgment *affirmed* on writ of error.

See same case below, 14 Okla. 296, 78 Pac. 170.

Statement by Mr. Justice **Brewer:**

On May 28, 1900, at Guthrie, Oklahoma territory, the parties to this action entered into the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek, and Broken Arrow Mining Companies, to the following persons: U. C. Guss, W. H. Gray, F. H. Greer, and J. W. McNeal. The consideration of the delivery under which the above-listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above-named companies, the seals and other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above-named property, and additional property in the way [299] of stock hereinafter listed. The *$500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above-named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand, five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above-mentioned 25 per cent of the capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:"

(Here follows a list of companies and number of shares of stock in each.)

"The $500.00 above mentioned is to be earnest money, to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above-named companies until such time as it may be convenient for him to resign and Guss or someone else be elected to fill the vacancy."

On April 6, 1901, Nelson brought suit in the district court of Logan county, Oklahoma territory, to recover the additional sum named in the contract. After answer the case was tried by the court without a jury, and judgment rendered in his favor on February 20, 1903, for $4,500 and interest. This was affirmed by the supreme court of the territory (14 Okla. 296, 78 Pac. 170), and its judgment was brought here both by appeal and writ of error.

Mr. **A. G. C. Bierer** argued the cause, and, with *Mr. Frank Dale*, filed a brief for appellants and plaintiffs in error:

The fact of possession of the stock by the defendants, and the failure to return it, could not be held to be an election to keep, to purchase, and to pay for the stock under the optional contract.

Wailes v. *Howison*, 93 Ala. 375, 9 So. 594; *Ide* v. *Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 697; *Gordon* v. *Swan*, 43 Cal. 564; *Sargent* v. *Gile*, 8 N. H. 325; *Ludden & B. Southern Music House* v. *Dusenbury*, 27 S. C. 464, 4 S. E. 60.

Mr. **W. R. Biddle** submitted the cause for appellee and defendant in error. *Messrs. Selwynn Douglas, George S. Green,* and *H. B. Martin* were on his brief:

On failure of defendants to return the stock within the specified time, they were liable for the price.

Foley v. *Felrath*, 98 Ala. 176, 39 Am. St. Rep. 39, 13 So. 485; *Tennessee R. Transp. Co.* v. *Kavanaugh*, 93 Ala. 324, 9 So. 395; *Buswell* v. *Bicknell*, 17 Me. 344, 35 Am. Dec. 262; *Crocker* v. *Gullifer*, 44 Me. 491, 69 Am. Dec. 118; *McKinney* v. *Bradlee*, 117 Mass. 322; *Hunt* v. *Wyman*, 100 Mass. 198; *Potter* v. *Lee*, 94 Mich. 140, 53 N. W. 1047; *Henderson* v. *Wheaton*, 139 Ill. 581, 28 N. E. 1100; *Texas & P. R. Co.* v. *Marlor*, 123 U. S. 687, 31 L. ed. 303, 8 Sup. Ct. Rep. 311; *Orvis* v. *Waite*, 58 Ill. App. 504; *Page* v. *Shainwald*, 169 N. Y. 246, 57 L.R.A. 173, 62 N. E. 356; *Stevens* v. *Hertzler*, 109 Ala. 423, 19 So. 841; 5 Wait, Act. & Def. 551; *Moss* v. *Sweet*, 16 Q. B. 493; *Jameson* v. *Gregory*, 4 Met. (Ky.) 363; *Spickler* v. *Marsh*, 36 Md. 222; *Schlesinger* v. *Stratton*, 9 R. I. 578; *Buffum* v. *Merry*, 3 Mason, 478, Fed. Cas. No. 2,112; *Chamberlain* v.

Smith, 44 Pa. 431; *Hall* v. *Ætna Mfg. Co.* 30 Iowa, 215; *Haskins* v. *Dern*, 19 Utah, 89, 56 Pac. 953; 21 Am. & Eng. Enc. Law, p. 647; 2 Benjamin, Sales, § 915, note 30, p. 796.

Mr. **W. P. Dillard** also submitted the cause for appellee and defendant in error. *Messrs. W. R. Biddle* and *George S. Green* were on his brief.

Mr. Justice **Brewer** delivered the opinion of the court:

The appeal must be dismissed. *Oklahoma City* v. *McMaster*, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324.

Considering the writ of error, we remark that no rulings were made in respect to the admission or rejection of testimony presenting anything worthy of consideration. No special findings of fact were made by either the district or supreme court, the former finding generally the issues in favor of the plaintiff, and rendering judgment upon such general finding, and the latter merely discussing the right of recovery upon the pleadings and such general finding.

Plaintiffs in error contend that this is a mere option contract, and that no liability could attach to them except upon an election to purchase the property, which they never made, but, on the contrary, declined to make, and notified the plaintiff thereof by letter. They call attention to the clause providing that "the $500 is to be considered an option," refer to the fact that there is nothing in the contract in terms mentioning "sale" or "purchase." There is always danger in applying a generic term to a contract, and then subjecting it to the general rules controlling contracts of that nature, irrespective of its special stipulations. While an option is given by the contract, and the price paid for the option is named, yet it contains other clauses which are equally binding, and from which liability arises. Option contracts are not all alike. As said in *Hunt* v. *Wyman*, 100 Mass. 198, 200, quoted approvingly by this court in *Sturm* v. *Boker*, 150 U. S. 312, 329, 37 L. ed. 1093, 1100, 14 Sup. Ct. Rep. 99, 104:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return."

[303] *In the contract before us, while an option running until the 4th of March, 1901, is given, for which $500 is to be paid, the stipulation for such option is followed by this: "At that date the above-named parties are to pay to Nelson an additional sum of $4,500 (four thousand, five hundred dollars), or, in lieu thereof, to turn back to said Nelson all the property delivered by him." Here is an absolute promise on the part of plaintiffs in error to pay an additional sum of $4,500 at a specified date, or, in lieu thereof, to turn back the property. They did not return the property. The amount to be paid and the time of payment are expressly named, and that stipulation in the contract is as significant and binding as any other. It shows that the option given is an option to return, and that, if it is not exercised at the time named, the sale is complete, and the promise to pay the balance of the purchase price becomes absolute. This construction of the contract is reinforced by the fact that not only was the stock to be delivered to the plaintiffs in error, but also Nelson agreed to give, and did give, his proxy as director in each of the companies, so that the possession of the stock and all the rights which attached to it passed to the plaintiffs in error, to be exercised by them subject to the right at any time before the 4th of March to return the property. *Haskins* v. *Dern*, 19 Utah, 89, 56 Pac. 953, is directly in point.

We see no error in the ruling of the Supreme Court of Oklahoma, and its judgment is affirmed.

Mr. Justice **McKenna** took no part in the decision of this case.

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*SAN ANTONIO TRACTION COMPANY, [304]
Plff. in Err.,
v.
GEORGE A. ALTGELT.

(See S. C. Reporter's ed. 304–310.)

1. Municipal corporations—legislative control—power to charter street railway.—The power to charter a street railway was not withdrawn from the legislature by Tex. Const. 1876, art. 10, § 7, providing that "no law shall be passed by the legislature, granting the right to construct and

NOTE.—*As to the power of the legislature to impose burdens upon municipalities and to control their local administration and property*—see note to State *ex rel.* Bulkeley v. Williams, 48 L.R.A. 465.

On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On contract exemptions from legislative power to fix tolls, rates, or prices—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway," but such power still exists, provided the consent of the local authorities be first acquired.

2. **Constitutional law—impairment of contract obligations—legislative regulation of street railway rates.**—The requirement that street railway companies shall issue half-fare tickets to school children, which is made by Tex. act April 10, 1903, § 2, does not impair the obligation of any contract with the municipality, fixing the rates which such company might charge, entered into after the adoption of Tex. Const. 1876, which, by § 17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority.

3. **Constitutional law—impairment of contract obligations—legislative regulation of street railway rates.**—Any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of the Texas Constitution of 1876, which, by § 17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority, was lost by the sale of its property on foreclosure, and the acquisition of its franchise, under a municipal ordinance, together with that of another company, by a new corporation, incorporated since the adoption of such Constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations were conferred on the new one, including all the limitations, contracts, and obligations.

[No. 131.]

Argued December 13, 1905. Decided January 22, 1906.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment affirming a judgment of the District Court of Bexar County, awarding a peremptory mandamus to compel a street railway company to issue half-fare tickets. *Affirmed.*

See same case below (Tex. Civ. App.) 81 S. W. 106.

Statement by Mr. Justice **Brown:**

This was a petition by Altgelt, suing by his next friend, originally filed in the district court of Bexar county, for a peremptory mandamus against the traction company, a Texas corporation operating a street railway system, commanding it to issue to the plaintiff twenty half-fare street car tickets upon the payment of 50 cents, the same being at the rate of 2½ cents per ticket.

Both parties relied upon the legal effect of certain legislation of the state of Texas hereafter set forth. The mandamus was granted by the district court, whose action was affirmed by the court of civil appeals. An application for a writ of error from the supreme court was denied.

Mr. **Charles W. Ogden** argued the cause and filed a brief for plaintiff in error:

The power to grant to street railways the property right and franchise to construct and operate a street railway within a city is withdrawn from the legislature by Tex. Const. 1876, art. 10, § 7, and conferred, if not by expressed words, then by necessary implication, upon the municipal authorities.

Houston v. *Houston City Street R. Co.* 83 Tex. 545, 29 Am. St. Rep. 679, 19 S. W. 127; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 369, 46 L. ed. 595, 22 Sup. Ct. Rep. 410; *Taylor* v. *Dunn*, 80 Tex. 659, 16 S. W. 732.

A franchise granted by municipal authorities in the exercise of a power conferred directly by the Constitution cannot be destroyed or impaired by the legislature because and for no other reason than that the same Constitution which vested this particular power in the municipal body reserved to the legislature the power to control the privileges granted by it or under its authority.

Detroit v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *City Water Co.* v. *State*, 88 Tex. 600, 32 S. W. 1033.

The exclusive power conferred by § 7 of article 10 of the Constitution of Texas upon the city authorities to control the use of the streets of the city by street railway companies necessarily involves the right to enter into a contract with a street railway company, imposing upon it such burdens and obligations, and conferring upon it such rights and privileges, including the right to collect a stipulated fare, as the parties to the contract may agree upon.

Detroit v. *Detroit Citizens' Street R. Co. supra.*

No counsel for defendant in error.

*Mr. Justice **Brown** delivered the opin-[305] ion of the court:

This case depends upon the construction and validity of certain legislative acts of the state of Texas from 1874, the date of the original charter, to 1903, the date of the act complained of as an impairment of the traction company's contract.

The Constitution of 1869, in force at the time the original company was chartered, contained no limitation upon the power of

the legislature to grant franchises in towns, cities, and other subdivisions of the state. The San Antonio Street Railway Company was incorporated in 1874 by special act, in which it was provided, § 8, that "all contracts made and entered into between the mayor and aldermen of the city of San Antonio and said company, or any privileges and rights granted . . . to said company, shall be in all respects legal and binding on the aforesaid contracting parties;" and by § 9, that the charter "shall remain in full force and effect for the period of fifty years."

By ordinance of the city council of October 5, 1875, privilege was granted to the San Antonio Street Railway Company to construct a first-class horse railway, during the term of its charter, upon the streets of said city, upon certain routes; but the ordinance did not fix the rate of fare to be charged for the transportation of persons over its projected lines.

By article 10, § 7, of the Constitution of Texas of 1876, it was provided that "no law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway."

Section 17 of article 1 of the Bill of Rights of the same Constitution provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises [306] granted by the legislature, or *created under its authority, shall be subject to the control thereof."

On March 16, 1899, twenty-three years after the adoption of this Constitution, an ordinance of the city was passed, granting an extension of time to the San Antonio Street Railway, and the San Antonio Edison Company, and imposing certain limitations upon the exercise of their franchises, among which was that "*said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.*"

It was also provided, by § 11 of the same ordinance, that "the rights, privileges, and franchises, or either of them herein referred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, and the limitations of this ordinance shall apply to the assignee thereof."

On April 4, 1900, all the property of this company was sold under the decree of a state court to a trustee for the stockholders, subject to the payment of the debts of the company, and to the performance of all outstanding contract obligations, which were declared "a preference lien" against all the property sold in the hands of the purchaser. The conveyance expressly stipulated that "within the meaning of the words 'contract obligations' shall be understood any and all existing contracts of the said Antonio Street Railway Company for street railway service over its road, or any portion thereof, had with any person or persons, now binding on said street railway company."

On August 7, 1900, the common council of the city passed an ordinance reciting the sale of the property and privileges of the former corporations, the San Antonio and Edison Companies, to the traction company, and enacting that all the rights and privileges theretofore granted to the former companies, which were said to be "now defunct," with all the limitations, duties, contracts, and obligations imposed and required of the said San Antonio Street Railway Company, were *imposed upon the [307] traction company. This ordinance was accepted.

The legislation remained in this condition until April 10, 1903, when the legislature of the state passed a new act, the 2d section of which reads as follows:

"Sec. 2. All such persons or corporations owning or operating street railways shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age, in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this state, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only on the presentation by the student desiring to purchase the same, of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used, except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets."

It is insisted by the plaintiff in error that, under article 10, § 7, of the state Constitution, above quoted, the power to

grant to street railways the property rights and franchises to construct and operate a street railway within a city is withdrawn from the legislature, and conferred, if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the legislature, granting the right to construct and operate a street railway, without first acquiring the consent of the local authorities; but we see nothing to prevent the legislature from chartering a [308]street railway, *provided such consent be acquired. Such we understand to be the ruling of the supreme court of that state in *Taylor* v. *Dunn*, 80 Tex. 659, 16 S. W. 732, and *Houston* v. *Houston City Street R. Co.* 83 Tex. 548, 29 Am. St. Rep. 679. 19 S. W. 127. But whether an act of the legislature be necessary to charter a street railway is not involved in this case, as we are cited only to the original charter of the San Antonio Street Railway Company of 1874; although it is clear that a new charter would be inoperative to authorize the construction of the road without the consent of the municipal authorities.

Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract *pro tanto* the question still remains whether the provision "that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other," constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which, in § 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof.

An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the legislature itself, but by a municipal corporation, since that is but an agency of the state, to which is delegated the power to regulate street railways and other municipal franchises. We have repeatedly held that where a railway was originally chartered before a new constitution took effect (and hence such charter was not limited *thereby), yet, if such road be sub- [309]sequently consolidated with other roads, or accepts new privileges, after a new constitution takes effect, all contracts, privileges, and franchises conferred after the adoption of such constitution are subject to its provisions. *Shields* v. *Ohio*, 95 U. S. 319, 24 L. ed 357; *Maine C. R. Co.* v. *Maine*, 96 U. S. 499, 24 L. ed. 836; *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359, 25 L. ed. 185; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 23, 45 L. ed. 395, 407, 21 Sup. Ct. Rep. 240.

In this case not only did the original San Antonio Street Railway Company become extinct by the foreclosure and sale of its property, but, under the ordinance of August 7, 1900, declaring the prior companies to be "now defunct," the traction company also became the owner of all the property, assets, rights, and privileges of another company, known as the San Antonio Edison Company, which thus became absorbed with the street railway company in the new corporation known as the traction company, which is admitted to have been incorporated since 1876, though the charter is not in the record. We are clearly of the opinion that, under these circumstances, it received its franchise under the Constitution of 1876, which forbade either the legislature or the municipal authorities to make any irrevocable contract.

It is true that in this ordinance it was provided that all rights and privileges previously granted to the street railway company and the Edison company were conferred unto the traction company, including all the limitations, contracts, and obligations; but this ordinance must be construed in connection with the Constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the court of civil appeals of Texas in this case, which expressly waived the question whether the provision of the former ordinance fixing a 5 cent fare constituted a contract or not, declaring that if it did, it was subject to further legislative control.

Under the Bill of Rights of that Constitution, the legislature could not reduce the fares to a confiscatory amount, or to an *amount which would render it unprofitable [310]to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenues. Indeed, it was found in the opinion

of the court below that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the act of 1903 is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment.

The judgment of the Court of Civil Appeals is affirmed.

HIBERNIA SAVINGS & LOAN SOCIETY,
Plff. in Err.,
v.
CITY AND COUNTY OF SAN FRANCISCO.

(See S. C. Reporter's ed. 310–316.)

Taxes—state taxation of Federal obligation.—United States Treasury checks, or orders issued for interest accrued upon registered bonds of the United States, where intended for immediate payment, may be taxed by a state, in the hands of the owner, without violating U. S. Rev. Stat. § 3701, U. S. Comp. Stat. 1901, p. 2480, exempting obligations of the United States from state taxation.

[No. 154.]

Submitted December 14, 1905. Decided January 29, 1906.

IN ERROR to the Supreme Court of the State of California to review a judgment affirming a judgment of the Superior Court in and for the City and County of San Francisco, in that state, in favor of defendant in an action to recover certain taxes paid under protest upon United States Treasury checks or orders. *Affirmed.*

See same case below, 139 Cal. 205, 96 Am. St. Rep. 100, 72 Pac. 920.

Statement by Mr. Justice **Brown:**

This was an action by the plaintiff in error, begun in the state superior court, to recover certain taxes paid under protest upon two checks or orders for $120,000 and $1,875, respectively, signed by the Treasurer of the United States, and addressed to the Treasurer or an Assistant Treasurer of the United States, for interest accrued upon certain registered bonds of the United States, owned by the plaintiff. These checks were issued in compliance with Rev. Stat. § 3698, U. S. Comp. Stat. 1901, p. 2479, which requires that "the Secretary of the Treasury shall cause to be paid, out of any money in the Treasury not otherwise appropriated, any interest falling due or accruing on any portion of the public debt authorized by law." These checks, [311] which were payable at the United States Treasury at San Francisco at any time within four months from their date, were not presented immediately for payment, but were withheld by the plaintiff until the first Monday in March, 1899, the day when the *status* of property, for the purpose of taxation, is determined. Plaintiff did not list these two checks for assessment; but the assessor, in making up his roll for the ensuing year, included them, and, after a fruitless effort to be relieved from the assessment, plaintiff paid the amount of the tax, and brought this suit to recover it back. There were claims for other taxes included in the action, upon which plaintiff was successful; but, in respect to the tax upon the two orders above mentioned, judgment went for the defendant, which was affirmed by the supreme court. 139 Cal. 205, 96 Am. St. Rep. 100, 72 Pac. 920.

Mr. **T. C. Van Ness** submitted the cause for plaintiff in error. *Messrs. Tobin & Tobin* were on the brief:

An unbroken line of cases has established the inherent nontaxability by the states of property held by the United States, and of bonds and obligations issued by the United States.

M'Culloch v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Howard Sav. Inst.* v. *Newark*, 63 N. J. L. 547, 44 Atl. 654; *Society for Savings* v. *Coite*, 6 Wall. 594, 18 L. ed. 897; *The Banks* v. *New York* (*New York ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*) 7 Wall. 16, 19 L. ed. 57; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *New York ex rel. Bank of Commerce* v. *Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *New Jersey* v. *Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Bank of New York* v. *New York County* (*New York ex rel. Bank of New York* v. *New York County*) 7 Wall. 26, 19 L. ed. 60.

The obligations here in question being as clearly within the very terms of § 3701 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2480), as were the government bills and notes under discussion in *The Banks* v. *New York* (*New York ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*) *supra*, within the terms of the then-existing statute of exemption, are not the state courts in both instances equally powerless to determine the effect of municipal taxation upon the facility with which the object of their issue may be accomplished?

NOTE.—*On the limitations of taxing power from the mutual independence of Federal and state governments*—see note to Grether v. Wright, 23 C. C. A. 515.

Messrs. **Percy V. Long** and **William I. Brobeck** submitted the cause for defendant in error:

Exemption from taxation enjoyed by Federal agencies is not without its limitations. It is based upon the necessity present in the national government, as in all governments, of exercising freely and without interference the powers conferred upon it by the states. When that necessity is served, the reason for the exemption ceases, and the inherent and reserve power of the state to tax everything within its boundaries not so exempted is reasserted and may be re-employed.

First Nat. Bank v. *Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Union P. R. Co.* v. *Peniston*, 18 Wall. 29, 36, 21 L. ed. 791, 793.

Checks issued, payable *in præsenti* and drawn against unappropriated revenues which were, at the time of issue, and must always be, sufficient to meet such drafts, constitute payment in and of themselves. They are equivalent to cash.

People v. *Stockton & V. R. Co.* 45 Cal. 306, 13 Am. Rep. 178; *Re Staten Island Rapid Transit R. Co.* 37 Hun, 422, Affirmed in 101 N. Y. 636; *Re Staten Island Rapid Transit R. Co.* 38 Hun, 382; *Metropolitan Nat. Bank* v. *Sirret*, 97 N. Y. 320; *Wells* v. *Brigham*, 6 Cush. 6, 52 Am. Dec. 750; *Woods* v. *Schroeder*, 4 Harr. & J. 276; *Cruger* v. *Armstrong*, 3 Johns. Cas. 5, 2 Am. Dec. 126.

He who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxation.

Northern P. R. Co. v. *Patterson*, 154 U. S. 130, 38 L. ed. 934, 14 Sup. Ct. Rep. 977; *Mitchell* v. *Leavenworth County*, 91 U. S. 206, 23 L. ed. 302; *Shotwell* v. *Moore*, 129 U. S. 590, 596, 32 L. ed. 827, 829, 9 Sup. Ct. Rep. 362.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the question whether the two checks or orders upon which the tax was imposed are exempt from state taxation under Rev. Stat. § 3701, U. S. Comp. Stat. 1901, p. 2480, declaring that "all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority." The basis of this exemption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the government, and upon its power to raise money for the purpose of carrying on its civil and military operations. The efficiency of the government service cannot be impaired by a taxation of the agencies which it employs for such service, and, as one of the most valuable and best known of these agencies is the borrowing of money, a tax which diminishes in the slightest degree the value of the obligations issued by the government for that purpose impairs *pro tanto* their market value.

The inability of the states to tax the official agencies of the Federal government, whether in the form of banks chartered under its authority, or of obligations issued by it as a means of providing a revenue, or for the payment of its debts, was applied in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, to a stamp tax upon notes of the United States bank; in *Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481, and in *New York ex rel. Bank of Commerce* v. *Tax Comrs.* 2 Black, 620, 17 L. ed. 451, to stock issued for loans made to the government of the United States; and in the *Bank Tax Case* (*New York ex rel. Bank of Commonwealth* v. *Tax & A. Comrs.*) 2 Wall. 200, 17 L. ed. 793, to a tax laid on banks on a valuation equal to the amount of their capital stock, when their property consisted of stocks of the Federal government; in *The Banks* v. *New York* (*New York ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*) 7 Wall. 16, 19 L. ed. 57, to certificates of indebtedness of the United States, issued to the creditors of the government for sup- [314] plies furnished in carrying on the Civil War; in *Bank of New York* v. *New York County* (*New York ex rel. Bank of New York* v. *New York County*) 7 Wall. 26, 19 L. ed. 60, to notes of the United States intended to circulate as money; and in *Van Brocklin* v. *Tennessee* (*Van Brocklin* v. *Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, to land purchased by the United States, for the amount of a direct tax laid thereon.

The principle, however, upon which this exemption is claimed, does not apply to obligations such as checks and warrants, intended for immediate use, and designed merely to stand in the place of money until presented at the Treasury, and the money actually drawn thereon. In such case the tax is virtually a tax upon the money which may be drawn immediately upon presentation of the checks. As was said by Mr. Justice Miller in *First Nat. Bank* v. *Kentucky*, 9 Wall. 353, 362, 19 L. ed. 701, 703: "That limitation [upon the power to tax] is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with, or impair, their efficiency in performing the functions by which they are designed to serve that government."

In *Union P. R. Co.* v. *Peniston*, 18 Wall.

5, 21 L. ed. 787, it was insisted by the plaintiff in error that the property of the Union Pacific Railroad Company was exempt from state taxation by virtue of the incorporation of the company by the United States, as a means for the performance of certain public duties of the government, enjoined and authorized by the Constitution. It was said, however, by Mr. Justice Strong, in delivering the opinion of the court, that no constitutional implications prohibited a state tax upon the property of an agent of the government merely because it is the property of such agent, but "that the agencies of the Federal government are uncontrollable by state legislation, so far as it may interfere with, or impair, their efficiency in performing the functions by which they are designed to serve that government. It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their
[315] constitution, or upon *the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Had the government, in the absence of money for the immediate payment of interest upon its bonds, issued new obligations for the payment of this interest at a future day, it might well be claimed that these were not taxable, as the taxation of such notes would, to the extent of the tax, impair their value and negotiability in the hands of the holder. This was practically the case in *The Banks* v. *New York* (*New York ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*) 7 Wall. 16, 19 L. ed. 57, where certificates were issued at a time when the government had no money to pay its obligations, and made use of its credit to obtain further time. But where checks are issued payable immediately, they merely stand in the place of coin, which may be immediately drawn thereon. As observed by the court below, the checks were, for all practical purposes, the money itself. *People* v. *Stockton & V. R. Co.* 45 Cal. 306, 313; *Metropolitan Nat. Bank* v. *Sirret*, 97 N. Y. 320, 325; *Re Staten Island Rapid Transit R. Co.* 38 Hun, 382, 101 N. Y. 636. A check may be given in evidence under the money counts. *Wells* v. *Brigham*, 6 Cush. 6, 52 Am. Dec. 750; *Cruger* v. *Armstrong*, 3 Johns. Cas. 5, 2 Am. Dec. 126.

While Congress has not amended Rev. Stat. § 3701, U. S. Comp. Stat. 1901, p. 2480, upon which plaintiff relies in this case, it did, by act approved August 13, 1894 (28 Stat. at L. 278, chap. 281, U. S. Comp. Stat. 1901, p. 2398), declare "that circulating notes of national banking associations and United States legal tender notes, and other notes and certificates of the United States, payable on demand, and circulating, or intended to circulate, as currency, . . . shall be subject to [state] taxation as money on hand or on deposit."

Although the checks in question were not intended to circulate *as money, and [316] therefore do not fall within the letter of the statute, the reasons that apply to that class of obligations we think apply with equal force to checks intended for immediate payment, though not intended to circulate as money. While the checks are obligations of the United States, and within the letter of § 3701, they are not within its spirit, and are proper subjects of taxation.

Had the plaintiff drawn the money immediately upon these checks, it would have become at once a part of the general property of the bank; and the fact that the money had been derived from the United States, and paid to the bank as interest on its obligations, would not have prevented its becoming part of the general property of the bank, and subject to state taxation.

Affirmed.

RUFUS MARTIN, *Plff. in Err.*,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 316–321.)

Constitutional law—equal protection of the laws—negroes as jurors.—A discrimination against negroes because of their race, in the selection of grand or petit jurors, forbidden by U. S. Const., 14th Amend., is not shown by verified written motions to quash respectively the indictment and the panel of petit jurors, charging such discrimination, where no evidence was either introduced or offered to establish the facts stated in the motions.

[No. 170.]

NOTE.—*On negroes as grand jurors*—see notes to State v. Russell, 28 L.R.A. 204, and Carter v. Texas, 44 L. ed. U. S. 839.

On the rights of negroes generally—see note to Civil Rights Cases, 27 L. ed. U. S. 835.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Submitted January 25, 1906. Decided February 19, 1906.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment affirming a conviction of murder in the District Court of Tarrant County, in that state. *Affirmed.*

See same case below (Tex. Crim. App.) 83 S. W. 390; on rehearing, 83 S. W. 391.

The facts are stated in the opinion.

Mr. **Watson E. Coleman** submitted the cause for plaintiff in error. *Messrs. O. P. Easterwood* and *O. E. Smith* were with him on the brief.

Mr. **C. K. Bell** submitted the cause for defendant in error. *Messrs. Robert Vance Davidson* and *Claude Pollard* were with him on the brief.

[318] *Mr. Justice **Harlan** delivered the opinion of the court:

By an indictment returned in the district court of Tarrant county, Texas, the plaintiff in error was charged with the crime of murder. Having been duly arraigned and pleaded not guilty, the accused (who is a negro) moved to quash the indictment, on the ground, stated in writing under oath, that all persons of the African race had been excluded from the grand jury, *because of their race,* although about one fourth of the inhabitants of the county, competent under the law to act as grand jurors, were of that race. The facts upon which the motion was based were set out, and the accused, in the written motion, prayed that testimony be heard in support of its grounds. The state's attorney, in writing, denied such discrimination, and offered to prove that only about one hundred and fifty persons of the African race in the county, as compared with twelve thousand whites, were competent under the law to act as grand jurors.

The accused then moved in writing, verified by his oath, to quash the panel of petit jurors, upon the ground that from the panel had been excluded all persons of the African race, *because of their race,* although about one fourth of the persons in the county competent under the law to serve as jurors were of that race. The facts set out in that motion were also denied in writing by the state's attorney.

Both motions were overruled by the court, the accused excepting. There was a verdict of guilty of murder in the first degree, and the accused was sentenced to suffer death. The judgment of conviction was affirmed in the court of criminal appeals, the highest court of the state in which a decision of the case could be had. One of the assignments of error in that court was the overruling of the motion to quash the indictment; but no error was there assigned in respect of the overruling of the motion to quash the panel of petit jurors.

It is not contended that the Constitution or laws of Texas authorized any discrimination, on account of race merely, in the selection of grand or petit jurors. Nor is it contended that *the prescribed qualifications for [319] jurors were not appropriate in order to secure an impartial jury for the trial of an accused. Nevertheless, if, upon the hearing of the written motion to quash the indictment, the facts stated in the motion had been established by affirmative proof, or if the trial court had refused to admit evidence to prove them, we should not hesitate to reverse the judgment. For it is the settled doctrine of this court that "whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the 14th Amendment of the Constitution of the United States." *Carter* v. *Texas,* 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687; *Strauder* v. *West Virginia,* 100 U. S. 303, 25 L. ed. 664; *Neal* v. *Delaware,* 103 U. S. 370, 397, 26 L. ed. 567, 574; *Gibson* v. *Mississippi,* 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Rogers* v. *Alabama,* 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257. So if, upon the hearing of the written motion to quash the panel of petit jurors, the facts stated in that motion had been proved, or if the opportunity to establish them by evidence had been denied to the accused, the judgment would be reversed.

But the record before us makes no such case. Although the accused in each of his written motions prayed the court to hear evidence thereon, it does not appear that he introduced any evidence whatever to prove discrimination against his race because of their color, or made any actual offer of evidence in support of either motion. The reasonable inference from the record is that he did not offer any evidence on the charge of discrimination, but was content to rely simply on his verified written motions, although the facts stated in them were controverted by the state. The trial court, it must be assumed from the record, had nothing before it, when deciding the motions to quash, except the written motions and the written answers thereto. In *Smith* v. *Mississippi,* 162 U. S. 592, 600, 601, 40 L. ed. 1082, 1085, 1086, 16 Sup. Ct. Rep. 900,—which was a prosecution of a negro for the crime of *murder, [320] it appeared that the accused, upon grounds

stated in writing, and similar to those assigned in this case, moved to quash the indictment. He moved, also, upon similar grounds, in writing, to quash the panel of petit jurors. Each motion was overruled. This court said: "No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified 'to the best of his knowledge and belief,' can be regarded as evidence in support of the motion. We are of opinion that it could not properly be so regarded. . . . The facts stated in the written motion to quash, although that motion was verified by the affidavit of the accused, could not be used as evidence to establish those facts, except with the consent of the state prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced, or offered to be introduced, by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was, therefore, unsupported by any competent evidence; consequently, it cannot be held to have been erroneously denied." To the same effect were *Tarrance* v. *Florida*, 188 U. S. 519, 521, 47 L. ed. 572, 573, 23 Sup. Ct. Rep. 402, and *Brownfield* v. *South Carolina*, 189 U. S. 426, 428, 47 L. ed. 882, 883, 23 Sup. Ct. Rep. 513. The present case cannot be distinguished from the *Smith Case;* and we are unable to hold, upon this record, that it was error to overrule the motions to quash; for, as already stated, it does not appear that the facts stated in those motions were established by evidence, or that the accused, after filing his motions, made any separate offer to prove them by witnesses, or was denied the opportunity to make such proof.

A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race because of their race could be established by simply proving that no one of that race was on the grand jury that returned the indictment, or [321] on the *petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the 14th Amendment. What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color. *Virginia* v. *Rives* (*Ex parte Virginia*) 100 U. S. 313, 323, 25 L. ed. 667, 671; *Re Wood*, (*Wood* v. *Brush*) 140 U. S. 278, 285, 35 L. ed. 505, 508, 11 Sup. Ct. Rep. 738. Whether such discrimination was practised in this case could have been manifested only by proof overcoming the denial on the part of the state of the facts set out in the written motions to quash. The absence of any such proof from the record in this case is fatal to the charge of the accused that his rights under the 14th Amendment were violated.

Judgment affirmed.

UNITED STATES, *Appt.*,
v.
DETROIT TIMBER & LUMBER COMPANY *et al.* (No. 106.)

MARTIN-ALEXANDER LUMBER COMPANY *et al.*, *Appts.*,
v.
UNITED STATES. (No. 165.)

(See S. C. Reporter's ed. 321-340.)

1. **Public lands—bona fide purchaser—constructive notice.**—A purchaser of the property of a lumber company is not charged with the knowledge of the wrongful character, as against the Federal government, of certain conveyances of standing timber, which might have been gained by a searching investigation of the books and papers turned over by the lumber company as evidence of its titles, where there were no circumstances disclosed which cast suspicion upon those titles.

2. **Public lands—bona fide purchaser of timber lands—purchase after patent—relation.**—A purchaser from the patentees for value, and without notice of any fraud on the part of the entrymen, is a bona fide purchaser within the meaning of the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151 U. S. Comp. Stat. 1901, p. 1545), and, as such, is entitled to protection, although such purchaser may have acquired an interest in the lands under a contract for the standing timber before the patents issued; since, by the doctrine of relation, the patents, when issued, became operative as of the date of the entries.

3. **Public lands—bona fide purchaser—relation.**—The doctrine of relation operates to protect the bona fide purchaser of timber lands from the patentees against the consequences of the wrongful conduct of the entrymen.

4. **Public lands—liability of purchaser of standing timber after avoidance**

NOTE.—*On bona fide purchasers of public lands*—see note to United States v. Detroit Timber & Lumber Co. 67 C. C. A. 13.

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of patent.—A bona fide purchaser of standing timber from the holders of receivers' final receipts for the purchase price of lands entered under the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), cannot, upon avoidance for the fraud of the entrymen of the patents afterwards issued, be required to account to the Federal government for the timber which it has paid for and cut and removed in reliance upon its purchase.

[Nos. 106, 165.]

Argued December 7, 1905. Decided February 19, 1906.

CROSS APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree of that court which, on appeal from a decree of the Circuit Court for the Western District of Arkansas dismissing a bill to cancel, for the fraud of the entrymen, certain patents for timber lands, some of which lands were still in the possession of the patentees and some of which had been conveyed to a bona fide purchaser, and to recover the value of the timber cut and removed therefrom, modified such decree by directing the cancelation of the patents for the lands still in the possession of the patentees, and affirmed the decree so far as it denied any relief against the bona fide purchaser. *Affirmed.*

See same case below, 67 C. C. A. 1, 131 Fed. 668.

Statement by Mr. Justice **Brewer:**

These are cross appeals from a decree of the circuit court of appeals for the eighth circuit, affirming in part and reversing in part a decree of the circuit court for the western district of Arkansas.

The bill was filed on April 5, 1902, by the United States against the Detroit Tim-
[323] ber & Lumber Company, the Martin-*Alexander Lumber Company, and a number of individual defendants. The object of the bill was to set aside patents to 44 tracts of land, issued to the individual defendants, and all conveyances, contracts, and leases from them purporting to convey title to or a right to cut and remove timber from the lands, and also for an accounting of the timber cut and removed from the lands by the two companies, and judgment therefor.

The charge was that the lands were entered under the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U S. Comp. Stat. 1901, p. 1545), and in fraud of its provisions, in that the purchase money was advanced by the Martin-Alexander Company under contracts with the entrymen that after the entries they should convey to it all the standing timber thereon. The Martin-Alexander Company denied that there were any such contracts, and the Detroit Company in addition pleaded that it was a bona fide purchaser from the former company. It appeared from the testimony that for some time prior to January 14, 1901, the Martin-Alexander Company owned and operated a sawmill plant in the vicinity of these lands; that most, if not all, of the entrymen were its employees; that it furnished all the money for the purchase prices of these lands, as well as for the expenses connected with the entries, and that after the entries the entrymen, with three exceptions, executed conveyances to it of all the standing timber. Fifty-eight and one half per cent of the stock of the Martin-Alexander Company belonged to E. B. Martin, while A. V. Alexander controlled the remainder, which was owned by himself, his wife, and J. O. Means.

On January 14, 1901, the Detroit Company purchased the entire property of the Martin-Alexander Company for $60,000 cash and an assumption of its obligations, amounting to $17,456.79. Prior to May 9, 1901, patents were issued for all the lands, thirteen having been issued before January 14, 1901. After the purchase from the Martin-Alexander Company the Detroit Company obtained deeds of the lands from the patentees of twenty-seven of the tracts.

*The circuit court found that the trans-[324] actions between the entrymen and the Martin-Alexander Company were not in conflict with the statute, that there were no agreements between them and it prior to the entries in respect to conveyances of the standing timber, and that there was only the mere expectation on the part of the company that it would be able to purchase the timber. Thereupon it dismissed the bill. 124 Fed. 393. The court of appeals, reviewing the testimony, held that there were contracts between the parties making the entries and the Martin-Alexander Company prior to the entries, and that therefore those entries were in fraud of the act, but it also found that the purchase by the Detroit Company was in good faith, and that therefore that company was entitled to protection in its purchase. It ordered the bill dismissed as to the 27 tracts for which patents had been issued and conveyances made to the Detroit Company. As to the seventeen which had not been conveyed, it ordered a decree canceling the patents, but dismissing the bill so far as respects any relief claimed against the Detroit Company. 67 C. C. A. 1, 131 Fed. 668.

Mr. **Marsden C. Burch** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for the United States:

The case is the same in principle, indeed,

it is the same in fact, as that of the *United States* v. *Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57.

The case of *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986, clearly shows the error in this decree.

Clark knew that the company had no record title to the lands described. He states on the stand that the Martin Company had final receipts covering the timber tracts. Had he supposed the Martin Company held deeds to the land, he, of course, would have asked for them in place of the mere final receipts. He had no legal right to rely upon the bare statement of interested parties whose interest might prompt them to make false or misleading statements.

Price v. *McDonald*, 1 Md. 403, 54 Am. Dec. 657.

A purchaser may part with a valuable consideration, may have no notice of any opposing claim, and yet lack the good faith which is essential to render his position a protection and his defense available. The party claiming to be a bona fide purchaser must come into a court of equity with absolutely clean hands.

2 Pom. Eq. Jur. § 762.

Passive good faith will not serve to excuse wilful ignorance.

21 Am. & Eng. Enc. Law, p. 584.

A purchaser who is put upon inquiry does not discharge his duty by making inquiry of his vendor alone, but must exhaust all reasonable and available sources of information.

23 Am. & Eng. Enc. Law, p. 515.

Mr. **Fred A. Maynard** also argued the cause for the United States.

Mr. **James F. Read** argued the cause, and, with *Messrs. Thomas C. McRae, U. M. Rose,* and *George B. Rose,* filed a brief for the lumber companies:

There is nothing to indicate that the mill company preferred illegal to legal entries, and, since they could be made according to law or contrary to law, there is a wise and charitable presumption that legal entries were intended.

United States v. *Budd*, 144 U. S. 154, 163, 36 L. ed. 384, 387, 12 Sup. Ct. Rep. 575.

The entries were not made for the purpose of speculation.

Myers v. *Croft*, 13 Wall. 294, 20 L. ed. 563; *United States* v. *Budd, supra.*

Clear, unequivocal, and convincing proof is exacted in this class of cases.

United States v. *Budd, supra; United States* v. *Clark*, 125 Fed. 774.

The Detroit Timber & Lumber Company was an innocent purchaser for value of the lands in controversy.

Townsend v. *Little*, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; *Williams* v. *Jackson*, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. Rep. 814; Devlin, Deeds, § 729; *Shepard* v. *Shepard*, 36 Mich. 173; *Hardy* v. *Harbin*, 1 Sawy. 194, Fed. Cas. No. 6,059; *Mills* v. *Smith*, 8 Wall. 27, 19 L. ed. 346; *United States* v. *Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Crawford* v. *Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Jones* v. *Simpson*, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; *Myers* v. *Croft*, 13 Wall. 291, 20 L. ed. 562; 1 Story, Eq. Jur. 13th ed. chap. 64; 2 Pom. Eq. Jur. §§ 740, 766, 771.

Where a purchaser finds that a patent has been issued, he is not required to look behind it.

Lea v. *Polk County Copper Co.* 21 How. 493, 16 L. ed. 203; *Bagnell* v. *Broderick*, 13 Pet. 448, 10 L. ed. 241; *United States* v. *California & O. Land Co.* 148 U. S. 31, 37 L. ed. p. 354, 13 Sup. Ct. Rep. 458; *United States* v. *Minor*, 29 Fed. 134.

Where an inference of notice is to affect an innocent purchaser, it must appear that the inquiry suggested, if fairly pursued, would lead to a discovery of the defect.

Simms v. *Morse*, 4 Hughes, 579, 2 Fed. 325.

It can hardly be supposed that a vendee is bound to inquire of the parties to a conveyance whether they are committing a fraud by suppressing an anterior deed, for it is evident that if fraud was intended, deception would be carried out by denial. Such inquiries are not resorted to in practice in business transactions.

Notes to Am. Lead. Cas. in Eq. (2 Hare & W.) pp. 66, 67; *Miller* v. *Fraley*, 23 Ark. 745; *Ferguson* v. *May*, 4 Ky. L. Rep. 989.

A concealed defect or secret equity arising from the conduct of those who originally owned the property, of which the purchaser had no notice, cannot be set up against him.

Danbury v. *Robinson*, 14 N. J. Eq. 213, 82 Am. Dec. 244.

To secure in equity all the rights of a bona fide and duly vigilant purchaser one is not required to make inquiry whether there is fraud or trust, where the title and possession give no indication that there is either.

Leach v. *Ansbacher*, 55 Pa. 85; *Yardley* v. *Torr*, 67 Fed. 857; *Fletcher* v. *Peck*, 6 Cranch, 135, 3 L. ed. 177; *Anderson* v. *Roberts*, 18 Johns. 531, 9 Am. Dec. 235.

The omission of the party to make inquiry cannot be material when such inquiry would not have led to a knowledge of the fact with the notice of which it is sought to

charge him. The question is whether the inquiry, if it had been made, would have afforded information on any fact material to his rights. If his conduct would have been the same whether he had or had not made inquiry, his omission cannot be a reason for charging him with notice.

21 Am. & Eng. Enc. Law, p. 588.

A party may have notice of conflicting claims, and still, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith.

United States v. *Southern P. R. Co.* 184 U. S. 54, 46 L. ed. 428, 22 Sup. Ct. Rep. 285.

There is no testimony that the Detroit Timber & Lumber Company procured the lands for an inadequate consideration; but, had they done so in fact, there are authorities that hold that all that was necessary was that the consideration should be valuable.

23 Am. & Eng. Enc. Law, p. 488; *Bullock* v. *Sadlier*, 2 Ambl. 764; *Dean* v. *Anderson*, 34 N. J. Eq. 508; Wait, Fraud. Convey. § 369.

It does not matter in this case that the Detroit Timber & Lumber Company did not acquire the legal title at the time it paid the purchase price for these lands.

Pom. Eq. Jur. § 727; Adams, Eq. 161, 162; *Dueber Watch Case Mfg. Co.* v. *Daugherty*, 62 Ohio St. 589, 57 N. E. 455; *Lea* v. *Polk County Copper Co. supra.*

Even if the Detroit Timber & Lumber Company had never acquired the legal title, it might well be contended that, as they had a right to call for it, the government could not recover in this case. The Detroit Timber & Lumber Company in good faith paid the purchase money and were in possession of the property. The title of the government is only an equitable one.

23 Am. & Eng. Enc. Law, p. 486; *St. Johnsbury* v. *Morrill*, 55 Vt. 165.

Since the patents issued before the government sought to attack the entries, the bona fide purchaser from the entrymen is in the same position he would have occupied if the patents had issued before his purchase. If the patent issues before it is attacked, whether before or after sale by the patentee is immaterial.

United States v. *Clark*, 125 Fed. 774.

Mr. **W. E. Hemingway** also argued the cause for the lumber companies.

Mr. Justice **Brewer** delivered the opinion of the court:

The able and elaborate opinions of both the circuit court and the court of appeals relieve us from much labor. There are two questions of fact: First, whether the parties making the entries had, prior to acquiring title from the government, made any agreement with the Martin-Alexander Company for a conveyance of an interest in the properties, or were seeking to acquire title solely for their own benefit. Second, whether *the Detroit Company was a pur- [329] chaser in good faith from the Martin-Alexander Company. With reference to the first question, the circuit court was of the opinion that there were no agreements between the parties. The court of appeals was of a different opinion, and held that the entries were made in pursuance of such agreements. This is a case in equity, and while in such a case questions of fact are always open to consideration by an appellate court, great respect is paid to the conclusions of the trial court in respect to them. Certainly, if the circuit court and the court of appeals had agreed, we should be very loath to disturb their conclusion. Differing as they do in the present case, we have examined this question, and agree with the court of appeals. The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys, both for the purchase prices and all expenses; and it is not easy to believe that it did all this on a mere expectation that, after the entries had been made, it could purchase the timber. It is a much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. It is quite likely that the entrymen were not conscious of wronging the government, and thought that if it received the full price demanded, that was enough. The testimony of one witness suggests at least that they may have been advised that there was no contract unless it was in writing, and that hence they could conscientiously take the oath required in connection with an entry. So, without casting any imputation of intentional perjury on those parties, we agree with the court of appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price.

With reference to the second question of fact, the circuit court made no finding, having disposed of the case by its conclusion in respect to the first. The court of appeals found *that the Detroit Company was a [330] purchaser in good faith from the Martin-Alexander Company. Here, too, we have examined the testimony, and are satisfied that the conclusion of the court of appeals was correct. A brief statement of the salient facts may be not unimportant. The head-

quarters of the Detroit Company were in St. Louis, of the Martin-Alexander Company in southwest Arkansas. They dealt at arm's length. On December 20, 1900, Alexander, of the Martin-Alexander Company, applied to U. L. Clark, president of the Detroit Company, at St. Louis, to purchase Martin's interest in the Martin-Alexander Company. Clark declined, stating that the Detroit Company would make no purchase of a fractional interest in the property. Thereupon it was arranged that he should make an examination with a view to the purchase of the entire property. The Detroit Company's inspector was sent to Arkansas to examine the lands. Clark himself went down in the January following, and, after receiving the report of the inspector, terms of sale were, on January 14, agreed upon; $60,000 cash and the assumption of the Martin-Alexander Company's debts. The $60,000, by agreement between the stockholders of the Martin-Alexander Company, were divided, $34,850 to Martin, $24,850 to Mrs. Alexander, $150 to A. V. Alexander, and $150 to J. O. Means. Martin and Means were paid at once; the debts were also promptly paid. Alexander desired to take stock in the Detroit Lumber Company in lieu of the money coming to his wife and himself. Clark was not then authorized to make such arrangement, but subsequently the stock of the Detroit Lumber Company was increased and the Alexanders were paid in full in that stock. The entire property of the Martin-Alexander Company, included in which were the sawmill, tram and logging roads, these timber contracts and other like contracts, and also all stock on hand, was, at the time of the purchase,—January 14,—turned over to the Detroit Lumber Company, which thereafter continued the business. The Martin-Alexander Company had no deeds of the lands in controversy,
[331] but simply contracts for the timber *thereon, and, in order to be relieved from the necessity of keeping accounts with respect to the different tracts, the Detroit Company proceeded to obtain deeds from twenty-seven of the patentees, paying on an average $25 apicce therefor, which was a fair price for the lands after the timber had been cut off. It had no knowledge or intimation that there was anything wrong in the titles until the last of September or the first of October, 1901,—more than four months after the government had issued its patents for all the lands,—when it received a notice to that effect from a government inspector.

Now we remark that there is no intimation in the testimony that the purchase price was not paid by the Detroit Company in cash and stock as agreed upon, no suggestion that the price was an unreasonable one. There was nothing strange or unnatural in the contract between the companies; on the contrary, it was one which might well be entered into by parties situated as these were. But it is contended by the government that if the Detroit Company had examined with care the books of the Martin-Alexander Company, and the papers which it turned over as evidences of its titles, it would have perceived that the timber contracts were made shortly after the issue of the final receiver's receipts, that the parties making the contracts were all or nearly all employees of the Martin-Alexander Company, to whom moneys had been advanced, and with each of whom an account was being kept; that it was its duty to critically examine these matters in order to be sure that the titles which it was acquiring were good. In their brief, counsel for the government say:

"We claim that the law as laid down in *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986, that one who takes title before the issuance of patent cannot claim to be a bona fide purchaser, made it the duty of the Detroit Company to make the most searching inquiry, at least as to all of the timber contracts except the thirteen for which patents to the land had issued."

We do not understand the law to be as stated, or that one who enters into an ordinary and reasonable contract for the *pur- [332]
chase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. *Jones* v. *Simpson*, 116 U. S. 609–615, 29 L. ed. 742–744, 6 Sup. Ct. Rep. 538. He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.

It is further said that the written contract of sale from the Martin-Alexander Company to the Detroit Company was not executed till March 1, 1901, and that on the

14th of January, 1901, Martin resigned his position as president of the Martin-Alexander Company, and Clark, the president of the Detroit Company, was elected president of the former company; that, as the chief executive of that company, he was charged with knowledge of all that the company knew, and that therefore, before the written contract was entered into, he and the Detroit Company had constructive notice of the wrongful character of these timber contracts. But that is a mere evasive technicality. The bill charges and the answer admits the sale on January 14, and the facts, as disclosed by the testimony, are that Martin desired to leave at once on receipt of his money, and return to his home in Illinois; that Clark was put in his place as president to enable the Martin-Alexander Company to close up its outstanding affairs. The real contract between the parties was entered into before Clark became president, and all that was afterwards done was simply to put in writing the terms of
[333] the contract which had been *agreed upon. Equity looks at the substance, and not at the mere form in which a transaction takes place. The rule in respect to constructive notice was thus stated in *Wilson* v. *Wall*, 6 Wall. 83, 91, 18 L. ed. 727, 730:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only refer to Sugden on Vendors, p. 622, where he says: 'In *Ware* v. *Egmont*, 4 De G. M. & G. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.'"

And, again, in *Townsend* v. *Little*, 109 U. S. 504, 511, 27 L. ed. 1012, 1014, 3 Sup. Ct. Rep. 357:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Plumb* v. *Fluitt*, 2 Anstr. 432; *Kennedy* v. *Green*, 3 Myl. & K. 699. . . . As said by Strong, J., in *Meehan* v. *Williams*, 48 Pa. 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See also *Holmes* v. *Stout*, 4 N. J. Eq. 492; *M'Mechan* v. *Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Hanrick* v. *Thompson*, 9 Ala. 409."

In the light of these authorities we see nothing which casts any imputation on the conduct of the Detroit Company, or *that [334] tends to show that it was not a purchaser in absolute good faith.

Now, what is the law controlling under these circumstances? Much reliance is placed by the government on *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986, which, affirming prior cases, holds that an entryman under the timber act acquires only an equity, and that a purchaser from him cannot be regarded as a bona fide purchaser within the meaning of the act. But the Detroit Company purchased 27 tracts after the issue of the patents therefor. And in making these purchases it dealt not with the Martin-Alexander Company, but directly with the patentees. While the amounts paid were small, yet, as counsel for the government admit in their brief that "the land without the timber is of no value," there can be no suggestion of inadequacy of price. As, also, it had no knowledge or suspicion of wrong in the titles, it is, as to these tracts, strictly and technically, within the language of the act, a bona fide purchaser. If it be contended that, by virtue of the contracts for the sale of timber, it had acquired some interest in the lands prior to the issue of patents, it is sufficient to say that, by the doctrine of relation, the patents, when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. Thus, a sheriff's deed takes effect, not of its date, but of the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in præsenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *St. Paul, M. & M. R. Co.* v. *Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United*

States v. *Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152. A patent from the United States operates to transfer the title, not merely from the date [335]of the *patent, but from the inception of the equitable right upon which it is based. *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet, when issued, they became operative as of the date of the original entries. This doctrine has frequently been recognized by this and other courts. *Landes* v. *Brant*, 10 How. 348, 13 L. ed. 449; *French* v. *Spencer*, 21 How. 228, 16 L. ed. 97; *Stark* v. *Starr*, 6 Wall. 402, 18 L. ed. 925; *Lynch* v. *Bernal*, 9 Wall. 315, 19 L. ed. 714; *Gibson* v. *Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Simmons* v. *Wagner*, 101 U. S. 260, 25 L. ed. 910; *Jackson ex dem. De Forest* v. *Ramsay*, 3 Cow. 75, 15 Am. Dec. 242; *Welch* v. *Dutton*, 79 Ill. 465; *Ormiston* v. *Trumbo*, 77 Mo. App. 310. In the first of these cases it was said (p. 372, L. ed. p. 459):

"To protect purchasers, the rule applies, 'that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation,'—as stated in Viner's Abr. title *Relation*, 290. . . . Cruise on Real Property, vol. 5, pp. 510, 511, lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason, and convenience than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation'. . . . Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act,—that of filing the claim in 1805."

In *Simmons* v. *Wagner*, p. 261, L. ed. p. 911:

"Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the [336]mere ministerial acts of *the officers charged with that duty. *Barney* v. *Dolph*, 97 U. S. 652, 24 L. ed. 1063."

See also *United States* v. *Freyberg*, 32 Fed. 195, a case in the circuit court for the eastern district of Wisconsin, in which it was held by Judge Dyer that an action brought by the government to recover for timber cut from land which had been entered as a homestead, but the full equitable title of which had not then passed to the entryman, either by the required occupation of the premises or by a commuting of the homestead to a pre-emption entry—an action maintainable at the time it was commenced—was defeated by the issue of the final receiver's receipt and the consequent perfection of a full equitable title.

Counsel for the government deny the application of this principle in the present case on the ground, first, that it gives vitality and validity to a wrongful acquisition of title from the government. They say that equity is never founded on a wrong, and that because the original entries were wrongful the doctrine of relation will not be applied. But this is a clear misunderstanding of the purpose and scope of the doctrine of relation. If the original entries were rightful, there is no need of its application, for the patents would pass perfect titles. The equity is founded on the rightful conduct of the purchaser, and not on the wrongful conduct of the entrymen. It upholds the purchaser in his honest purchase notwithstanding the wrongful character of the entries. This is akin to the ordinary rule in respect to a bona fide purchaser. Equity sustains the title in spite of the fact that his grantor may have wrongfully obtained it, and upholds it because of his rightful conduct.

Counsel also say that the question is settled by the decision in *Hawley* v. *Diller*, *supra*, relying upon the second paragraph in the headnotes:

"An entryman under this act acquires only an equity, and a purchaser from him cannot be regarded as a bona fide purchaser within the meaning of the act of Congress unless he become *such after the govern- [337]ment, by issuing a patent, has parted with the legal title."

There are two or three answers to this contention. In the first place, the headnote is not the work of the court, nor does it state its decision,—though a different rule, it is true, is prescribed by statute in some states. It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports. In the second place, if the patent referred to in that headnote is a patent issued upon a wrongful entry, no such fact appeared in the case, because no patent was issued upon the entry charged to have been wrongful, but after that entry had been canceled, a patent was issued to Diller on a new entry. If it refers to some other patent than one issued upon a wrongful entry,

it has no pertinency, for the doctrine of relation never carries a patent back to the date of any other entry than that upon which it is issued. And finally, the headnote is a misinterpretation of the scope of the decision.

With reference to the other tracts and the denial of any relief, by accounting or otherwise, against the Detroit Company, it is contended that as prior to the issue of a patent, the Land Department could have set aside the entries on account of the fraudulent contracts, the courts will now grant the same relief; and further, that inasmuch as the patents are by this decree canceled and the title restored to the government, the Detroit Company must be regarded as a wrongdoer in respect to the timber which it took from the lands prior to the decree, and an accounting should have been ordered. But this ignores the fact that the Detroit Company acted in good faith, and purchased the timber from those having an apparently perfect equitable title thereto. It becomes necessary to inquire what is the significance of a final receiver's receipt and the effect of a cancelation by the Land Department of such a receipt. The receipt is an acknowledgment by the government that it has received full pay for the land, that it holds the legal title in trust for the entry-
[338] man, and will in due course issue to *him a patent. He is the equitable owner of the land. It becomes subject to state taxation, and under the control of state laws in respect to conveyances, inheritances, etc. *Carroll* v. *Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon* v. *Duncan*, 4 Wall. 210, 18 L. ed. 339; *Simmons* v. *Wagner*, *supra*; *Winona & St. P. Land Co.* v. *Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877.

Indeed, in some of the opinions of this court, emphasizing the value of a receiver's receipt, there are expressions which seem to underestimate the significance of a patent. *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 510, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 251, 35 L. ed. 999, 1002, 12 Sup. Ct. Rep. 158. For it must be remembered that the latter is the instrument which passes the legal title, and that until it is issued the legal title remains with the government, and is subject to investigation and determination by the Land Department. *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 326, 38 L. ed. 992, 1001, 14 Sup. Ct. Rep. 1030; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; *Guaranty Sav. Bank* v. *Bladow*, 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425. But while, until the issue of the patent the land is under the control of the Land Department, which, upon proper investigation and for sufficient reasons, may set aside the certificate of entry, yet this power of the Land Department cannot arbitrarily be exercised without notice to the entryman, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has issued to other parties. *Guaranty Sav. Bank* v. *Bladow*, *supra*. It is true, as against the government, and while the title remains in the government, he may not be able to enforce his equity, because no action can be maintained against the government except upon contract, express or implied. *United States* v. *Jones*, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669. But while he may not sue on his equity, he may protect that equity when sued by the government. It is sometimes said that a legal title with an equity is paramount to an equity alone; but this is not strictly true unless the equities are equal, for sometimes a superior equity *may be [339]
adjudged paramount to a legal title and an inferior equity. *Garland* v. *Wynn*, 20 How. 8, 15 L. ed. 801; *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306; *Lindsey* v. *Hawes*, 2 Black, 554, 17 L. ed. 265; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. ed. 86; 2 Pom. Eq. Jur. § 678, and following. But we need not stop to inquire what rights the Detroit Company will have after a patent has issued. It is enough now to hold that it can defend its equities against the suit of the government.

It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions. And clearly, upon those principles, a party purchasing an equitable right is entitled to be protected in his purchase so far as it can be done without trespassing upon the rights of other parties. The statute provides that if an entry is wrongfully made, it may, prior to patent, be set aside by the Land Department, the entryman for-

feiting the money which he has paid. In other words, by the action of the Department the equitable title is canceled and restored to the government. It then has both the full title to the land and the money which had been paid for it. And this is the penalty which is imposed for the wrongful entry. Certainly, when the government retains the full price which it has placed upon the land and also recovers the land itself, it is abundantly compensated for any wrong which has been attempted by the entryman. And a party who deals with such entryman—relying upon the evidences of his entry, which are in all respects in form good and sufficient, and are an acknowledgment by the government officials of a rightful entry—is justly entitled to the consideration of a court of equity. In
[340] this case, finding *the entryman holding apparently valid equitable titles to the lands, it entered into contracts with them for the purchase of the timber. It cut and removed the timber—all in good faith. It is equitable that, having thus acted in good faith, it should not be held to account for the timber which it has already paid for and cut and removed in reliance upon these contracts. The government has every dollar which it would have received in case of a perfectly valid entry, and has also recovered the land. Surely it is not just for it to ask further payment, and from a party who dealt in good faith with the entrymen, relying upon the titles which it had created. If the Detroit Company has taken some timber from the land, it has once paid for it and ought not to be compelled to pay a second time, and to the government, which has already received full pay for the land, timber and all. It is inequitable to give to the government not merely the land and the price which it charged for the land, but also the value of the timber obtained by the Detroit Company. It is doubling the penalty which the statute imposes, or, if not doubling, at least, largely increasing it.

We think the decision of the Court of Appeals was right, and it is affirmed.

Mr. Justice **Harlan** and Mr. Justice **McKenna** dissent.

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[341] *SOUTHERN PACIFIC RAILROAD COMPANY, Homer S. King, Trustee, and Central Trust Company of New York, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 341-353.)

1. Equitable jurisdiction — adequate remedy at law.—The objection that complainant had an adequate remedy at law does not—when not made until the hearing—require the dismissal of a cause the subject-matter of which is within the jurisdiction of a court of equity, such as is presented by a bill filed on behalf of the United States, which avers that certain public lands had been erroneously patented to a railroad company, and, in addition to the relief sought by way of cancelation of the patents for lands still held by the railroad company, which was eliminated from the litigation by the decree, prays a discovery of any sales to bona fide purchasers, and a confirmation of their titles, and asks a recovery from the railroad company of the value of the lands so conveyed.

2. Public lands—railroad land grants—recovery of value of lands erroneously patented.— Irrespective of the adjustment acts of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), and March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), the Federal government had the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith.

[No. 141.]

Argued January 24, 1906. Decided February 19, 1906.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California, confirming the titles of bona fide purchasers of land erroneously patented to a railroad company, and adjudging that the United States recover from the company the value of such lands. *Affirmed.*

See same case below, 66 C. C. A. 581, 133 Fed. 651.

Statement by Mr. Justice **Brewer**:

This was a suit begun in the circuit court of the United States for the southern district of California, by bill filed April 13, 1899. The parties named as defendants were the Southern Pacific Railroad Company, the trustees in certain mortgages, and a number of individuals sued as representatives *of a class. In a general way it may [342] be said that the bill averred that a large body of lands, some 30,000 acres and over, had been erroneously patented to the railroad company, and that portions thereof had been conveyed by it to bona fide pur-

NOTE.—*On the jurisdiction of equity where remedy at law exists*—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

chasers. The relief sought was the confirmation of the titles of bona fide purchasers, the cancelation of the patents to the other lands, and the recovery from the railroad company of the value of the lands conveyed by it to bona fide purchasers, in accordance with the terms of the acts of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), February 12, 1896 (29 Stat. at L. 6, chap. 18, U. S. Comp. Stat. 1901, p. 1596), March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), providing for the adjustment of railroad land grants. After answers by the railroad company and some of the individual defendants, proofs were taken, and upon a hearing a decree was entered which, in separate paragraphs, specifically confirmed the titles to the several tracts held by bona fide purchasers, and adjudged that the United States recover from the railroad company the value of those lands, a sum amounting in the aggregate to $33,596.92. 117 Fed. 544. This decree was affirmed by the court of appeals (66 C. C. A. 581, 133 Fed. 651), from whose decision the railroad company and the trustees appealed to this court.

Mr. **Maxwell Evarts** argued the cause and filed a brief for appellants:

In such a case as the one at bar, in which the complainant's remedy at law is complete and adequate, and the case is nothing more than an action of debt, and in which no costly proceedings have been imposed upon the complainant by the failure of the defendant to object in his pleadings to the jurisdiction of the court of equity, the rule seems to be that the objection taken for the first time at the hearing is good.

Litchfield v. *Ballou,* 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Lewis* v. *Cocks,* 23 Wall. 466, 23 L. ed. 70; *Killian* v. *Ebbinghaus,* 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. Rep. 232; *Allen* v. *Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; *Mills* v. *Knapp,* 39 Fed. 592; *Hoey* v. *Coleman,* 46 Fed. 221; *Jones* v. *Bradshaw,* 16 Gratt. 361; *Green* v. *Massie,* 21 Gratt. 362; *Scott* v. *Neely,* 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Buzard* v. *Houston,* 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; *Lacombe* v. *Forstall's Sons,* 123 U. S. 562, 570, 31 L. ed. 255, 258, 8 Sup. Ct. Rep. 247.

This cause was not properly in a court of equity because of the discovery sought, and because of the account asked.

Preston v. *Smith,* 26 Fed. 884; *Ex parte Boyd,* 105 U. S. 647, 26 L. ed. 1200; Tiedeman, Eq. Jur. 1893, § 550.

The act of Congress of March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), so far as it purports to give a right of action in favor of the United States to recover the government price of $1.25 an acre for all land erroneously patented to the railroad and sold by it to bona fide purchasers, is unconstitutional.

United States v. *Union P. R. Co.* 11 Blatchf. 385, Fed. Cas. No. 16,598; *United States* v. *Union P. R. Co.* 98 U. S. 569, 25 L. ed. 143; *United States* v. *Klein,* 13 Wall. 128, 20 L. ed. 519; *Sinking Fund Cases,* 99 U. S. 700, 25 L. ed. 496; *Medford* v. *Learned,* 16 Mass. 215; *Towle* v. *Eastern R. Co.* 18 N. H. 547, 47 Am. Dec. 153; *Pittsburgh & S. R. Co.* v. *Gazzam,* 32 Pa. 340; *Craft* v. *Lofinck,* 34 Kan. 365, 8 Pac. 359; *Lane* v. *Doe,* 4 Ill. 238, 36 Am. Dec. 543; *Isom* v. *Mississippi C. R. Co.* 36 Miss. 300; *Coosa River S. B. Co.* v. *Barclay,* 30 Ala. 120; *State ex rel. Arick* v. *Hampton,* 13 Nev. 439.

Mr. **Joseph H. Call** argued the cause and filed a brief for appellee:

The right of the defendants to object to the jurisdiction in equity has been waived.

Brown, B. & Co. v. *Lake Superior Iron Co.* 134 U. S. 530, 535, 536, 33 L. ed. 1021, 1024, 1025, 10 Sup. Ct. Rep. 604; *Insley* v. *United States,* 150 U. S. 512, 515, 516, 37 L. ed. 1163, 1165, 14 Sup. Ct. Rep. 158; *Perego* v. *Dodge,* 163 U. S. 160, 164, 41 L. ed. 113, 116, 16 Sup. Ct. Rep. 971; *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 7 Sup. Ct. Rep. 594.

The bill alleges and the case shows that these lands were excepted from the grant to the defendant railroad by the terms of the acts of Congress of March 3, 1871, and July 27, 1866, they having been granted to and set apart for the Atlantic & Pacific Railroad Company, but were erroneously patented to the Southern Pacific.

United States v. *Southern P. R. Co.* 146 U. S. 570, 610, 36 L. ed. 1091, 1102, 13 Sup. Ct. Rep. 152; *Southern P. R. Co.* v. *United States,* 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The right of the United States to vacate and annul patents erroneously issued by the Land Department, by bill in equity, is sustained by an unbroken line of authority.

United States v. *Stone,* 2 Wall. 525, 535, 17 L. ed. 765, 767; *United States* v. *Minor,* 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; *Mullan* v. *United States,* 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1141; *United States* v. *American Bell Teleph. Co.* 128 U. S. 315, 362, 32 L. ed. 450, 460, 9 Sup. Ct. Rep. 90; *Colorado Coal & I. Co.* v. *United States,* 123 U. S. 307, 313, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131; *United States* v. *Southern P. R. Co. supra; Wisconsin C. R. Co.* v. *United States,* 164 U.

S. 190, 211, 41 L. ed. 399, 406, 17 Sup. Ct. Rep. 45; *Germania Iron Co.* v. *United States*, 165 U. S. 379, 383, 41 L. ed. 754, 756, 17 Sup. Ct. Rep. 337. See also Story, Eq. Jur. § 134.

The statute of California (Code of Civil Procedure, § 738) authorizes suits in equity to quiet and determine title to land.

Pennie v. *Hildreth*, 81 Cal. 127, 22 Pac. 398; *Pierce* v. *Felter*, 53 Cal. 18.

It is well settled that the Federal courts will administer such relief in equity where authorized by state statute.

Reynolds v. *First Nat. Bank*, 112 U. S. 405, 412, 28 L. ed. 733, 736, 5 Sup. Ct. Rep. 213; *Chapman* v. *Brewer*, 114 U. S. 158, 170, 171, 29 L. ed. 83, 87, 88, 5 Sup. Ct. Rep. 799; *More* v. *Steinbach*, 127 U. S. 70, 84, 32 L. ed. 51, 56, 8 Sup. Ct. Rep. 1067; *Hammer* v. *Garfield Min. & Mill. Co.* 130 U. S. 291, 295, 32 L. ed. 964, 9 Sup. Ct. Rep. 548.

This bill is cognizable in equity as one brought to avoid multiplicity of suits.

Pom. Eq. Jur. 255, 256, 269; *Brown* v. *Guarantee Trust & S. D. Co.* 128 U. S. 403, 410, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; *Ogden City* v. *Armstrong*, 168 U. S. 224, 237, 42 L. ed. 444, 451, 18 Sup. Ct. Rep. 98; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Hayden* v. *Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60; *Kelley* v. *Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55; *Barcus* v. *Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 791; *Bailey* v. *Tillinghast*, 40 C. C. A. 93, 99 Fed. 801; *Whitehead* v. *Sweet*, 126 Cal. 67, 58 Pac. 376; *Southern P. Co.* v. *Robinson*, 132 Cal. 408, 64 Pac. 572.

Special jurisdiction in equity has been conferred by Congress upon the circuit court to confirm titles of bona fide purchasers and render judgment against the railroad company for value of lands.

This is a constitutional exercise of power by Congress, and creates an additional and new ground of equity which may be administered.

Holland v. *Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Arndt* v. *Griggs*, 134 U. S. 316, 320, 33 L. ed. 918, 919, 10 Sup. Ct. Rep. 557; *Bardon* v. *Land & River Improv. Co.* 157 U. S. 327, 330, 39 L. ed. 719, 720, 15 Sup. Ct. Rep. 650; *Cowley* v. *Northern P. R. Co.* 159 U. S. 569, 583, 40 L. ed. 263, 267, 16 Sup. Ct. Rep. 127.

Where land or other property has been transferred from one to another wrongfully or under a mistake, the court will establish and construct a trust in the property and in its proceeds, in favor of the beneficiary, and against the person wrongfully holding it, and will require the trustee to return the property or its value.

Chapman v. *Douglas County*, 107 U. S. 349, 360, 27 L. ed. 379, 383, 2 Sup. Ct. Rep. 62; Perry, Tr. § 186; Story, Eq. Jur. §§ 134, 1261–1263; Pom. Eq. Jur. §§ 155, 156, 1044; *May* v. *Le Claire*, 11 Wall. 217, 236, 237, 20 L. ed. 50, 54; *Cook* v. *Tullis*, 18 Wall. 332, 341, 342, 21 L. ed. 933, 937; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 26, 27, 38 L. ed. 55, 67, 14 Sup. Ct. Rep. 240; *Townsend* v. *Vanderwerker*, 160 U. S. 171, 179, 40 L. ed. 383, 385, 16 Sup. Ct. Rep. 258; *New Orleans* v. *Warner*, 175 U. S. 120, 129, 44 L. ed. 96, 101, 20 Sup. Ct. Rep. 44; *Clews* v. *Jamieson*, 182 U. S. 461, 479, 480, 45 L. ed. 1183, 1192, 1193, 21 Sup. Ct. Rep. 845; *Taylor* v. *Benham*, 5 How. 233, 274, 12 L. ed. 130, 149; Story, Eq. Pl. § 221.

This bill is maintainable in equity as one for an accounting and for discovery.

Story, Eq. Jur., §§ 441–443, 456; Pom. Eq. Jur., §§ 1420, 1421; *Kirby* v. *Lake Shore & M. S. R. Co.* 120 U. S. 130, 134, 138, 30 L. ed. 569, 571, 572, 7 Sup. Ct. Rep. 430; *Colonial & U. S. Mortg. Co.* v. *Hutchinson Mortg. Co.* 44 Fed. 219; *Kilbourn* v. *Sunderland*, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594; *United States* v. *Old Settlers*, 148 U. S. 427, 465, 37 L. ed. 509, 523, 13 Sup. Ct. Rep. 650; *Fowle* v. *Lawrason*, 5 Pet. 495, 8 L. ed. 204; *Magic Ruffle Co.* v. *Elm City Co.* 14 Blatchf. 114, Fed. Cas. No. 8,950; *Kelley* v. *Boettcher*, *supra*; *Indianapolis Gas Co.* v. *Indianapolis*, 90 Fed. 196; *McMullen* v. *Strother*, 136 Fed. 295.

The jurisdiction in equity in this case is sustained because the final relief sought and the mode of obtaining it is more efficient than in a court of law.

Oelrichs v. *Spain* (*Oelrichs* v. *Williams*) 15 Wall. 211, 228, 21 L. ed. 43, 44; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514, 515, 32 L. ed. 1005, 1008, 1009, 9 Sup. Ct. Rep. 594; *Joy* v. *St. Louis*, 138 U. S. 1, 11, 50, 34 L. ed. 843, 848, 859, 11 Sup. Ct. Rep. 243; *United States* v. *Old Settlers*, *supra*; *United States* v. *Union P. R. Co.* 160 U. S. 1, 51, 52, 40 L. ed. 319, 336, 337, 16 Sup. Ct. Rep. 190; *Chicago, R. I. & P. R. Co.* v. *Union P. R. Co.* 47 Fed. 15; *United States* v. *Western U. Teleg. Co.* 50 Fed. 28.

The legislation of Congress (acts of 1866 and 1871) for the construction of the railroad, its public uses, grant of lands, and their sale by the road, and requiring repayment of value of lands erroneously patented, as required by the acts of 1887 and 1896, shows that the railroad company was a trustee of the government for those purposes.

United States v. *Michigan*, 190 U. S. 379,

47 L. ed. 1103, 23 Sup. Ct. Rep. 742; *California* v. *Southern P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *United States* v. *Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190.

Where a court of equity takes jurisdiction of a cause upon one ground, pertaining either to its exclusive or its concurrent jurisdiction, it will retain it to do complete justice, even to granting legal remedies.

United States v. *Union P. R. Co.* 160 U. S. 1, 52, 40 L. ed. 319, 337, 16 Sup. Ct. Rep. 190; *Ober* v. *Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Root* v. *Lake Shore & M. S. R. Co.*, 105 U. S. 189, 205, 208, 26 L. ed. 975, 981, 982; *Ward* v. *Todd*, 103 U. S. 327, 26 L. ed. 339; *Hopkins* v. *Grimshaw*, 165 U. S. 342, 358, 41 L. ed. 739, 744, 17 Sup. Ct. Rep. 401; *Smyth* v. *Ames*, 169 U. S. 466, 516, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418.

Mr. Justice **Brewer** delivered the opinion of the court:

[349] *The appellants challenge the decree on two grounds: First, that a suit in equity cannot be maintained because there is a plain, adequate, and complete remedy at law; and, second, that the United States cannot by legislation create an obligation of the railroad company for the value of the land patented to and conveyed by it to bona fide purchasers.

No objection was made to the jurisdiction of the court as a court of equity by any pleading or before the hearing. It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate, and complete remedy at law. Such is the mandate of the Revised Statutes (Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583) as well as the general rule in equity. *Lewis* v. *Cocks*, 23 Wall. 466, 23 L. ed. 70; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. Rep. 232; *Litchfield* v. *Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Allen* v. *Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the appellate court; and, if not suggested by counsel, may be enforced by the court on its own motion. See authorities just cited. But, on the other hand, it is equally true that where the objection that the plaintiff has an adequate remedy at law is not made until the hearing, and the subject-matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though, if taken *in limine*, it might have been worthy of attention. *Wylie* v. *Coxe*, 15 How. 415, 420, 14 L. ed. 753, 755; *Reynes* v. *Dumont*, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 954; *Brown, B. & Co.* v. *Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; *Insley* v. *United States*, 150 U. S. 512, 515, 37 L. ed. 1163, 1165, 14 Sup. Ct. Rep. 158; *Perego* v. *Dodge*, 163 U. S. 160, 164, 41 L. ed. 113, 116, 16 Sup. Ct. Rep. 971; 1 Dan. Ch. Pl. & Pr. 4th ed. p. 555. It is necessary, therefore, to notice more in detail the allegations in the bill. That sets forth land grants to the Atlantic & Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. It shows the acceptance by the Atlantic & Pacific Company of its grant, the filing of its maps of definite location, a failure to complete its road within the state of California, an act of Congress forfeiting *the lands along the [350] line of said road within that state, a claim of the Southern Pacific Company to some of those lands, the erroneous patenting of them to that company, a demand for a reconveyance, and the acts of Congress in respect to the adjustment of railroad land grants. The bill further alleges that more than one thousand persons, among whom are the individual defendants named in the bill, who are sued as representatives of the class, had purchased by immediate or mesne conveyances from the Southern Pacific Company certain of those lands specifically described in Exhibit A; that all these purchasers claim an interest in the lands, but the nature and extent of their claims are unknown; that a prior suit, brought to vacate and annul patents, included those lands, and had been dismissed as to them without prejudice, upon the claim of the Southern Pacific Company that it had conveyed them to bona fide purchasers. In an amendment to the bill is a prayer (in order to secure an accounting with the railroad company) for a statement of the sales of these tracts, with the names of the purchasers, dates of sales, purchase prices, and amounts paid. The bill also alleges that there is a dispute between the railroad company and the persons purchasing or contracting with it, in respect to the validity of the title conveyed, or attempted to be conveyed by the company; avers that the United States has no desire to question the title of bona fide purchasers, but, on the contrary, seeks to have such title confirmed. It prays for a determination of the tracts sold to bona fide purchasers, to the end that the titles thereto may be confirmed, for a decree vacating and annulling the patents for any lands not so sold,

and quieting the title of the United States thereto, and that the railroad company be required to account to the United States for the value of the lands sold to bona fide purchasers, or such sum as had been received by the company from those sales, not exceeding $1.25 per acre, and for such other and further relief as is just and equitable.

It is contended by the railroad company [351] that this is merely *an action in assumpsit to recover the amount claimed to be due for the lands patented to and sold by it to bona fide purchasers. But this ignores the full scope of the suit. The bill asked cancelation of the patents and a quieting of the title of the plaintiff to those lands still held by the company, or not sold to bona fide purchasers. It prayed a discovery of all sales and conveyances, with the dates of the sales and the amounts received thereon. It also sought a confirmation specifically of the titles of bona fide purchasers, and finally an accounting with and recovery from the company. A cancelation of patents and a quieting of title is obtainable in equity. *Hughes* v. *United States*, 4 Wall 232, 18 L. ed. 303; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *Mullan* v. *United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; *Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457; *Germania Iron Co.* v. *United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337. It is true no decree was entered for the cancelation of any patents, and that matter was thus eliminated from the litigation. But the confirmation of the title of specific tracts to bona fide purchasers, which did pass into decree is equally within the jurisdiction of a court of equity. While discovery is now seldom the object of a suit in equity, and doubtless would not uphold such a suit when the full information was obtainable by proceedings at law, yet it was a well-recognized ground of equity jurisdiction (*Kennedy* v. *Creswell*, 101 U. S. 641, 645, 25 L. ed. 1075, 1076; 1 Story, Eq. Jur. 11th ed. §§ 689 and following; 1 Pom. Eq. Jur. § 193 and cases cited in notes), and whether in any given case a court of equity would be justified in acting is a question for its determination. It is unnecessary to determine whether, if properly challenged, the allegations in this bill were sufficient. Probably not. *United States* v. *Bitter Root Development Co.* 200 U. S. 451, *post*, 550, 26 Sup. Ct. Rep. 318. It is enough that discovery was sought, that discovery is not obtainable in an action at law, but only in a suit in equity. It may be that in order to support a recovery from the railroad company it was not necessary that there be a formal confirmation of the titles of the purchasers from it, or that the purchasers be made parties defendant, *yet it was competent [352] for the court, under the pleadings, to enter such a decree, and the government was justified in asking for it. Indeed, such action seems to have been contemplated by the statute, for in the 2d section of the act of March 2, 1896, it is provided: "An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made, for the value of the land as hereinbefore provided."

If only an action at law had been brought to recover the value of these lands from the railroad company, unless the verdict had been for the full amount claimed, $1.25 an acre, or unless there had been specific findings of fact showing the particular tracts on account of which recovery was given, it would be open to grave doubt whether any titles would be confirmed even by inference; and a cloud would be left hanging over the titles of each of these purchasers. Clearly the case here presented was within the jurisdiction of a court of equity; and if there was any objection to that jurisdiction it should have been made *in limine*, and not after pleadings had been perfected and proofs taken.

Passing to the other question, it is charged in the bill that these statutes constituted a valid contract between the government and the railroad company. Now whether that be strictly true we need not stop to consider. It is enough that upon the facts the government was entitled to recover from the company. Erroneously and by mistake the officers of the government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to *parties [353] who dealt with it in good faith. When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus

confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective, therefore, of the act of Congress, the government had the right, when it found that these lands had been erroneously patented to the railroad company, and by it sold to persons who dealt with it in good faith, to sue the railroad company, and recover the value of the lands so wrongfully received and sebsequently conveyed. The acts of Congress really inure to the benefit of the railroad company, and restrict the right of the government, for they provide that the recovery shall in no case be more than the minimum government price. In other words, the government asks only its minimum price for public land, no matter what the value of the tracts or the amounts received by the company may be.

It may be noticed in this connection that in no case was the value of any land sold fixed in the decree above the sum received by the company therefor, and that in many instances that sum exceeded the minimum price of $1.25 per acre. It may also be noticed that by stipulation it appears that within the indemnity limits there still remains a large body of lands from which the railroad company can select lands in lieu of those involved in the suit.

We see nothing in this decision of which the railroad company can complain. *The decree of the Circuit Court of Appeals is affirmed.*

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[354]*SOUTHERN PACIFIC RAILROAD COMPANY and Central Trust Company of New York, D. O. Mills and Homer S. King, as Trustees, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 354–360.)

1. Public lands—railroad land grants—lands sub judice.—Lands within the place limits of a railroad land grant, but which were also included by the lines of an official survey of a Mexican grant, made at the instance of the person to whom such grant was confirmed to remove the uncertainty as to its boundaries due to the generality of the description in the decree of confirmation, must be deemed *sub judice*,—at least, until the survey is set aside,—and therefore excluded from the grant to the railroad company, although the claimant may not have insisted upon the boundaries as so established.

2. Public lands—railroad land grants—lands sub judice.—The objection that there had not been the final order of confirmation requisite under the act of March 3, 1851 (9 Stat. at L. 631, chap. 41), § 13, to justify an official survey of a Mexican grant, because the Federal government had appealed to the Federal Supreme Court from the decree of confirmation in the district court, is not available to defeat the contention that lands within the place limits of a railroad grant, which were also, when the map of definite location was filed and approved, included by the lines of such survey, were *sub judice*, and therefore excluded from the grant to the railroad company, where such appeal had practically been abandoned before the survey through a delay of ten years in filing the transcript of record in the appellate court, and the government did not question the right to the survey when the application therefor was made.

[No. 142.]

Argued January 24, 25, 1906. Decided February 19, 1906.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California, canceling certain patents erroneously issued to a railway company, quieting the title of the government to the lands, confirming the titles of bona fide purchasers of other lands erroneously patented to the company, and adjudging that the United States recover from the company the value of the lands so conveyed. *Affirmed.*

See same case below, 66 C. C. A. 560, 133 Fed. 662.

Statement by Mr. Justice **Brewer:**

This case, in which, on February 28, 1901, the United States filed its bill in the circuit court for the southern district of California, resembles the one immediately preceding, in that it was a suit to cancel certain patents erroneously issued to the Southern Pacific Railroad Company, and to quiet the title of the government to the lands mentioned therein; to confirm the title of certain other lands erroneously patented to the company and by it conveyed to bona fide purchasers; and to obtain an accounting and recovery from the company of the value of the lands so conveyed to bona fide purchasers. By the decree the full relief asked—cancelation, confirmation, and recovery—was granted. The question presented is different in that the railroad company denies that the patents were erroneously issued. The lands were within the place limits of the railroad company's grant, but the plaintiff contends that they *were[355] excluded from the grant because within the claimed and undetermined limits of a Mexican land grant.

In 1838 one Juan Bandini received from

NOTE.—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

tne Mexican government a grant of what is termed the Jurupa ranch. After California was acquired under the treaty of Guadalupe Hidalgo [9 Stat. at L. 922], and on September 25, 1852, Bandini presented his petition to the commissioners appointed under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), asking confirmation of his title, and on October 17, 1854, it was confirmed, the order of confirmation describing the boundaries of the rancho in substantially the language of the act of juridical possession.

An appeal was taken to the district court of the United States for the southern district of California, as authorized by the statute, which court, on April 5, 1861, sustained the action of the commissioners. The boundaries of the grant were thus described:

"The said boundaries being as follows: Commencing at the foot of a small hill, standing alone, at the cañada which the Messrs. Yorba recognize as their boundary, on the further side of the river of Jurupa, which hill the Indians in their tongue call 'Pachappa,' which was taken for a landmark, placing on it certain stones on top of others; thence course westerly along the bank of the said river thirty thousand varas to the point of the same table land on which Mr. Bandini had established his house; and where the said river makes a bend, where a stake was driven for a landmark; thence northerly, fronting towards the mountains of Cucamonga, seven thousand varas, passing between the two springs of Guspar, ending at the first white sand bank which there is on said course towards Cucamonga; thence easterly the same thirty thousand varas to a small lone mountain on the left hand of the high road going from San Gabriel to San Bernardino, called by the Indians 'Catalmacay,' and which was designated as a landmark; thence southerly seven thousand varas to the point of beginning at the foot of the small hill called 'Pachappa,' which makes a corner east, west."

[356] *The confirmation was made in the name of Abel Stearns, a purchaser pending the proceedings, and substituted of record for the original petitioner. On January 14, 1869, the surveyor general of California, on application of the claimant and deposit by him of the estimated cost thereof, directed a survey of the rancho. This was made, and on February 26, 1872, the survey and field notes were filed in the office of the surveyor general of California, and by him approved. On May 13, 1876, the Commissioner of the General Land Office at Washington directed a correction of some alleged errors in this survey. On appeal from this order the Secretary of the Interior, on February 21, 1877, ordered a resurvey. This was made, and on May 23, 1879, a patent was issued conforming to such resurvey. The lands in dispute are within the limits of the first, but outside those of the second, survey, and are not included in the patent.

On May 1, 1862, an appeal to this court was prayed and allowed in the district court of California. On January 8, 1875, an order was here entered which, after stating that an appeal had been allowed by the district court, as shown by an inspection of the certificate of the clerk of that court, recites:

"And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-four, the said cause came on to be heard before the said Supreme Court, and it appearing that the said appellant has failed to have its cause filed and docketed in conformity to the rules of this court, it is now here ordered, adjudged, and decreed by this court that this appeal from the district court of the United States for the district of California be, and the same is hereby, docketed and dismissed."

Upon these facts a decree in favor of the plaintiff was entered by the circuit court, June 15, 1903 (59 C. C. A. 683, 123 Fed. 1007), which was affirmed by the circuit court of appeals on October 17, 1904 (66 C. C. A. 560, 133 Fed. 662), and thereupon this appeal was taken.

Mr. **Maxwell Evarts** argued the cause and filed a brief for appellants:

The decree of the district court was not final within the meaning of the statute, while the appeal to this court was pending.

Childs v. *Southern P. R. Co.* 10 Land Dec. 630; *Newhall* v. *Sanger*, 92 U. S. 761, 763, 23 L. ed. 769, 770.

Mr. **Joseph H. Call** argued the cause and filed a brief for appellee:

Lands embraced within the limits of a Mexican or Spanish grant, *sub judice* when the grant takes effect, or which are covered by a subsisting pre-emption or homestead filing, or mineral claim, or other claims or rights, or otherwise reserved, are excepted from railroad grants.

Leavenworth, L. & G. R. Co. v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Cameron* v. *United States*, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; *Whitney* v. *Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32, 41, 36 L. ed. 64, 66, 12 Sup. Ct. Rep. 362; *Northern P. R. Co.* v. *Musser-Sauntry Land, Logging, & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct.

Rep. 205; *Northern P. R. Co.* v. *Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; *Bardon* v. *Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

Whenever the law provides for a survey of a Mexican grant by the Commissioner of the General Land Office, or by his inferior officer, the surveyor general for the district of California, it is presumed, when such survey has been made and approved, that survey was made in accordance with law; and it will be binding upon the government and all others until reversed or set aside by a higher authority.

McCreery v. *Haskell*, 119 U. S. 327, 30 L. ed. 408, 7 Sup. Ct. Rep. 176; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 34 L. ed. 887, 11 Sup. Ct. Rep. 279.

Mr. Justice **Brewer** delivered the opinion of the court:

The single question is whether these lands were, between the dates of the two surveys, *sub judice*, and therefore not passing under the grant to the railroad company. The map of definite location was filed and approved in 1874, and at that time, which was between the dates of the two surveys, the grant took effect. The description of the lands in the Mexican grant and in the decree of confirmation was not in the language of the United States land legislation, by section, township, and range, nor was it such that, without a survey, the exact boundaries could be determined. No one could say from reading this description whether the true north boundary was shown by the first or the second survey. The regular land surveys made by the government, establishing section, township, and range lines, would not locate the boundaries of the grant, nor would they identify either of those lines with any particular boundary. There was that generality of description which required a special survey to locate the grant. It is said that the patentee never claimed the land north of the boundary line established by the second survey, and therefore that it was in no just sense *sub judice*. But the boundaries being uncertain, he applied to the department authorized by Congress to determine them. It acted upon his application, and, by its survey, located the boundaries. He made no challenge of its action, but, so far as the record shows, was content therewith. While a new survey was subsequently ordered, it was not at his instance. So, at least until the first survey was set aside, it was the measure of his claim, and the lands within the boundaries established by it were *sub judice*. No affirmative dec-
[358] laration that he insisted *upon his right to them was essential to make them a part of his claims.

But the special contention of the appellants is that the first survey was without any authority of law, because the statute provides that upon final confirmation of the claim a survey may be ordered, and it is insisted that there was no final confirmation until the order made by this court in 1875; that, although the confirmation by the district court was in 1861, yet an appeal was allowed which transferred the case to this court, and held the question of confirmation in abeyance until the order here made in 1875. The statute (§ 13) provides:

" . . . and for all claims finally confirmed by the said commissioners, or by the said district or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same."

Hence it is contended that the entire proceedings under the first survey were void and may be put out of consideration in determining whether the lands were *sub judice*. But this ignores the fact that, anterior to the first survey, the United States had practically abandoned its appeal from the order of the district court. It had for ten years failed to file any transcript in this court, and the petitioner had been entitled to the formal entry of docket and dismissal which he obtained in 1875,—an entry implying an abandoned appeal, and made to place that fact upon record. The government, which was the party interested against the petitioner, and the party taking the appeal, did not, when the application was made in 1869 to the surveyor general of California, question the right to a survey. It did not suggest that there had been no final order of confirmation, nor has it at any time raised any question of the right to that survey, and the Land Department ordered *the [359] second only upon a doubt of the accuracy of the first. It does not lie within the mouth of a third party to say that the government had a right to appeal, could have insisted on that right, and could have objected to the first survey on the ground of a failure to obtain a final order of confirmation. It is enough that the government recognized that it had abandoned its appeal, and was willing that proceedings should be taken looking to a survey and patent. Nor were the proceedings so absolutely void that it can be said that no claim was pending.

The surveyor general was the official of the government, placed in charge of surveys, who, on application, was to determine whether the conditions had arisen which justified him in acting. If he decided erroneously his action could be set aside on review, but it was not a nullity. Even between individuals, if one brings a suit in a Federal court to quiet his title to a tract of land, and obtains a decree in accordance with his bill, and on appeal this court sets aside the decree and orders the suit to be dismissed for lack of proper allegations in respect to diverse citizenship,—while it may be that the proceedings are ineffectual to determine the title, yet, can it be said that no suit was pending, no claim was made? Put the question in another aspect: Suppose no challenge of the first survey had been made, and the Land Department, acting on that survey, had caused a patent to be issued,—could the government obtain a decree setting it aside upon that showing alone, and without a disclosure of equities? In *Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457, and *Germania Iron Co.* v. *United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337, something more than premature action in certificate and patent was shown,—something which presented an equity entitling the United States to maintain its suit for cancelation.

Another matter; at the time the map of definite location was filed and approved, this first survey had been made and approved by the surveyor general of California, and by that survey the lands in dispute were included within the Mexican grant. The railroad company, therefore, took title to its land grant with this fact apparent on the records of the Land Depart-
[360] ment. *In an early case in this court (*Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566) in which the question of the relative rights of railroads to granted lands and individuals claiming rights to separate tracts within the place limits was presented, we said (p. 641, L. ed. p. 1126, Sup. Ct. Rep. p. 571):

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations.

"The reasonable purpose of the government undoubtedly is that which is expressed; namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preemption or homestead right to attach. No right to such land passed by this grant."

And this proposition has been repeatedly reaffirmed in later cases. *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; *Whitney* v. *Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796.

One thing more; it appears from a stipulation of counsel that within the indemnity limits of the grant to the Southern Pacific Railroad there remain more than 50,000 acres of surveyed public lands for which there has been no selection or application to select by the company. So that there is no such equity in favor of the company as was suggested in the case of *United States* v. *Winona & St. P. R. Co.* 165 U. S. 463, 482, 41 L. ed. 789, 797, 17 Sup. Ct. Rep. 368.

The decree of the Court of Appeals is affirmed.

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*NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Appt.*, [361]

v.

INTERSTATE COMMERCE COMMISSION. (No. 24.)

INTERSTATE COMMERCE COMMISSION, *Appt.*,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, and New York, New Haven, & Hartford Railroad Company. (No. 27.)

(See S. C. Reporter's ed. 361–405.)

1. **Commerce — Federal regulation — maintenance of published rates by interstate carrier — undue preferences and discrimination.**—An interstate carrier not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.

2. **Commerce — Federal regulation — maintenance of published rates by interstate carrier — undue preferences and discrimination.**—Deliveries of coal by an interstate carrier not empowered to mine and market coal by its char-

ter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made.

3. **Statutes—construction by the body charged with enforcement.**—The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that act, this construction, which has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute.

4. **Injunction—extent of relief—general injunction.**—A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular.

[Nos. 24, 27.]

Argued October 25, 26, 1905. Decided February 19, 1906.

CROSS APPEALS from the Circuit Court of the United States for the Western District of Virginia to review a decree enjoining an interstate carrier from violating prohibitions of the act to regulate commerce against undue preferences and discriminations. Modified by enjoining the taking of less than the published tariff of freight rates by means of dealing in the purchase and sale of coal, and *as modified, affirmed.*

See same case below, 128 Fed. 59.

The facts are stated in the opinion.

Mr. **John W. Daniel** argued the cause, and, with *Mr. Fred Harper,* filed a brief for the New York, New Haven, & Hartford Railroad Company:

So long as a sufficient sum is realized from the sale of the coal by the vender-carrier to cover its transportation charges, bearing in mind that the contract of sale is not a mere device to evade the law, there can be no unjust discrimination in the freight rates.

Haddock v. *Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 302; *Coxe Bros.* v. *Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

In order to justify the court in considering the question of undue or unreasonable prejudice or disadvantage, it should be alleged.

Texas & P. R. Co. v. *Interstate Commerce Commission,* 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

In seeking legislative intent, resort may be had to every part of a statute; or, when there is more than one *in pari materia,* to the whole system.

Kohlsaat v. *Murphy,* 96 U. S. 153, 159, 24 L. ed. 844, 845.

The general subject and purpose of the statute, read as a whole, will restrict the meaning of general words in some portion of the statute, in order to effectuate the true legislative intent.

Pennington v. *Coxe,* 2 Cranch, 33, 52, 2 L. ed. 199, 204; *Kohlsaat* v. *Murphy, supra; Brewer* v. *Blougher,* 14 Pet. 198, 10 L. ed. 417; *Washington Market Co.* v. *Hoffman,* 101 U. S. 112, 116, 25 L. ed. 782, 783; *Petri* v. *Commercial Nat. Bank,* 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; *United States* v. *American Bell Teleph. Co.* 159 U. S. 549, 40 L. ed. 256, 16 Sup. Ct. Rep. 69; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 540; *McKee* v. *United States,* 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92.

An injunction must be specific.

16 Am. & Eng. Enc. Law, p. 342; 2 Story, Eq. 861; Spelling, Inj., § 3; Anderson, Law Dict. *Injunction,* High, Inj., § 1; *Robinson* v. *Clapp,* 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939; *Lyon* v. *Botchford,* 25 Hun, 57; *Sullivan* v. *Judah,* 4 Paige, 444; *Moat* v. *Holbein,* 2 Edw. Ch. 188; *Laurie* v. *Laurie,* 9 Paige, 235; *Southern P. Co.* v. *Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 779; *Swift & Co.* v. *United States,* 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Mr. **John W. Griggs** also argued the cause and filed a brief for the New York, New Haven, & Hartford Railroad Company.

Mr. **Randolph Harrison** argued the cause, and, with *Mr. A. R. Long,* filed a brief for the Chesapeake & Ohio Railway Company:

Before the court will exercise the power of injunction, the bill must specifically allege the thing or act to be restrained, and the order must clearly and definitely put the defendant on notice of what he "may or may not do without making himself liable as in contempt of the order."

10 Enc. Pl. & Pr. p. 923; *Warsop* v. *Hastings,* 22 Minn. 437; *Lyon* v. *Botchford,* 25 Hun, 57; *Laurie* v. *Laurie,* 9 Paige, 234;

1 High, Inj. 2d ed. 30; *Sullivan* v. *Judah*, 4 Paige, 444; *Moat* v. *Holbein*, 2 Edw. Ch. 188; *Robinson* v. *Clapp*, 65 Conn. 365, 29 L.R.A. 592, 32 Atl. 939; *Whipple* v. *Hutchinson*, 4 Blatchf. 190, Fed. Cas. No. 17,517; *St. Louis Min. & Mill Co.* v. *Montana Min. Co.* 58 Fed. 129; *Southern R. Co.* v. *Machinists' Local Union No. 14*, 111 Fed. 58.

A restraining order that neither forbids nor commands the doing of any specific act, but simply repeats the general admonitions of the interstate commerce act, should not be granted, since such an injunction does not give any additional sanction to the statute, but leaves all vital questions concerning violations of the law to be tried by proceedings for contempt, instead of being tried in the usual manner, before a court and jury.

Southern P. Co. v. *Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 779.

The action of the lower court in refusing to enlarge the injunction in accordance with the contention of the Interstate Commerce Commission was correct.

Swift & Co. v. *United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for the Interstate Commerce Commission:

The interstate commerce act was intended to cut up by the roots the entire system of rebates and discriminations, and to put all shippers on an absolute equality.

Union P. R. Co. v. *Goodridge*, 149 U. S. 680, 690, 37 L. ed. 896, 902, 13 Sup. Ct. Rep. 970.

If, when a railroad is detected in wilfully violating the law by transporting any article at less than schedule rates, the only remedy in equity is to restrain it from thereafter so carrying that article for that person, little may be accomplished. But if, under the circumstances suggested, a broad order forbidding transportation of the article for anybody must be issued, the results may be much more wholesome, and the true purpose of the law may be more fully effectuated.

Re Debs, 158 U. S. 564, 570, 39 L. ed. 1092, 1094, 15 Sup. Ct. Rep. 900.

A defense bottomed on the recognition of a liability springing from a void contract would be clearly without merit.

Union P. R. Co. v. *Goodridge*, 149 U. S. 680, 691, 37 L. ed. 896, 902, 13 Sup. Ct. Rep. 970.

The deleterious effect of permitting railroads to act as dealers in merchandise is lucidly pointed out by the Vice Chancellor in—

Atty. Gen. v. *Great Northern R. Co.* (1860) 29 L. J. Ch. N. S. 794; and by Cockburn, Ch. J., *Baxendale* v. *Great Western R. Co.* 28 L. J. C. P. N. S. 81, 5 C. B. N. S. 336. See also *Haddock* v. *Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 302; *Coxe Bros.* v. *Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460; *Re Alleged Unlawful Rates*, 7 Inters. Com. Rep. 33; 1 Wood, Railroads, Minor's ed. 652; *Baxendale* v. *North Devon R. Co.* 3 C. B. N. S. 324.

Mr. W. A. Day also filed a brief for the Interstate Commerce Commission:

A railway corporation cannot, in its capacity as carrier, discriminate in favor of itself when engaged in some business other than that of carrier over its line of railway, to the prejudice of others engaged in the same business.

Baxendale v. *Great Western R. Co.* 1 Railway & Canal Traffic Cases, 202, 5 C. B. N. S. 336; *Haddock* v. *Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 302.

Mr. Justice **White**, delivered the opinion of the court:

Following an inquiry, begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1905, p. 599), in the circuit court of the United States for the western district of Virginia, this proceeding against the Chesapeake & Ohio Railway Company, *a Virginia corporation, and [382] the New York, New Haven, & Hartford Railroad Company, a corporation, of the state of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake & Ohio, and the New Haven. The petition averred that the Chesapeake & Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the

Chesapeake & Ohio bought it, and the cost of transportation from Newport News to Connecticut, would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton.

Referring to the developments before the Commission, and annexing as part thereof the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake & Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination, for two reasons: First. Because if such difference existed, [383] *it was a loss suffered by the Chesapeake & Ohio, not from taking less than its published rates, but because it had received less as seller than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake & Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made, the New Haven had a claim exceeding $100,000 against the Chesapeake & Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake & Ohio, including its published rates. Averring that the prior contract was in itself void because it also embodied an agreement to take less than the published rates, and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake & Ohio, knowing that they were in violation of the interstate commerce law. The prayer was that the Chesapeake & Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal, and the other from seeking to enforce it; that the Chesapeake & Ohio be enjoined from "accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practised." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

*A preliminary restraining order was is- [384] sued, conforming to the prayer of the petition. The Chesapeake & Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about 60,000 tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the coal, plus the published rates and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about $100,000, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake & Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that, at about the time the original contract was made, arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of $100,000 to the Chesapeake & Ohio was occasioned.

The New Haven road, in its answer, asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake & Ohio, and not a shipper over that road; that the coal bought was intended for its own use *in the operation of [385] its railroad; that it had no knowledge of the price which the Chesapeake & Ohio

would be obliged to pay for the coal, or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not equal the market price of the coal, the cost of delivery, and the published rate of the Chesapeake & Ohio. It averred the validity of the agreement, the legality of the debt of $100,000 which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake & Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake & Ohio. It denied that there was any departure from the published rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled the Chesapeake & Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if, in execution of the contract, a condition arose where a loss was suffered by the Chesapeake & Ohio in either capacity, it was caused by subsequent events which could not affect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake & Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the 2d and 6th sections of the act to regulate commerce, forbidding the taking of less than the published rates. [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.] It, however, held that the contracts amounted to an undue discrimination and a violation of the 3d section of the act. The court, hence, permanently enjoined the Chesapeake
[386] & *Ohio from discharging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as, in general terms, to command the Chesapeake & Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake & Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits, and in effect asks its reversal on the merits.

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy, as considered by the Commission on the inquiry by it conducted, and as decided below, and as here presented, involves an analysis of all the dealings under both contracts, and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are undisputably established, reserving such questions of fact as are in dispute for separate consideration when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake & Ohio, chartered by the state of Virginia, *operates a road which [387] reaches both the New River and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the state of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy, between July 1, 1897, and July 1, 1902, not to exceed 2,000,000 gross tons of bituminous coal, to be taken from the line of the Chesapeake & Ohio road; deliveries to be made not exceeding 400,000 tons per annum. The price agreed upon was $2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.†

†Contract Made between the Chesapeake & Ohio Railway Company and the New York, New Haven, & Hartford Railroad Company.

Said Chesapeake & Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed 2,000,000 gross tons of bi-

The Chesapeake & Ohio, not in its own name, but through others who really, although not ostensibly, acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfil the contract which had been made with the New Haven. In
[388] consequence *of failure of some of the operators to perform their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900–1901, when, because of strikes and other difficulties, delivery ceased, and the New Haven bought coal in the open market and presented to the Chesapeake & Ohio a bill for the increased price which it had paid, and the Chesapeake & Ohio paid $160,000 to cover such loss. Subsequently, in 1902, further strikes supervened and deliveries again ceased, at a time when about 60,000 tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to $103,000. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of 60,000 tons upon the original contract might be discharged by delivery on the part of the Chesapeake & Ohio of that amount of coal from the Kanawha district at the contract price of $2.75, and when this delivery was consummated it was agreed that the Chesapeake & Ohio would be absolutely relieved from the payment of the damage claim just referred to.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake & Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to car-
[389] ry out the agreement, *an individual who represented the Chesapeake & Ohio made contracts in his own name with the operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake & Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly long prior to the making of the first contract the Chesapeake & Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the state of West Virginia passed "An Act to Prevent Railroad Companies from Buying or Selling Coal or Coke and to Prevent Discrimination." The 1st section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake & Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven, to do so not in its own name, but through another.

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tuminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding 400,000 tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake & Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundreths dollars per gross ton. New Haven basis, settlement to be made *monthly*.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this, the 3d day of December, 1896.

Chesapeake & Ohio Railway Company,
By M. E. Ingalls, President.
The New York, New Haven, & Hartford Railroad Company,
By C. E. Mellen, Second Vice President.

For value received, I hereby guarantee that the Chesapeake & Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. Pierpont Morgan.

Before applying to these undisputed facts [390] the legal question *arising for decision, we must determine a question of fact as to which there is some dispute; that is, was the price at which the Chesapeake & Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence, we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract, and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought, then, to determine whether the contract made in 1896 for the 2,000,000 tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we, for the moment, put out of view the provisions of the West Virginia statute, and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake & Ohio had obligated itself to deliver. We shall also assume, for the purpose of the inquiry, that the Chesapeake & Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the [391] commodity *sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates?

The previous decisions of this court concerning the interstate commerce act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions, against discrimination, favoritism, or rebates, but have mainly concerned the meaning of the act in other respects; that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission, which are relied upon by the two railroads, directly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the 2d section of the act, that no departure from the published rate shall be made, "directly *or indirectly," how [392] can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the

mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of
[393] the commodity, it must *result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately, and not merely remotely, to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law, and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *Atty. Gen.* v. *Great Northern R. Co.* 29 L. J. Ch. N. S. 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798):

"These large companies, joint-stock companies generally, *for whatever purpose [394] established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money,—large amounts of property,—and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways."

Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p. 799):

"Here we find this company, having the traffic from the north of England, where the great coal fields are (at least, some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic; that is, the dealing in all the coal in the large districts supplying coal to the country. They have, to a considerable extent, done so, and there is no reason why it should not go on progressing. I observe that in the eight [?] years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets

of London and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, [395] therefore, *great detriment to the interests of the public, for this reason, taking merely the article of coal."

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier, and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage," and unjust discrimination," are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and, as such dealer, to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions [396] *urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(*a*) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(*b*) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control. The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake & Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device *for avoiding the [397] operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake & Ohio was wholly indifferent to and did not concern itself with, the prohibitions of the statute, of which, of course, it must be assumed to have had full knowledge. As we have seen, the president of the Chesapeake & Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line, and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that

the Chesapeake & Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that, in making the contract, the Chesapeake & Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the interstate commerce act. In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line, and thereby, as it conceived, to increase the carriage of that commodity, and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classifi-
[398] cation, and would *besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in their stead of the conceptions of the Chesapeake & Ohio as to what was best for itself and for the public. Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depends not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

*(c) It is urged that if the requirement [399] of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

But it is in effect said, conceding this to be true as an original question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an administrative construction long since given to the act by the interstate commerce commission, the body primarily charged with its enforcement, and which has become a rule of property, affecting vast interests, which should not be judicially departed

from, especially as such construction, it is asserted, has been impliedly sanctioned by Congress by frequently amending the act without changing it in this particular.

Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the Interstate Commerce Com-
[400] mission upon which *the premise is based are *Haddock* v. *Delaware, L. & W. R. Co.* 4 I. C. C. Rep. 296, 3 Inters. Com. Rep. 302, and *Coxe Bros.* v. *Lehigh Valley R. Co.* 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460, decided respectively in 1890 and 1891.

Without going into detail, we content ourselves with saying that in both of the cases complaints were made to the Interstate Commerce Commission concerning the defendant railroads, and it was charged that whilst acting as common carriers they were dealing in coal, and as a result violating the prohibitions of the interstate commerce act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers, prior to the adoption of the interstate commerce act, were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined, and transporting the same to market. Indeed, it was found in both cases that the functions of producing and transporting, as authorized, were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold, and transported some coal which was not produced in the mines which they owned, this fact was evidently treated, in view of the other circumstances of the case, as of minor importance, since the commingled powers of producing, selling, and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell, and transport, existing before the passage of the act to regulate commerce, the Commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the interstate commerce act was pointed out by the Commission in *Re Alleged Unlawful Rates*, 7 I. C. C. Rep. 33. In that case, in
[401] deciding *that the defendant carrier was without power to purchase grain for the purpose of securing the right to transport it, and thus evade the law which would have applied to its transportation had it been owned by any other party, the Commission, in distinguishing the case before it from the *Haddock* and *Coxe Bros. Cases*, said (p. 38):

"Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property; and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one."

Now, without at all intimating that, as an original question, we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the *Haddock* and *Coxe Bros. Cases* would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; at least, until Congress has legislated on the subject. We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical *execution, and [402]
has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight, and was not lightly to be

interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows since the Chesapeake & Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the *Haddock* and *Coxe Bros. Cases*.

Concluding, therefore, that both the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake & Ohio, and therefore the court below was correct in so deciding.

This leaves only for consideration the question raised by the cross appeal of the Interstate Commerce Commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the Commission:

"That the circuit court of the United States for the western district of Virginia, after finding that the claim of the New York, New Haven, & Hartford Railroad Company against the Chesapeake & Ohio Railway Company for $103,910.69, asserted as damages arising from a partial nonperformance by said railway company of a con-
[403] tract of December 3, 1896, set *out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake & Ohio Railway Company, its officers, agents, and employees from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake & Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake & Ohio Railway Company from transporting coal from one state to or through any other state for the New York, New Haven, & Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven, & Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage; and said decree, entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven, & Hartford *Railroad Company [404]
and its officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake & Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the antitrust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most ele-

mentary principles of justice. The injunction which was granted in the case of *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the [405] 2d and 6th *sections of the act, relating to the maintenance of rates, had been violated, the injunction by it issued was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal. And, *as thus modified, the decree below is affirmed.*

FRED C. RECTOR, Trustee of Reinhard & Company, *Plff. in Err.*,

v.

CITY DEPOSIT BANK COMPANY.

(See S. C. Reporter's ed. 405–420.)

1. **Error to state court—Federal question—certificate of state court.—** The certificate of a state court of last resort may serve to remove any doubt whether rights under the Federal bankrupt law were so relied upon and passed upon in affirming, without opinion, a judgment dismissing a suit brought by a trustee in bankruptcy to recover an alleged asset of the bankrupt estate, as to sustain a writ of error, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, from the Federal Supreme Court.

2. **Bankruptcy—assets of bankrupt estate.—** A bank which, in payment of a clearing house check drawn in its favor on another member, and held as a result of the day's clearings, receives the proceeds of checks presented by such other member for clearing on the next morning, shortly before suspending payment, must account therefor to the bankrupt estate of such defaulting member, where the clearing house, in the revision of the clearings made necessary by such suspension, eliminated and returned the checks which had been debited against the defaulting member, and which were subsequently dishonored; and this is no less true because the clearing house, under its rules, might have called on its other members to pay *pro rata* the amount of the checks drawn upon the defaulting member, and might have treated the credits in favor of the defaulting member as belonging proportionally to the contributing members, since, even under these rules, a check which was a result of the clearings of the previous day would not be entitled to participation.

[No. 137.]

Submitted December 12, 1905. Decided February 19, 1906.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Franklin County, in that state, which had in turn affirmed a judgment of the Court of Common Pleas of that county, dismissing an action by a trustee in bankruptcy to recover an asset of the bankrupt estate. *Reversed* and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **David F. Pugh** submitted the cause for plaintiff in error. *Messrs. Fred C. Rector* and *Pugh & Pugh* were on the brief:

If the title of the bankrupt is not questioned, and if the question is whether the property passed to his trustee under the bankrupt act, then this court has jurisdiction.

McKenna v. *Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Cramer* v. *Wilson*, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94; *Williams* v. *Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; *Dushane* v. *Beall*, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637.

The petition here recites the assignment for the benefit of creditors under the state law, the insolvency of the assignors, the filing of the petition in bankruptcy, the adjudication in bankruptcy, the appointment of the trustee,—all of which, together with the allegations about the transfer and payment of the money, show a voidable preference, and that the petitioner intended to assert a right under the bankrupt law. All of this appears on the face of the record, and is in strict conformity with the rule as laid down in *Hoyt* v. *Shelden*, 1 Black, 518, 7 L. ed. 65; *Maxwell* v. *Newbold*, 18 How. 515, 15 L. ed. 508, and in other subsequent cases.

If the petition should be deemed too general and indefinite, the certificate of the chief justice of the supreme court of Ohio makes it more specific and certain, which is the function of a certificate.

Brown v. *Atwell*, 92 U. S. 327, 23 L. ed. 511.

It was not necessary that the petition

NOTE.—*On certificate of state court as showing the presence of a Federal question*—see note to Cincinnati, P. B. S. & P. Packet Co. v. Bay, *ante*, 428.

should aver in so many words, or positively, that the right which the petitioner claimed was derived from or under the bankrupt law.

Crowell v. *Randell*, 10 Pet. 368, 9 L. ed. 458; *Miller* v. *Nichols*, 4 Wheat. 311, 4 L. ed. 578; *Willson* v. *Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412.

The petition of the plaintiff in error was abundantly sufficient to authorize a recovery, even if there had been no preference intended, and there had been simply a conversion by the defendant in error.

The import of the decision by the circuit court is that there was a variance between the proof offered by the plaintiff in error and the allegations of his petition. If there was a mere variance, and not a failure of proof, the objection should have been made on the trial. It was too late to make the objection, for the first time, in the appellate court.

Speer v. *Bishop*, 24 Ohio St. 598; *Hoffman* v. *Gordon*, 15 Ohio St. 211.

Mr. **Talfourd P. Linn** submitted the cause for defendant in error. *Messrs. Outhwaite, Linn, & Thurman* were on the brief:

There must be a definite issue as to the possession of the right, distinctly deducible from the record, before the state court can be held to have disposed of such Federal question by its decision.

Sayward v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The certificate of the presiding judge of the state court cannot itself confer jurisdiction upon this court to re-examine the judgment, and the petition for the writ of error forms no part of the record, upon which action can be taken here.

Ibid.

To render a Federal question available on writ of error to the state court, it must have been raised in the case before judgment, and cannot be claimed for the first time in a petition for rehearing.

Turner v. *Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295. See also *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

The question cannot be raised for the first time in the assignments of error.

Jacobi v. *Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; *Johnson* v. *New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

A writ of error to a state court must be dismissed where no Federal question was raised in the record, and the case was disposed of in the state courts on a ground wholly independent of a Federal question.

New York C. & H. R. R. Co. v. *New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

This court will not review, on error, mere questions of construction of Federal statutes, or applications of facts to those statutes, when the validity of the act or statute is not involved, and where no right to proceed under the statute is denied by the state court.

Cameron v. *United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; *Choteau* v. *Marguerite*, 12 Pet. 509, 9 L. ed. 1175; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Osborne* v. *Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Kennard* v. *Nebraska*, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879.

In the very recent case of *Thompson* v. *Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306, the identical question under consideration was decided by this court.

To the same effect is the case of *Cramer* v. *Wilson*, 195 U. S. 409, 49 L. ed. 257, 25 Sup. Ct. Rep. 94.

McKenna v. *Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365, is also in point. That was a suit brought by an assignee in bankruptcy to set aside a fraudulent conveyance. The court held that it was an action which might have been brought in the United States court direct, but that having been brought in the state court, and no decision having been rendered in the state court against the validity of any statute of, or authority exercised under, the United States, or immunity claimed under the Constitution of the United States, this court had no jurisdiction to review the state decision. It was held, further, that the decision of the state court as to what should be deemed a fraudulent conveyance does not present any Federal question, nor does the application by the court of the evidence in reaching such decision raise a Federal question.

Under the rule announced in *Kaufman* v. *Tredway*, 195 U. S. 271, 49 L. ed. 190, 25 Sup. Ct. Rep. 33, the decision of the supreme court of Ohio, confirming the lower courts, is final, and not subject to review by this court.

The law is too well settled to need citation, that an unlawful preference, within the meaning of the bankruptcy act, must have been a preference obtained by the creditor—in this case, the City Deposit Bank—with full knowledge of the insolvency, and with a deliberate intent to obtain the preference at the expense of other creditors.

Collier, Bankruptcy, 4th ed. 418.

Mr. Justice **White** delivered the opinion of the court:

The firm of Reinhard & Company, com-

posed of John G. Reinhard and Henry A. Reinhard, carry on a banking business in Columbus, Ohio. On April 10, 1900, the firm made a general assignment under the insolvent laws of Ohio. On the following day a petition in involuntary bankruptcy under the laws of the United States was filed against the firm, and on August 10, 1900, it was adjudged bankrupt, and subsequently Rector, the plaintiff in error, was appointed the trustee.

In a court of common pleas of the state of Ohio the trustee began this suit against the defendant in error to recover the sum of $1,300, which it was subsequently agreed was only $1,161.74. The petition alleged the adjudication in bankruptcy and the appointment of the trustee, and based his right to recover upon the ground that on April 10, 1900, the firm had transferred and assigned to the defendant bank, who had received the same, the sum of money sued for,
[410] which it was *alleged was the property of Reinhard & Company, and, in substance, the payment to the bank was alleged to constitute a voidable preference.

The answer admitted the making of the general assignment, the adjudication of the firm as an involuntary bankrupt, and the appointment and qualification of the plaintiff as trustee. The other averments of the petition were denied.

A trial was had to a jury. At the close of the evidence for the plaintiff the court, at the request of the defendant, instructed a verdict in its favor, and judgment was entered dismissing the action. The circuit court of Franklin county affirmed the judgment, which was thereafter affirmed by the supreme court of Ohio, without opinion. The chief justice of the supreme court of Ohio made, and the court caused to be filed and entered on its journal, the certificate which is in the margin.†

[411] *It is contended that this court is without jurisdiction. The argument upon which this proposition is rested is this: First. It is said that whilst, in the petition, the right of recovery was based upon the ground of fraudulent preference, it was not disclosed therein whether the preference relied upon was in violation of the bankrupt law of the United States or of the insolvent laws of the state of Ohio; and therefore a Federal question was not raised, as it was necessary to specially direct the attention of the state court to such a question if it was intended to rely upon it. Second. But even if the Federal question was referred to in the petition, as the cause of action stated in nowise involved the construction or validity of any provision of the bankrupt act, therefore there is no right to review under § 709 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 575.

Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States. *Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Barton* v. *Geiler*, 108 U. S. 161, 27 L. ed. 687, 2 Sup. Ct. Rep. 387; *Williams* v. *Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; *Dushane* v. *Beall*, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; *Stanley* v. *Schwalby*, 162 U. S. 275, 40 L. ed. 967, 16 Sup. Ct. Rep. 754. Whether expressions, relied upon in argument, contained in *Cramer* v. *Wilson*, 195 U. S. 416, 49 L. ed. 258, 25 Sup. Ct. Rep. 94, must be taken as not in harmony with the previous cases, or whether those expressions simply implied that where a right claimed by a trustee in bankruptcy in its final aspect depended *solely upon a [412] state law, the courts of the United States would follow the construction given by the highest courts of the state to the state law, we do not deem it necessary now to say, for, without reference to the doctrine announced in the previous cases, and without regard to the import of the case of *Cramer* v. *Wilson*, the contention as to the want of jurisdiction is without merit. It is to be observed that the matter certified by the supreme court of Ohio was made by that court a part of the record, and, if it be considered as having the force of an opinion of that court, would clearly establish the fact that the court had considered and decided a Federal question, which, apart from other

†On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William T. Spear, chief justice of said supreme court, does now certify, that in said cause, and on the hearing before this court, it was claimed, contended, and alleged by the said plaintiff in error that, on the 10th day of April, A. D. 1900, Reinhard & Company, a partnership, by deeds of its individual members, committed an act of bankruptcy, to wit: made a general assignment for the benefit of creditors; that on the 11th day of April, A. D. 1900, a petition in bankruptcy was filed in the district court of the United States of the southern district of Ohio, eastern division; that on the 10th day of August, A. D. 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D. 1900, said plaintiff in error was appointed trustee thereof; that on the 10th day of April, A. D. 1900, said Reinhard & Company, then being, to the knowledge of the defendant in error, insolvent, assigned and transferred to

considerations, would obviously give jurisdiction. But even if the action of the court be treated as not an opinion, but a mere certificate, the same result would follow. It is elementary that the certificate of a court of last resort of a state may not import a Federal question into a record where otherwise such question does not arise; it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists. Applying this principle, we think, as the suit was brought by a trustee in bankruptcy in virtue of the power and authority conferred upon him by a law of the United States, the certificate makes clear the fact, if it were otherwise doubtful, that rights under the bankrupt law were relied upon and passed upon below. And as, this being true, the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of § 709 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 575. *Nutt* v. *Knut*, 200 U. S. 12, *ante*, 348, 26 Sup. Ct. Rep. 216.

Coming to the merits, we premise that if the court below had found the facts we should be bound thereby. Here, however, as we have seen, the court below did not find the facts, but instructed a verdict for the defendant, being of the opinion that, upon no view of the evidence, was there a case made which would have justified a verdict for the plaintiff. This raises a question of law, which is this: Was the evidence such as would have justified the jury, under any [413] reasonable view thereof, to *find for the plaintiff? In other words, Was there sufficient evidence to warrant the submission of the case to the jury? This brings us to consider the evidence, in order to ascertain what inferences, one way or the other, might reasonably have been drawn by the jury therefrom.

Outside the testimony of the trustee as to the insolvency of the bankrupt estate, the only evidence introduced was the testimony of John Field, manager of the Columbus Clearing House Association. By that testimony the following facts were disclosed:

Prior to the bankruptcy of Reinhard & Company that firm carried on a banking business in the city of Columbus, Ohio, and the firm, as well as the City Deposit Bank Company, were members of the clearing house association. In order to accomplish the purpose of its existence the clearing house association was an agent, for a limited purpose, of the banks composing the association; that is, its duty was to clear or balance daily the claims of the respective banks, one against the other, resulting from the checks drawn upon and held by the different members. The only source from which the association derived the means to carry on its operations was from assessments upon the members, which were made solely for the purpose of paying rent, salaries, and similar expenditures. To effect the clearings each member of the association, on banking days, sent to the clearing house, at a specified hour, the checks held by it against other banks. The checks sent by each member were considered as remaining the property of the member, the association being simply an agent for collection. Where the sum of the checks presented by one bank exceeded the sum of the checks against it presented by other members of the association, that bank had, of course, a credit balance. Where the checks presented by a particular bank against other banks were less than the sum of the checks against it presented by other banks, that bank had a debit balance. Where a bank was entitled to a credit or payment corresponding to the excess which the sum of the checks presented by it exceeded the sum *of the checks against it, the clearing [414] house paid that bank the difference by drawing its check upon one or more of the debtor banks; and each member constituted the manager of the association its agent to draw a check or checks upon such member for any balance found to be due by that member.

In making the clearings on April 9, 1900, the day before the assignment of Reinhard & Company, the checks presented against that

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the defendant in error, The City Deposit Bank Company, and that the said last-named company then and there received from said Reinhard & Company, the sum of $1,161.74 of moneys belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of § 60*a* and §60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $1,161.74 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said § 60*a* and § 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set aside and declared null and void, and to have a judgment and order for the recovery of said money against said defendant in error; that the decision of this court was adverse to the claims and contentions of the said plaintiff in error, in this: that said court decided that said assignment and transfer of said sum of $1,161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1,161.74 from said defendant in error.

firm in the clearings exceeded the checks presented by it against other banks by $1,161.74; that is, Reinhard & Company, as a result of the clearing, was indebted in that amount. On the same day the City Deposit Bank presented in the clearings checks drawn upon other banks which exceeded by $10,245.63 the amount of the checks presented against that bank; in other words, as a result of the clearings it was entitled to receive the amount of money just stated. In payment of the balance the clearing house gave to the City Deposit Bank a check on Reinhard & Company for the sum due by that firm, *viz.*, $1,161.74, and a check upon the Capital City Bank for $9,083.89. There was nothing in the evidence to show upon what bank the checks were drawn which were held by the City Deposit Bank on April 9, and which it presented for clearing on that day, nor was there anything in the evidence to show upon what banks the checks were drawn which were presented by Reinhard & Company for clearing on the same day. The check of the clearing house on Reinhard & Company for the balance due by that firm in the clearings, and which, as we have said, was given to the City Deposit Bank, was not on that day presented by the City Deposit Bank on April 9, and which it prepayment. On the contrary, the City Deposit Bank held the clearing house check until the next day. When, on the morning of the 10th of April, the City Deposit Bank presented its checks for clearing, it treated the clearing house check on Reinhard & Company as being entitled to participate in the clearing, and included it in the checks presented for that purpose.

On the morning of April 10, the checks, as
[415] presented to the *clearing house by the City Deposit Bank, including the clearing house check, exceeded the amount of the checks presented against it by other banks in the sum of $4,875.98; and the clearing house gave to the City Deposit Bank its check on the Deshler National Bank for that sum. On that day the checks presented by Reinhard & Company against other banks aggregated $2,132.19, whilst the checks against it presented by other banks amounted to $6,369.30, leaving a balance due by Reinhard & Company in the clearing of $4,237.11. Shortly after the clearing was made it developed that Reinhard & Company had made a general assignment for the benefit of their creditors and had suspended payment, and as a result, of course, it was certain that the firm of Reinhard & Company would not meet its obligations. The rules of the clearing house had provided for such a contingency as follows:

"In case of failure to respond promptly to the checks of the manager, on the part of any member of the association, they shall be immediately returned to the manager, who shall call upon the other banks or bankers to make up the sum for which payment has been refused in proportion to the amount of checks upon the defaulting member sent into the clearing house at the preceding settlement, which sums so furnished or contributed shall constitute claims in the hands of the responding members respectively against the defaulting members, and it is hereby agreed that the checks received from the clearing house by the defaulting members shall be delivered, if required, to the member owning the same, without mutilation; the agency of the clearing house in the matter, it is understood, is only as a trustee, and in no case is the association to be held responsible for any loss that may occur."

All the checks drawn against Reinhard & Company, and which figured in the morning settlement, were returned to the clearing house with the information that Reinhard & Company had failed. The clearing house thereupon revised the previous settlements by deducting, wherever appearing, the credits which had been given for checks drawn on Reinhard & Company, *which had [416] been presented by other banks, and changed the balances to correspond with such deductions, and the dishonored checks were returned to the respective banks. Having thus returned all the checks which had been presented against Reinhard & Company on that morning, the entire sum which had been collected on the checks sent to the clearing house by Reinhard & Company on the same morning for the purpose of the clearing, *viz.*, $2,132.19, remained in the hands of the clearing house without any debit against it. Being thus in possession of the sum referred to, the manager testified that he paid $970.45 thereof to the Commercial Bank and the balance of $1,161.74 to the City Deposit Bank. With a view of making the payment to the last-named bank, the manager went to the office of the City Deposit Bank. Conflicting versions were given of what took place at the interview, which was had with an officer of the City Deposit Bank named Jennings. The manager at first testified:

"I told him that the Reinhards had failed, and that his check had been returned, and that I had a balance due Reinhard & Company, and that I would substitute a check on the Capital City Bank for this check on Reinhard, which had been returned. Mr. Jennings said that he would—

I think he said he would telephone Mr. Outhwaite, and if it was all right he would return my check,—the Reinhard check. . ."

Subsequently, referring to checks which the witness had carried to the City Deposit Bank to give to that bank in exchange for the prior check of $4,875.98, he said:

"It runs in my mind . . . that I told him that I wanted to substitute those, and that he asked me what for, and I told him not to ask any questions,—I am not sure about that,—that I wanted to substitute those checks."

Certain it is, however, that the manager took up the check for $4,875.98 drawn on the Deshler Bank, which had been given to the City Deposit Bank in discharge of the credit balance in its favor as the result of the previous clearing of that day, and substituted for it a check for $3,714.24, [417] drawn on the Deshler *National Bank, and in addition gave a check drawn on the Capital City Bank for $1,161.74, the exact amount of the clearing house check which had been thrown out of the clearings.

Analyzing these facts for the purpose of arriving at the inferences which may reasonably be deduced from them, this plainly results: When, on the morning of April 10, 1900, as the result of the failure of Reinhard & Company, the clearings of that day required revision, the clearing house having received back the checks drawn on Reinhard & Company which it had cleared for its members that morning made new settlements with those members based upon deductions from the original settlements of the sum of the checks which had been put in the clearings on that morning and were afterwards dishonored. The result of each new settlement was that the amount due to the member was reduced or the indebtedness shown on the original settlement was increased, according as, by the original settlement, the member was a creditor of or a debtor in the clearing; and, as a necessary consequence of the new settlements having eliminated all the debits against Reinhard & Company, the clearing house held, as the property of that firm, the proceeds of the checks on other banks which that firm had sent for clearing on that morning.

The statements of the manager as to what was done with the clearing house check which had been put in the clearings by the City Deposit Bank are not perfectly clear. In one aspect he returned that check to the City Deposit Bank as he had returned the other dishonored checks, and then gave to the City Deposit Bank a check for the amount due it on the revision of the clearing ($3,714.24), and also delivered a check for $1,161.74, to take up the dishonored clearing house check. In another aspect the same result was brought about without any return of the dishonored check. The mere form of the transaction, however, does not affect its nature. The payment out of this fund by the manager, in part to the City Deposit Bank and in part to another bank, therefore amounted simply to *this: [418] that in the revision of the clearings, although the clearing house eliminated, and returned the checks which had been debited against Reinhard & Company, and were subsequently dishonored, it retained and appropriated the credits arising from the checks put in by Reinhard & Company for the purpose of the clearing of the morning. Having thus appropriated those credits, it used them *pro tanto* to pay the clearing house check on Reinhard & Company held by the City Deposit Bank as the result of the clearings of the previous day. But as the clearing house had received the checks from Reinhard & Company on the morning of April 10, 1900, for the purpose of making the clearing on that day, such agent was without power, after returning to the banks which had presented the same, the checks debited against the firm, to hold on to the credits of Reinhard & Company, and treat them as subject to be appropriated. Indeed when the inferences from the proof are thus accurately fixed it is apparent that the transaction was in substance like the one which was held by this court in *Yardley* v. *Philler*, 167 U. S. 344, 42 L. ed. 192, 17 Sup. Ct. Rep. 835, to be a misappropriation, and besides to constitute a fraudulent preference within the meaning of the national banking act.

The result, however, of the proof would not be different, even if it be conceded that, under the rule as to clearings, which we have quoted, the clearing house would have had the power, upon the default of one of its members, simply to call upon the other members to pay in a *pro rata* proportion of the amount of the check or checks which had been drawn upon the defaulting member, and to treat the credit standing in the clearing in favor of the defaulting member as belonging proportionately to the contributing members. We say this because even under such hypothesis the clearing house check held by the City Deposit Bank would not have been entitled to so participate. That check was the result of the clearings of the previous day; and, under the hypothesis as to the meaning of the rule in which we have indulged, the holder was only entitled to obtain payment, *pro rata*, from those who had presented checks *against [419]

Reinhard & Company in the clearing wherein the check was given.

Was the receipt and appropriation of the $1,161.74 by the City Deposit Bank a preference within the bankruptcy law? is, then, the question. It is said that it was not, because, to constitute a preference under that law, the transfer or payment must have been the act of the bankrupt. *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339. Here it is insisted that it cannot be so held, because there was nothing in the proof warranting the implication that the firm authorized or ratified the misappropriation, or that the clearing house was the agent of the firm when it made such misappropriation. The latter proposition rests on the contention that whatever agency the association possessed in virtue of its authority to make clearings was revoked by the fact of the voluntary assignment made by Reinhard & Company before the money was appropriated to the City Deposit Bank. Whilst it may be conceded that these propositions are well founded, it does not follow that the inferences deducible from the evidence did not warrant the conclusion that, under the bankrupt law of the United States, there was a duty on the part of the City Deposit Bank to pay over to the trustee the sum received by it of the funds of Reinhard & Company deposited on April 10, 1900, with the clearing house for the purposes of the clearing of that date. From the inferences, which we have stated were properly deducible from the evidence, it follows that the jury would have been amply justified in finding that the clearing house had made a wrongful disposition of a trust fund in favor of the City Deposit Bank, which institution had notice, either actual or constructive, of the misappropriation. *Western Tie & Timber Co.* v. *Brown*, *supra*.

We interpret the certificate of the supreme court of Ohio as establishing that that court did not rest its affirmance of the judgment rendered by the trial court against the trustee upon the mere technical ground that the petition counted upon a voidable preference, and there could not
[420] be a recovery unless *the facts constituted such preference, even although the evidence justified the inference that the money which the City Deposit Bank received from the clearing house association, under the circumstances we have stated, was the property of Reinhard & Company, which the bank, by operation of the bankrupt law, was obliged to account for to the bankrupt estate. We so conclude, because the supreme court of Ohio not only certified that its decision "was adverse to the claims and contentions of the said plaintiff in error, in this: that said court decided that said assignment and transfer of said sum of $1,161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law;" but in addition, moreover, certified that the case was decided against the trustee, because, under the facts proved, the trustee "was not deprived of any right under said (bankrupt) law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1,161.74 from said defendant in error."

The judgment of the Supreme Court of Ohio must be reversed and the cause be remanded to that court for further proceedings, not inconsistent with this opinion.

FRED C. RECTOR, Trustee of Reinhard & Company, *Plff. in Err.*,
v.
COMMERCIAL NATIONAL BANK.

(See S. C. Reporter's ed. 420–424.)

Bankruptcy—assets of bankrupt estate.—A bank which receives from a clearing house association the proceeds of checks presented for clearing by a member shortly before suspending payment cannot escape liability to account to the estate in bankruptcy of the defaulting member, where the clearing house, in revising the day's clearings because of such suspension, eliminated and returned the checks which had been debited against the defaulting member, on the theory that, under the doctrine of rescission and following of trust funds, the bank had the right to appropriate any property of the defaulting member and apply it to the reduction of an advance of currency made on that day,—especially where such currency was paid out by such defaulting member over its counters to its customers.

[No. 138.]

Submitted December 12, 1905. Decided February 19, 1906.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Franklin County, in that state, which had in turn affirmed a judgment of the Court of Common Pleas of that county, dismissing an action by a trustee in bankruptcy to recover an asset of the bankrupt estate. *Reversed* and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **David F. Pugh** submitted the cause for plaintiff in error. *Messrs. Fred C. Rector* and *Pugh & Pugh* were on the brief:

It may be that, upon the face of the petition, the Federal question appears in language that may be called general. A reference to the certificate shows that it makes more specific what may be otherwise general. The certificate may be relied upon for this purpose.

Parmelee v. *Lawrenee*, 11 Wall. 36, 20 L. ed. 48; *Lawler* v. *Walker*, 14 How. 149, 14 L. ed. 364; *Brown* v. *Atwell*, 92 U. S. 327, 23 L. ed. 511.

The trustee had title to the money, which was given to the defendant bank without authority, because it was the money of Reinhard & Company, and, by virtue of the bankruptcy act, the title passed to the trustee upon the adjudication of Reinhard & Company as bankrupts. This fact distinguishes *Cramer* v. *Wilson*, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94.

Where a state court decides against the claim of the assignee in bankruptcy to certain of the bankrupt's property under U. S. Rev. Stat. § 5044, the decision is against a right or title claimed under the statute of the United States within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, and its judgment is subject to review by the Supreme Court of the United States.

Williams v. *Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885.

This court considered the question as to whether a judgment and execution might be held to have been a preference committed by a bankrupt so as to amount to a violation of the bankrupt act in *Wilson Bros.* v. *Nelson*, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74, and *Thompson* v. *Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), as if it had been specifically referred to and the right directly refused.

Chapman v. *Goodnow* (*Chapman* v. *Crane*) 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211.

Mr. **F. F. D. Albery** submitted the cause for defendant in error:

It has been frequently decided that mere questions of construction, either of Federal or state laws, will not be considered unless the question of their validity is involved.

Chotcau v. *Marguerite*, 12 Pet. 507, 9 L. ed. 1174; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Osborne* v. *Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Cameron* v. *United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

It was not the intention to give a general review of all questions of law and fact involved.

Clipper Min. Co. v. *Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Thayer* v. *Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576.

This decision of the state court is final.

Kaufman v. *Tredway*, 195 U. S. 271, 49 L. ed. 190, 25 Sup. Ct. Rep. 33.

Even if the decision of the state court undertakes to construe a Federal statute, that does not give jurisdiction.

Kennard v. *Nebraska*, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879.

The bankrupt's trustee in bankruptcy, therefore, obtains no right, title, or privilege, as such, under the various provisions of the statute. His rights can be worked out under the state law just as well (*McKenna* v. *Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365). He is simply an intermediary and factor of the court, appointed for the purpose of administering the estate according to the statute. In this case there was never any question as to his right to make the claim which he made. No right, title, or privilege was ever denied him. The record must show that he has been deprived of some title, right, privilege, or immunity secured to him by the Constitution of the United States, which was specially set up or claimed in the state court.

Kennard v. *Nebraska*, *supra*.

If he failed to make out his case to the satisfaction of the state courts, that was a mere matter of failure of proof, or, possibly, a failure of the state courts to properly understand and apply the law to the facts; but that is very far from bringing the case within the provisions of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), and there was no decision at any time "against the right especially set up or claimed."

Cramer v. *Wilson*, 195 U. S. 409, 49 L. ed. 257, 25 Sup. Ct. Rep. 94.

The question whether any conveyance, etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a Federal nature.

Thompson v. *Fairbanks*, 196 U. S. 516, 523, 49 L. ed. 577, 585, 25 Sup. Ct. Rep. 306; *McKenna* v. *Simpson*, *supra*; *Cramer* v. *Wilson*, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94.

The record must show that a Federal question was raised in the state court in the manner in which a question of that nature should be raised by the state practice.

Sayward v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

Whatever the question is, it must be raised before the judgment of the supreme court of the state, and if it relates to a title, right, privilege, or immunity, it must be specially set up.

Yazoo & M. Valley R. Co. v. *Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Turner* v. *Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295.

It cannot be raised for the first time in the assignments of error.

Jacobi v. *Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; *Johnson* v. *New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

Moreover, the record must show that the case in the state court "turned on the Federal question" which was passed upon.

Detroit City R. Co. v. *Guthard*, 114 U. S. 136, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *New York C. & H. R. R. Co.* v. *New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

The Federal character of the suit must appear in the plaintiff's own statement of his claim.

Houston & T. C. R. Co. v. *Texas*, 177 U. S. 78, 44 L. ed. 680, 20 Sup. Ct. Rep. 545.

To constitute a fraudulent preference, there must be mutual understanding between the bankrupt and the creditor; there must be the intent to prefer and the intent to receive a preference; the preference must be fraudulent; the effect of it must be to work a fraud; the relation of creditor and debtor must exist; there must have been actual insolvency on the part of the bankrupt; the fact of the insolvency must have been known to the creditor; and the debt must have been an antecedent debt.

Loveland, Bankruptcy, chap. 13, § 194; Collier, Bankruptcy, 3d ed. pp. 341–348, 351–356, 4th ed. pp. 414–425.

Suppose that, at the time the $2,000 was obtained by Reinhard & Company, security of some kind had been given by them to the Commercial National Bank,—is there any doubt that the transactions would have been valid?

Re Wolf, 98 Fed. 84; *Re Soudan Mfg. Co.* 51 C. C. A. 476, 113 Fed. 804; *Re Durham*, 114 Fed. 750; *Young* v. *Upson*, 115 Fed. 192; *Stedman* v. *Bank of Monroe*, 54 C. C. A. 269, 117 Fed. 237; *Davis* v. *Turner*, 56 C. C. A. 669, 120 Fed. 605; *McNair* v. *McIntyre*, 51 C. C. A. 89, 113 Fed. 113; *Re Clifford*, 136 Fed. 475.

The fraudulent nature of the transaction by which Reinhard & Company got the $2,000 would have enabled the defendant in error to recover that money from the receiver or trustee, in case it had not done what it did.

Re Weil, 111 Fed. 897; *Re Hildebrant*, 120 Fed. 992.

Current transactions of debit and credit, occurring during the four months preceding the adjudication in bankruptcy, are distinctly upheld as being lawful, and not falling within the inhibition of the bankrupt law.

Re Dickson, 55 L.R.A. 349, 49 C. C. A. 574, 111 Fed. 726; *Re Topliff*, 114 Fed. 323; *Jaquith* v. *Alden*, 55 C. C. A. 364, 118 Fed. 270.

*Mr. Justice **White** delivered the opinion of the court: [421]

This case is governed by the principles which controlled the decision just announced in the case of the same plaintiff in error against the City Deposit Bank Company, No. 137. [200 U. S. 405, *ante*, 527, 26 Sup. Ct. Rep. 289.]

In the trial court judgment was prayed for $970.45, on the ground that on April 10, 1900, that amount of money, the property of Reinhard & Company, had been by that firm transferred to the defendant in error, and that the transaction constituted a voidable preference. The answer was in substance a general denial of the allegations of the petition in the particulars just stated.

The case was submitted to the court upon the pleadings and the following agreed statement of facts:

"For ten years or more prior to April 10, 1900, Reinhard & Company kept an open account with the Commercial National Bank, depositing their outside items on places where they had no correspondent, for the purpose of saving themselves the exchange or collection charges on some of these items. The balance with the Commercial National Bank on the morning of April 10, 1900, was ten hundred and sixty-seven and 76-100 dollars ($1,067.76). On that morning John G. Reinhard came to the Commercial National Bank with Reinhard & Company's draft on New York for two thousand (2,000.00) dollars, for which the Commercial National Bank gave him the currency. This money was used by Reinhard & Company to pay checks drawn on them, and was paid out over their counter on April 10 to their customers.

"At 12.15 o'clock, P. M., on said day, Reinhard & Company, a partnership, composed of John G. Reinhard and Henry A. Reinhard, said partnership and each of said partners being then insolvent, filed a deed of assignment in the probate court of Frank-

lin county, Ohio, and at about the same hour and afternoon of said day their banking house was closed, at the same time each of said partners filed deeds of assignment.

"The following day a petition was filed [422] in the district court *of the United States for the southern district of Ohio by certain creditors, alleging that said assignment was an act of bankruptcy; and thereafter such proceedings were had that said Reinhard & Company were on August 11, 1900, adjudged bankrupt, and the plaintiff became their trustee, pending which election of trustee one Walter Zinn was appointed and acted as receiver of Reinhard & Company, but the fact of such insolvency and the making of said assignment were not known to said The Commercial National Bank except by hearsay until after said amount of two thousand ($2,000.00) dollars was charged back on the account of Reinhard & Company, and until after it had received the check of the manager of the clearing house for said sum of nine hundred and seventy and 45-100 ($970.45) dollars.

"During said day of April 10, 1900, the Commercial National Bank learned by street rumor that Reinhard & Company's draft on New York would probably not be paid, and it charged the same back on the account of Reinhard & Company, which overdrew their account nine hundred and thirty-two and 24-100 ($932.24) dollars.

"On the 10th day of April, 1900, Reinhard & Company sent their representative to the clearing house as usual at 12.30 P. M. They received checks from the clearing house as usual, which their representative took back to their bank, and the checks which they brought to the clearing house were cleared on the respective banks as usual in all cases. Then about one o'clock P. M. after the manager of the clearing house had made his adjustment of balances for the day and had made out the checks to pay for the same, Reinhard's representative brought back the checks which the different banks of the clearing house had cleared on them that day.

"The manager took these checks back to the different banks that had cleared them and deducted the amounts of their clearings that day. This left a balance of $—— due to Reinhard & Company from the clearing house for that day. Out of this balance he gave a check for $——to the City De- [423] posit Bank, *and for the balance of $970.45 he gave a check to the Commercial National Bank.

"When Mr. Field, the manager of the clearing house, went to the Commercial National Bank to return the checks which they had cleared on Reinhard & Company that day, he informed Mr. Hoffman, the cashier, that that bank had suspended, and that he had a balance on hand due Reinhard & Company of $——, $—— of which he was going to pay to the City Deposit bank, leaving a balance of $970.45 due the said Reinhard & Company, which he did not know what to do with. Mr. Hoffman informed him that he had advanced Reinhard & Company $2,000.00 on that morning, and suggested that he pay the balance to him. He agreed to this, and gave him the check as suggested. Said amount was credited by the Commercial National Bank to Reinhard & Company, leaving a balance, as shown by the books of the Commercial National Bank, due from said bank to Reinhard & Company of thirty-eight and 21-100 ($38.21) dollars, which amount was paid over to Walter Zinn, as receiver of Reinhard & Company, upon his check as such receiver, drawn on the Commercial National Bank on the 16th day of May, 1900."

Judgment was entered against the trustee, and that judgment was affirmed by the appellate courts. The supreme court of Ohio entered upon its journal a certificate, made by its chief justice, which is precisely like that set out in the opinion delivered in the *City Deposit Bank Case.*

A motion assailing the power of this court to entertain this writ of error is overruled, for the reasons given in passing upon a similar motion filed in case No. 137. And, applying the principles announced in the case just referred to, it inevitably follows that the payment made on April 10, 1900, by the clearing house association, out of the credits of Reinhard & Company in the hands of the clearing house association, was a transfer of property belonging to Reinhard & Company which the trustee in bankruptcy was entitled to demand and receive from the defendant in error. We need not dwell upon the contention *made in argument that [424] because the defendant in error, on the morning of April 10, 1900, gave Reinhard & Company $2,000 in currency in return for Reinhard & Company's draft on New York for a like sum, the transaction, even if fraudulent, invested the defendant in error with the right, upon the suspension of Reinhard & Company, to appropriate any property belonging to Reinhard & Company which they might be able to possess themselves of, and to apply the same in reduction of the advance made upon the security of the draft. The doctrine of rescission and following of trust funds can have no applica-

tion, especially when, as expressly agreed in the statement of facts, the money which the defendant in error gave to Reinhard & Company in exchange for its draft "was used by Reinhard & Company to pay checks drawn on them, and was paid out over their counter on April 10, 1900, to their customers."

The judgment of the Supreme Court of Ohio must be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

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[425]*FIRST NATIONAL BANK OF OTTAWA, Illinois, *Plff. in Err.*,

v.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company.

(See S. C. Reporter's ed. 425–445.)

1. Corporations—ultra vires—power of national banks—purchase of stock in speculative enterprise.—It is *ultra vires* of a national bank to take stock in a corporation organized to embark in the purely speculative business of buying and selling the stocks and assets of an existing and insolvent corporation, with power, but without the obligation, to engage, as an independent enterprise, in a manufacturing business, although the bank takes such stock in exchange for a claim against the insolvent corporation.

2. Corporations—ultra vires as defense in action against national bank.—Want of authority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder.

[No. 176.]

Argued January 25, 26, 1906. Decided February 19, 1906.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of the receiver of an insolvent corporation in an action against a national bank as a stockholder, to recover the statutory liability, entered upon overruling a demurrer to the declaration. *Reversed* and remanded with directions to sustain the demurrer and enter judgment for the bank.

Statement by Mr. Justice **White**:

*For brevity, the plaintiff in error will [426] be hereafter referred to as the bank and the defendant in error as the receiver.

The receiver commenced this action against the bank in the circuit court of the

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NOTE.—*As to what corporate acts are ultra vires*—see notes to Scranton Electric Light & Heat Co.'s Appeal, 1 L.R.A. 285; Rockhold v. Canton Masonic Mut. Benev. Asso. 2 L.R.A. 420; Portland Lumbering & Mfg. Co. v. East Portland, 6 L.R.A. 290; and Central Transp. Co. v. Pullman's Palace Car Co. 35 L. ed. U. S. 55.

As to estoppel of corporation to set up plea of ultra vires—see notes to Central Transp. Co. v. Pullman's Palace Car Co. 35 L. ed. U. S. 55; Wood v. Corry Waterworks Co. 12 L.R.A. 168; and Miller v. American Mut. Acci. Ins. Co. 20 L.R.A. 765.

Power of national bank to take corporate stock in satisfaction of a debt or as collateral security.

As a general proposition, a national bank is disqualified from investing its money in the stock of another corporation, but, under extraordinary circumstances, it may be necessary and proper for it to acquire stock in another corporation in satisfaction of a valid debt or by way of security therefor, but with a view to its subsequent sale or conversion into money. First Nat. Bank v. National Exch. Bank, 92 U. S. 128, 23 L. ed. 681, Affirming 39 Md. 600; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739.

A contract, by the terms of which a national bank receives corporate stock in payment of a debt owing to the bank by the corporation, is not *ultra vires* as to the bank, when, at the time of making the contract, the corporation is financially embarrassed and unable to meet its financial obligations as they mature. Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8.

A national bank may also accept stock in another corporation as collateral security for a loan. Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Shoemaker v. National Mechanics' Bank, 2 Abb. (U. S.) 416, Fed. Cas. No. 12,801; Canfield v. State Nat. Bank, Fed. Cas. No. 2,382.

The bank, under such circumstances, may sell the stock at any time after the maturity of the debt. Canfield v. State Nat. Bank, *supra*.

And it may protect itself against loss by accepting a formal transfer of the stock in part payment. Westminster Nat. Bank v. New England Electrical Works (N. H.) 62 Atl. 971.

The doctrine of the principal case, that a national bank cannot take stock in a new speculative corporation, although in satisfaction of a debt, is followed in Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, *post*, 1036, 26 Sup. Ct. Rep. 613, where it is held that a national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell, a leasehold.

See also note to Buckeye Marble & Freestone Co. v. Harvey, 18 L.R.A. 252, on the *Power of corporation to deal in the stock of other corporations, or in its own stock*, and note to Anglo-American Land, Mortg. & A. Co. v. Lombard, 68 C. C. A. 120, on *Acquisition by corporation of stock of other corporation*.

United States for the northern district of Illinois. The object of the action was to recover from the bank, as the owner of 274 shares of preferred stock in the Minnesota Thresher Manufacturing Company, the amount of an assessment of $18 per share, levied upon said stock for the payment of the debts of the thresher company. A demurrer to an amended declaration having been overruled, and the bank electing not to plead further, judgment was entered for the receiver, and, on account of constitutional questions raised by the demurrer, the case was brought directly to this court.

The averments of the amended declaration may be summarized as follows: In May, 1884, the Northwestern Manufacturing & Car Company was a corporation engaged in the manufacturing business at Stillwater, Minnesota. At the date mentioned the car company owed a large amount of debt, which it was unable to pay, among which was a sum due to the bank for money lent. In that month a receiver was appointed for the car company by a court of the state of Minnesota having jurisdiction. Some time afterwards, in November, 1884, the bank with other creditors, and some of the stockholders of the car company, organized, under the laws of Minnesota, a new corporation, styled the Minnesota Thresher Manufacturing Company. The articles of incorporation of the new company provided "that the objects for which said corporation was formed were the purchase of the capital stock, evidences of indebtedness issued by and the assets of the Northwestern Manufacturing & Car Company, a corporation existing under the laws of the state of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture [427] and *sale of all articles, implements, and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used."

The thresher company exchanged its preferred stock at par for the debts of the car company and issued common stock in exchange for the preferred stock of the car company. Subsequently, at a judicial sale, the new company acquired all the assets of the car company, and paid for the same with the claims which it had acquired for issuing its preferred stock as above stated. The stock held by the bank upon which the assessment was sought to be enforced was alleged to have been acquired by the bank in the manner above stated; that is, by an exchange of its claim against the car company for the preferred stock of the new corporation. The declaration alleged that at the time of the acquisition of the stock by the bank, as above stated, under the Constitution and laws of Minnesota, there was a double liability imposed upon the stockholders to pay the debts of the corporation in the event of its insolvency.

After the organization of the thresher company and the purchase of the assets of the car company, as above stated, the thresher company carried on the manufacturing business authorized by its charter. In 1901 it became insolvent. A creditor having sued and obtained judgment, and an execution having been issued and returned unsatisfied, the creditor procured, under the provisions of chapter 76 of the General Statutes of Minnesota and the amendments thereto, the appointment of a receiver of the property of the thresher company, who duly qualified and entered upon the discharge of his duties. In the proceeding in which the receiver was appointed, creditors exhibited claims and demands against the thresher company, aggregating $443,752.17, but no property or assets of the corporation existed available to pay this indebtedness or any portion thereof.

Thereafter, upon petition of the receiver, pursuant to the provisions of chapter 272 of the General Laws of Minnesota *for 1899, [428] copied in the margin, † steps were taken to

†General Laws of Minnesota for 1899.

Chapter 272.

"An Act to Provide for the Better Enforcement of the Liability of Stockholders of Corporations.

"Sec. 1. Whenever any corporation created or existing by or under the laws of the state of Minnesota, whose stockholders, or any of them, are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for, or upon, or growing out of, or in respect to, the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the Constitution and laws of said state of Minnesota, or any statute of said state, or otherwise, has heretofore made, or shall hereafter make, an assignment for the benefit of its creditors, under the insolvency laws of this state; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this state, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota, and the acts amendatory thereof, or under or pursuant to any other statute of this state, or under the general equity powers and practice of such court, the district court appointing such receiver, or having jurisdiction of the matter of said assignment, may proceed as in this act provided.

"Sec. 2. Under the petition of the assignee or the receiver of any such corporation, or of any creditor of such corporation, who has filed his claim in such assignment or receivership

provide a fund for the payment of the debts of the corporation, by enforcing contribution from its stockholders upon the double liability alleged to result from the ownership of its stock. The bank did not appear in the proceeding.

[429] *After compliance with the requirements of the act of 1899 the court made an assessment of $18 upon each of the shares of the stock of the thresher company, and the receiver was authorized and directed, in the

[430] event of the failure *of a stockholder to pay, after due notice by mail, "to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation, or party liable in any court having jurisdiction, whether in this state or elsewhere, which said receiver may deem necessary or proper for the recovery of the amount due from such person, persons, corporation, or party under the terms of this order." After alleging the default of the bank to pay the assessment, the amended declaration prayed for a judgment against the bank for the sum of the assessment, that is, $18 per share on the 274 shares of stock of the thresher company, which stood on the books of that company in the name of the bank.

As stated at the outset, the bank demurred to the amended declaration, and, on the demurrer being overruled, stood upon the demurrer, and judgment was entered against it as prayed for. The grounds upon which the amended declaration was demurred to were as follows:

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proceedings, the said district court shall, by order, appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the clerk of said court, and shall direct such notice of such hearing to be given to the party presenting said petition, by publication or otherwise, as the court, in its discretion, may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the court shall direct that notice of such hearing be personally served on such assignee or receiver.

"Sec. 3. At such hearing the court shall consider such proofs, by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of said assignment or receivership, and the probable amount of assets available for the payment of such indebtedness and expenses, and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability. And if it appear to the satisfaction of the court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay, its indebtedness and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of the stockholders, the said court shall thereupon, by order, direct and levy a ratable assessment upon all parties liable as stockholders or upon or on account of any stock or shares of said corporation, for such amount, proportion, or percentage of the liability upon or on account of each share of said stock as the court, in its discretion, may deem proper (taking into account the probable solvency or insolvency of stockholders, and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order.

"Sec. 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute action against each and every such party so failing to pay the same, wherever such party may be found, whether in this state or elsewhere.

"Sec. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided.

"Sec. 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount to be assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is liable. Said actions may be maintained against each stockholder, severally, in this state or in any other state or country where such stockholder, or any property subject to attachment, garnishment, or other process in an action against such stockholder, may be found. But if said assignee or receiver shall, in good faith, believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of disadvantage to the estate and interest of creditors to prosecute the same, said assignee or receiver shall so report to said court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said court. And in such case said court shall not require said receiver to institute or maintain such action unless said court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation, except as hereinafter provided."

"(1) It does not state facts sufficient to constitute a cause of action against the defendant.

"(2) It does not show that plaintiff has legal capacity to institute and maintain the present action.

"(3) It shows that said supposed Laws of Minnesota for 1899 are in contravention of clause 1 of § 10 of article 1 of the Constitution of the United States.

"(4) It shows that said supposed Laws of
[431] Minnesota for *1899 are in contravention of the 14th Amendment of the Constitution of the United States.

"(5) It shows that said supposed Laws of Minnesota for 1899, being 'An Act to Provide for the Better Enforcement of the Liability of Stockholders of Corporations,' are in contravention of the Constitution of the United States.

"(6) It shows that said supposed Laws of Minnesota for 1899 unjustly discriminate against nonresident stockholders, and are such as will not be enforced in this jurisdiction.

"(7) It shows that the supposed order of the court levied an assessment on stockholders that is excessive and beyond reason.

"(8) It does not show that the supposed corporate indebtedness is contractual, or that it has been judicially determined as against this defendant.

"(9) It does not show that all the necessary steps prescribed by the supposed laws of Minnesota have been taken.

"(10) It shows, as a basis of liability, supposed acts of the defendant which are *ultra vires* and void under the national bank act.

"(11) It states conclusions of the pleader instead of facts.

"(12) It does not allege a case within the jurisdiction of this court.

"(13) It is, in other respects, uncertain, informal, and insufficient."

Mr. **Lester H. Strawn** argued the cause, and, with *Messrs. Winston, Payne, & Strawn,* filed a brief for plaintiff in error.

Mr. **Laurence Arnold Tanzer** also argued the cause and filed a brief for plaintiff in error.

Mr. **C. A. Severance** argued the cause, and, with *Messrs. Frank B. Kellogg, Robert E. Olds,* and *J. H. Chandler,* filed a brief for defendant in error.

Mr. Justice **White,** after making the foregoing statement, delivered the opinion of the court:

The questions principally discussed at bar relate to the alleged repugnancy to the Constitution of the United States of the Minnesota law of 1899, by virtue of which the receiver *asserted his power and author-[434] ity to sue in a court of another jurisdiction than that of Minnesota to enforce the assessment made by the court of Minnesota on the stockholders of the thresher company. But antecedent to that question we must consider and dispose of the propositions arising from the tenth ground of the demurrer; that is, that under the averments of the bill there was no liability on the bank as the facts alleged from which it is asserted the liability arose showed that the act of the bank in subscribing to the stock was *ultra vires* and prohibited by the provisions of the national banking act. We say this is antecedent because, if from the averments of the declaration, aside from the validity or invalidity of the act of 1899, there could be no liability on the bank to pay the assessment, it will be unnecessary to consider whether the Minnesota statute added such conditions to the obligation resulting from the stock subscription at the time it was made as to cause the statute to be repugnant to the contract or any other clause of the Constitution of the United States.

At the time the bank took the stock in the thresher company it was provided in § 3 of article 10 of the Constitution of Minnesota as follows: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

If the thresher company was organized solely for manufacturing purposes, it is of course apparent that under this provision of the Minnesota Constitution the stockholders of the company would not be liable for its debts. *Senour Mfg. Co.* v. *Church Paint & Mfg. Co.* 81 Minn. 294, 84 N. W. 109. It has, however, been decided by the supreme court of Minnesota that unless it unquestionably appears that a Minnesota corporation claiming to be a manufacturing corporation was organized for the exclusive purpose of engaging in manufacturing and such incidental business as might be reasonably necessary for effecting that purpose, the exception in the Minnesota Constitution to which reference has been made would not apply, *and the double liabil-[435] ity would result. *State ex rel. Clapp* v. *Minnesota Thresher Mfg. Co.* 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; *Merchants' Nat. Bank* v. *Minnesota Thresher Mfg. Co.* 90 Minn. 144, 95 N. W. 767. These cases, it is to be observed, referred to the very act of incorporation, upon which the liability of the bank, if at all, must rest. It clearly

appears, from the comments of the supreme court of Minnesota upon the charter, that in the articles of association the thresher company was declared to be organized under the law of Minnesota relating to manufacturing corporations as a class exempt from double liability, and that the motives of the incorporators were to obtain immunity from the double liability. The court, however, held that the mere law under which the corporation was organized, and the motive therefor, would not suffice to bring the incorporators within the control of the exemption accorded by the constitutional provision if, from the articles of association, it did not clearly appear that the corporation was confined solely to a manufacturing business and its incidents. The doctrine of the court was thus clearly stated (90 Minn. p. 147, 95 N. W. p. 768):

"It is immaterial that the corporation was organized under the statute providing for organizing manufacturing corporations, or what the actual intention of the incorporators was, or that the corporation in fact carried on only a manufacturing business, but its articles of incorporation are the sole criterion as to such intention and the purposes for which the corporation was organized; and, unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purpose of its organization, its stockholders are not within the exception to the general rule of constitutional liability of stockholders for the debts of their corporation."

And further along in the opinion the declaration was reiterated (p. 148, N. W. p. 768) that the intention of the corporators could not be ascertained by reference to matters not appearing on the face of the articles of association, and that the articles
[436] were the *sole criterion as to the purpose for which a corporation was formed; "that is, for ascertaining the intention of the associates." Applying this rule to the articles of association of the thresher company, the court found that the acquisition of the stock, etc., of the car company was a business independently to be engaged in, and was not incidental to that of manufacturing, and, hence, that the corporation was not within the exception embodied in the constitutional provision imposing a double liability upon stockholders.

Now, the exclusive and only ground upon which the supreme court of Minnesota, in construing the articles of association of the thresher company, held that the articles embodied a distinct business from that of manufacturing, is plainly made manifest by the opinions expressed by the court in the two cases to which we have referred. In the earlier case the court said (40 Minn. p. 223, 3 L. R. A. p. 517, 41 N. W. p. 1024):

"It is clear, therefore, to our minds that, under the act of 1873, a corporation can only be organized for carrying on an exclusively manufacturing or mechanical business, which, of course, includes anything that is properly incidental to or necessarily connected with such business. A corporation organized to carry on manufacturing and also some other lawful, but independent, business, belongs to the class authorized by title 2, chap. 34 (§§ 109–119.) With this construction of the law in mind, it is not difficult, on examination of respondent's articles of association, to determine to what class it belongs. One of the declared objects of its formation is to purchase the capital stock and evidences of indebtedness of the car company, a business in no way incident to or properly connected with that of manufacturing. The contention of counsel to the contrary cannot be seriously entertained for a moment. If a manufacturing corporation desires to buy the plant of another corporation formerly engaged in the same business, that is legitimate; and if, in order to get it, it becomes necessary to buy with it some other property, not needed for nor connected with the manufacturing *business, this also would be [437]
permissible, if done as incidental to the main purpose of securing the plant; but no such reason or excuse existed for buying the stock and indebtedness of the car company. Indeed, it would be difficult to imagine anything more foreign to or inconsistent with a legitimate manufacturing business than for a corporation to invest all its capital in the stock and indebtedness of another and insolvent corporation. Under title 2, a corporation can be organized to carry on any lawful business, and, if parties desire to deal in such speculative property, they can do so under that title, but not under the act of 1873, even by connecting it with manufacturing. Our conclusion, therefore, is that respondent is a corporation of the class authorized by title 2. That is what the corporators themselves have characterized it by their statement of the objects of its formation."

In the latter case, after restating the rule that the face of the articles of association was the sole criterion as to the purpose for which the corporation was formed, the court said (90 Minn. p. 148, 95 N. W. p. 768):

"Now, taking the articles in question by the four corners, and reading them in the light of the rule we have stated, without

resorting to technicalities, does it fairly appear therefrom that the corporation was organized for the exclusive purpose of engaging in manufacturing and business incidental thereto and reasonably necessary for carrying into effect such purpose? We answer the question in the negative. There are two general purposes for which the corporation was organized, as declared by the articles,—one, the purchase of the capital stock, evidence of indebtedness, and assets of an existing corporation; and the other, the manufacture and sale of all articles, implements, and machinery made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corporation was authorized to buy and sell the stock, choses in action, and assets of the Northwestern Manufac-
[438] turing & Car Company mentioned in the *articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then-existing corporation. Nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood or iron, or either of them."

Accepting this construction given by the supreme court of Minnesota to the articles of association, by which alone the incorporators under those articles can be taken out of the exemption accorded by the Constitution of Minnesota, it follows that the thresher company was organized to embark in the purely speculative business of buying and selling the stock and assets of an existing and insolvent corporation, with power, but without the obligation, to engage, as an independent enterprise, in a manufacturing business.

Now, the limitations upon the powers of national banks were clearly pointed out in *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, where it was said (p. 366, L. ed. p. 200, Sup. Ct. Rep. p. 833):

"It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 73, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral, and be subject to liability as other stockholders. *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448. So, also, a national bank may be conceded *to possess the incidental power of [439] accepting, in good faith, stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 128, 23 L. ed. 681."

As no authority, express or implied, has ever been conferred by the statutes of the United States upon a national bank to engage in or promote a purely speculative business or adventure, accepting the view of the articles of association by which the bank was denied the benefit of the exemption accorded by the Constitution of Minnesota, it follows that the bank had no power to engage in such business by taking stock or otherwise. The power of a national bank to engage in the character of business which the articles of association of the thresher company manfested, as defined by the supreme court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money, or as a means of protecting itself from loss upon a pre-existing indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as a security for a pre-existing debt does not imply that, because a national bank has lent money to a corporation, it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done.

The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the thresher company, being *ultra vires*, it follows, under the settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver. The doctrine on the subject was stated in *De la Vergne Refrigerating Mach. Co.* v. *German Sav. Inst.* 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct.

Rep. 20, where it was said (p. 59, L. ed. p. 71, Sup. Ct. Rep. p. 25):

[440] *"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that, if the contract be prohibited by statute, everyone dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized."

And, moreover, the authorities cited in the case just referred to conclusively establish that the principle which the case announced as to the power of a corporation to avail of the defense of *ultra vires* had been previously conclusively settled in this court. Indeed, the case arising on the record presents an obvious dilemma, which is this: If the construction of the articles of association given by the supreme court of the state of Minnesota, by which alone the double liability can be enforced, is accepted, then there was no liability because of *ultra vires*. If, on the other hand, we were to disregard the construction given by the supreme court of Minnesota to the articles of association, we should be constrained to the conclusion that those articles but endowed the incorporators of the thresher company with the power to carry on a manufacturing business; and, as a mere incident, to acquire for the purposes of such business the property of the car company; and it would follow that there was no double liability, by force of the exception created in the Constitution of Minnesota.

The judgment must be reversed and the case remanded with directions to sustain the demurrer and enter judgment for the bank.

Mr. Justice **Harlan** concurs solely upon the authority of *California Nat. Bank* v. *Kennedy* and the previous cases announcing the doctrine which was adhered to and applied in that case.

[441] *Mr. Justice **Brewer**, dissenting:

I am unable to concur in the opinion and judgment in this case, and will briefly state the grounds of my dissent.

There is nothing in the organization of a national bank that puts it outside of the ordinary rules governing corporations, whether we consider the rights, obligations, or the remedies in actions by or against it. Section 5136, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3455), prescribes the terms of its charter. It is authorized to do a banking business, and, like any other corporation, its powers are limited by the terms of the charter. A national bank may not engage in manufacturing, for its charter gives it no authority therefor. Neither can a manufacturing corporation engage in banking, and for a like reason. Neither one can engage in the business of buying and selling stocks, because authority therefor is not granted in the charter of either; but, nevertheless, each has authority to take stock in another corporation as security for or in payment of a debt. It was so long since decided by this court,—*First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122, 126–128, 23 L. ed. 679, 681, 682,—in which the question presented, as stated in the opinion of the court, announced by Mr. Chief Justice Waite, was:

"Whether a national bank, organized under the national banking act, may, in a fair and bona fide compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than existed, a loss which would otherwise accrue from the transaction might be averted or diminished."

And answering that question in the affirmative, it was said.

"Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the *power to incur the liability or be-[442] come the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do in this behalf whatever natural persons could do under like circumstances.

. . . . . .

"Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with

a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner* v. *Bank of United States*, 8 Wheat. 351, 5 L. ed. 634, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions."

In *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, the right to take stock of another corporation as collateral security was affirmed.

In the case before us the bank had a claim against the Northwestern Manufacturing & Car Company. This was in 1884. The car company was in financial trouble and had been placed in charge of a receiver appointed by a state court. The bank, in connection with other creditors of the car company, organized a new corporation—the Minnesota Thresher Manufacturing Company—to buy the entire plant of [443] the car *company. It was so purchased and the bank surrendered its claim, taking in payment thereof preferred stock in the thresher company. The latter company carried on business until it failed, and then proceedings were had by which the defendant in error was appointed receiver and an assessment made by order of the court, which assessment is the basis of this action. Now, in accordance with the decision of this court in 92 U. S., *supra*, the bank had a right to surrender its claim and take stock in payment thereof. It did so, and, so far as the record shows, everything was done in good faith and in the belief that the best interests of the bank would be promoted thereby. Having thus become a stockholder in the thresher company, it was entitled to all the benefits and subject to all the liabilities which attached to ownership of the stock. The fact that the arrangement antedated the organization of the thresher company is immaterial, for, until the arrangement was carried into effect, the claim of the bank against the car company was undisturbed. To hold that a national bank may take, in satisfaction of a claim, stock in a corporation already existing, and cannot agree to take in such satisfaction stock in a corporation to be created, and which is afterwards created, and whose stock is issued to it in payment of the claim, is to create a distinction without a difference, and to sacrifice substance to form. The transaction is precisely the same as though the thresher company had been fully organized, and thereafter the bank surrendered its claim against the car company for stock in the thresher company, and that, as held in 92 U. S., is perfectly legitimate. It held that stock for nearly a score of years, its right to so hold being, so far as the record shows, unchallenged by the government or any stockholder, and enjoying during that time all the benefits and profits resulting from such holding. Finally the thresher company became embarrassed. Its creditors proceeded against it, and then for the first time is it discovered that the holding by the bank of stock in the thresher company was unauthorized and illegal, and now it repudiates its liability as stockholder, and leaves the burden of the thresher *company's debts to be borne [444] by the other stockholders. Certainly there is little in this to appeal to the sense of justice.

The bank was not, as suggested, investing in any merely speculative business. It was not accepting stock in a corporation organized for the business of buying and selling. It was no more engaged in a speculative transaction than if it had taken a piece of real estate in satisfaction of a debt, hoping that the time would come when that real estate would be worth as much or more than the debt. The object of the organization of the thresher company, as stated in its charter, was to purchase the plant of the Northwestern Manufacturing & Car Company—that is, to buy a single property which was then in the hands of the court, and likely to be sacrificed in judicial proceedings. Clearly the creditors thought that, by acquiring title and possession of the entire plant, they could realize more than by a receiver's sale to outside parties; and at the same time, contemplating the possibilities of the future, they provided in the charter for the carrying on of a general manufacturing business. The scheme is clearly set forth in the following passage from the opinion of the supreme court of Minnesota, quoted in the opinion of this court:

"There are two general purposes for which the corporation was organized, as declared by the articles,—one, the purchase of the capital stock, evidence of indebtedness, and assets of an existing corporation; and the other, the manufacture and sale of all articles, implements, and machinery made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corpora-

tion was authorized to buy and sell the stock, choses in action, and assets of the Northwestern Manufacturing & Car Company mentioned in the articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then-existing cor-
[445] poration. *Nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood and iron, or either of them." [90 Minn. 148, 95 N. W. 767.]

Clearly the thresher company was no speculative corporation, but an ordinary and legitimate business venture. Suppose the bank had been the only creditor, is it possible that it could not have taken the whole car company's plant in satisfaction of its claim, and then held it in the hopes of being able to realize fully on the property? And if it could do so, acting alone and for its single interest, what is there in the organization of a national bank which prevents it doing the like thing in conjunction with other creditors?

Of course, as held by the supreme court of Minnesota, unless the thresher company was organized solely for the purpose of carrying on a manufacturing business, its stockholders would, under § 3 of article 10 of the Constitution of Minnesota, be subject to the double liability. For if a power to engage in manufacturing exempts stockholders from double liability, no matter what other business the corporation is chartered to carry on, every corporation organizing under the Minnesota statutes would include that among its charter powers. We ordinarily accept the construction by a state supreme court of its Constitution and laws as conclusive. In this case the construction placed by the supreme Court of Minnesota upon this clause in the Constitution is so obviously right as to preclude the necessity of defense.

For these reasons, thus briefly stated, I am constrained to dissent from the opinion and judgment of the court, and am authorized to say that Mr. Justice **Brown** concurs in this dissent.

*SECURITY MUTUAL LIFE INSURANCE [446]
COMPANY, *Plff. in Err.*,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.

(See S. C. Reporter's ed. 446–450.)

Error to state court—moot case.—A writ of error to review a judgment of a state court refusing to cancel the revocation of a permit to do business in the state, granted, renewable annually, to a foreign insurance company, must be dismissed, where the permit itself has become of no effect by the lapse of one year since it was granted.

[No. 178.]

Argued January 16, 1906. Decided February 19, 1906.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which reversed a judgment of the Circuit Court of Jefferson County, in that state, canceling the revocation of a permit to do business in the state, granted to a foreign insurance company. *Dismissed.*†

See same case below, 26 Ky. L. Rep. 1239, 83 S. W. 611.

Statement by Mr. Justice **Peckham:**

The plaintiff in error seeks by this writ to review the judgment of the court of appeals of Kentucky, reversing the judgment of the court below and dismissing the petition of plaintiff in error. The trial court granted such petition, which was to cancel the revocation, by the state insurance commissioner, of the permit granted by him to the plaintiff in error to do business in the state.

The facts are as follows: The company is an insurance company, existing under the laws of the state of New York, and having its principal office in the city of Binghamton, in that state. In the year 1900 the company, pursuant to the laws of the state of Kentucky, applied to the insurance commissioner of that state for a permit to do business therein, and it was granted for one year from the date of such permit, which was annually renewed thereafter. On July 1, 1904, it was renewed for the last time, and the permit contained a statement that it was granted for one year, provided it was not sooner revoked. Section 635, Kentucky

†Dismissal set aside on rehearing May 14, 1906, and judgment affirmed. See *post*, p. 1013.

NOTE.—*On error to state courts in cases presenting merely abstract or moot questions*—see note to Campbell v. California, *ante*, 382.

Statutes, provides that these licenses or permits must be renewed annually. At the time of the first application by the company
[447] for admission (A. D. *1900), the following statute of Kentucky was, and it ever since has been, in existence. It is known as § 631, Kentucky Statutes. The section reads as follows:

"Before authority is granted to any foreign insurance company to do business in this state it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state or upon the commissioner of insurance in this state, in any action brought or pending in this state, shall be a valid service upon said company; and, if process is served upon the commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in the state."

In September, 1904, certain parties, named Crain and Gayle sued the company in a state court of Kentucky, and the company, without their consent, removed the suit to the circuit court of the United States for the eastern district of Kentucky. Thereupon Crain and Gayle notified the state insurance commissioner of such removal, and demanded that the commissioner should revoke the authority of the company to do business in the state, as provided for by the above statute.

The company avers that the insurance commissioner did, on the sole ground of such removal, revoke the authority of the company to do business after September 29, 1904. The company thereupon demanded of the commissioner that he should set aside such revocation and cancel the same, which the commissioner refused to do.

[448] *The company then commenced these proceedings in the proper state court of Kentucky, asking that the insurance commissioner be required to cancel the revocation of the authority of the plaintiff and its agents to do business in the state, and that he should grant, or continue, the authority to the plaintiff and its agents, to transact the business of life insurance in the state; and that the commissioner should be required to publish in a newspaper the fact of such cancelation, and that he should be restrained and enjoined from notifying the general agents of the plaintiff of the suspension of its license. The company specially set up the claim that, under the Constitution and laws of the United States, it was entitled to remove the suit mentioned from the state court into the United States circuit court for the eastern district of Kentucky, and that any statute of the state of Kentucky in anywise restricting or affecting that right was void as a violation of the Federal Constitution.

The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, and the defendant commissioner declining to plead further, the prayer of the insurance company was granted, and judgment was entered (1) directing the defendant to cancel the revocation of the permit; (2) granting authority to the company to transact business in the state; (3) restraining the commissioner from notifying the general agents of the company of the suspension of its license and its right to do business in the state; (4) enjoining the commissioner from applying to any judge for an injunction restraining the company from further proceeding with its business. The defendant prayed an appeal to the court of appeals of the state, which was granted, and that court reversed the judgment of the trial court, and remanded the case, with instructions to dismiss the petition, and judgment to that effect was thereupon entered. 26 Ky. L. Rep. 1239, 83 S. W. 611.

Mr. **William Marshall Bullitt** argued the cause, and, with *Messrs. F. W. Jenkins, Julien T. Davies,* and *Charles S. Grubbs,* filed a brief for plaintiff in error:

Although it has been loosely stated (as in *Paul* v. *Virginia,* 8 Wall. 168, 181, 19 L. ed. 357, 360, and *Hooper* v. *California,* 155 U. S. 652, 656, 39 L. ed. 298, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207) that a state may entirely exclude foreign corporations, or may prescribe such conditions of admittance as it thinks fit, the Supreme Court has repeatedly pointed out (as in *Home Ins. Co.* v. *Morse,* 20 Wall. 445, 456, 22 L. ed. 365, 369 and *Horn Silver Min. Co.* v. *New York,* 143 U. S. 305, 314, 36 L. ed. 164, 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403), that such expressions were subject to the qualification that there were certain classes of corporations that could not be excluded at all, and with reference to all other corporations the conditions prescribed must not be repugnant to the Federal Constitution.

For example, a state cannot exclude from

its limits a foreign corporation engaged in interstate commerce (*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708), nor one employed in doing work under authority of Congress (*Stockton* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9), or engaged in any Federal function (*Horn Silver Min. Co.* v. *New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403). A state cannot provide, as a term of admission, that the corporation will not remove a case to the Federal courts (*Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365). Neither can a state prevent a foreign corporation from doing business because it refused to obtain a license under a statute providing for a revocation of the business if it removed a case to the Federal court (*Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931).

A state may, by a valid affirmative expression, prohibit the entrance of or expel all foreign corporations which are not engaged in interstate commerce or in performing a Federal function.

Paul v. *Virginia*, and *Horn Silver Min. Co.* v. *New York*, *supra*.

Until a state has decided otherwise by some valid affirmative direct enactment to the contrary a foreign corporation has the right, by virtue of the common-law rule of comity, to enter any state and transact its business.

13 Am. & Eng. Enc. Law, pp. 838, 839; *Cowell* v. *Colorado Springs Co.* 100 U. S. 55, 59, 25 L. ed. 547, 549; *American & F. Christian Union* v. *Yount*, 101 U. S. 352, 356, 25 L. ed. 888, 890.

The principle of comity does not mean "courtesy," but is as much a part of the law as any other legal principle; it exists at common law, and is operative until changed by statute.

Beale, Foreign Corp. § 104.

A state may, subject to the provisions of the Federal Constitution, prescribe the terms or conditions upon which foreign corporations (except those engaged in interstate commerce, etc.) will be admitted to carry on their business.

Cooper Mfg. Co. v. *Ferguson*, 113 U. S. 727, 732, 28 L. ed. 1137, 1138, 5 Sup. Ct. Rep. 739; *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305, 315, 36 L. ed. 164, 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Hooper* v. *California*, 155 U. S. 648, 655, 5 Inters. Com. Rep. 610, 39 L. ed. 297, 300, 15 Sup. Ct. Rep. 207; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 46, 44 L. ed. 657, 664, 20 Sup. Ct. Rep. 518; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 397, 44 L. ed. 1116, 1122, 20 Sup. Ct. Rep. 962.

But the terms or conditions of admission must not be inconsistent with the Federal Constitution, for there is a limit beyond which a state cannot go, to wit, it cannot prescribe terms, the effect of which will be to abridge or deprive the corporation of a right guaranteed to it by the Constitution and laws of the United States.

Lafayette Ins. Co. v. *French*, 18 How. 404, 407, 15 L. ed. 451, 452; *Home Ins. Co.* v. *Morse*, *supra*; *Barron* v. *Burnside*, 121 U. S. 186, 200, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Blake* v. *McClung*, 172 U. S. 239, 254, 255, 43 L. ed. 432, 437, 438, 19 Sup. Ct. Rep. 165; *Dayton Coal & I. Co.* v. *Barton*, 183 U. S. 23, 25, 46 L. ed. 61, 64, 22 Sup. Ct. Rep. 5.

The power of Congress over the removal of causes is quite as broad as its power to regulate commerce, and yet it has been repeatedly held that a state cannot discriminate against the citizens or products of other states (*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight* v. *Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Tiernan* v. *Rinker*, 102 U. S. 123, 26 L. ed. 103; *Guy* v. *Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454), nor impose a tax on interstate commerce, either by a tax laid on the transportation of the subjects of that commerce (*State Freight Tax Case*, 15 Wall. 232, 279, 21 L. ed. 146, 162; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 465, 26 L. ed. 1067, 1068; *New York* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87), or by a tax on the receipts derived from that transportation, or upon the capital stock of the carrier (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co.* v. *Alabama Bd. of Assessment* [*Western U. Teleg. Co.* v. *Seay*] 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Fargo* v. *Michigan* [*Fargo* v. *Stevens*] 121 U. S. 230, 30

L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *California* v. *Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826), or by means of a license fee on the privilege or occupation of engaging in interstate commerce (*Robbins* v. *Taxing District*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Corson* v. *Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; *Leloup* v. *Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Harman* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Henderson* v. *New York* [*Henderson* v. *Wickham*] 92 U. S. 259, 23 L. ed. 543; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256); nor can a state in any way attempt to regulate interstate commerce by imposing burdensome conditions under which it may be conducted, whether by fixing rates (*Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087), or by preventing the introduction of certain articles of commerce (*Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. Rep. 681, 3 Inters. Com. Rep. 36), or by requiring telegraphic messages to be sent in the order received, and delivered by messengers within 1 mile of the office (*Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126), or by requiring common carriers to give equal passenger accommodations without distinction on account of race or color (*Hall* v. *De Cuir*, 95 U. S. 485, 24 L. ed. 547).

So in *Easton* v. *Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288, it was held that, as Congress had the sole power to regulate national banks, a statute of Iowa was void which provided a penalty for any banker receiving a deposit at a time when he knew the bank was insolvent.

In *Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. ed. 451, the court said that the terms which a state could impose in admitting a foreign corporation must not be inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others.

A state cannot tax or punish a person for, or prevent him from, exercising any right conferred by the Constitution and laws of the United States.

For example, a state could not imprison or fine one of its own citizens (individual or corporate) for bringing a suit in a Federal court, or impose a tax or fine on a person because he voted for a congressional candidate (*Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17), or because he gave information to the United States of a crime against its laws (*Re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 959), or because he protected a Federal judge (*Re Neagle* [*Cunningham* v. *Neagle*], 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658), or desired to travel from one state to another (*Crandall* v. *Nevada*, 6 Wall. 35, 18 L. ed. 745),—the obvious reason being that a state cannot punish one for doing what one has a right do.

A punishing clause dependent upon a void prohibiting clause is itself void.

Easton v. *Iowa*, 188 U. S. 220, 228, 47 L. ed. 452, 455, 23 Sup. Ct. Rep. 288.

A review of the authorities will demonstrate the correctness of the foregoing argument; and, while in some of the earlier cases the subject was dealt with by this court from a somewhat narrower view, it will be observed that the decisions were finally placed on the broad ground that any statute designed to entail the surrender of a privilege secured by the Constitution and laws of the United States is void, and nice distinctions between the different statutes were disregarded, and they were all held subject to the same infirmity.

Lafayette Ins. Co. v. *French, supra; Pennsylvania Lumbermen's Mut. F. Ins. Co.* v. *Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365; *Ducat* v. *Chicago*, 10 Wall. 410, 19 L. ed. 972; *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Southern P. Co.* v. *Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44;

Barrow S. S. Co. v. *Kane*, 170 U. S. 100, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526; *Blake* v. *McClung*, 172 U. S. 255, 256, 43 L. ed. 438, 19 Sup. Ct. Rep. 165; *Com.* v. *East Tennessee Coal Co.* 97 Ky. 238, 30 S. W. 608; *Com.* v. *Jellico Coal Co.* 97 Ky. 246, 30 S. W. 611.

Doyle v. *Continental Ins. Co.* 94 U. S. 540, 24 L. ed. 151, so far as its doctrine interferes with our contentions, has already been overruled and destroyed by the case of *Barron* v. *Burnside, supra.*

Mr. **J. H. Hazelrigg** argued the cause, and, with *Messrs. N. B. Hays, H. R. Prewitt,* and *Hazelrigg & Hazerligg,* filed a brief for defendant in error:

The admission into a state and the continued conduct therein of the business of a foreign corporation depend solely on the consent of the state.

Paul v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Hooper* v. *California*, 155 U. S. 650, 39 L. ed. 298, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 10 L. ed. 274; *Blake* v. *McClung*, 172 U. S. 255, 43 L. ed. 438, 19 Sup. Ct. Rep. 165.

The chief cases in point are: *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365; *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Com.* v. *East Tennessee Coal Co.* 97 Ky. 238, 30 S. W. 608.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

It appears that the laws of Kentucky require the annual renewal of the permit to any foreign insurance company, in order that the company may continue to do business in the state, and without such license the company is prohibited from doing any business therein.

The writ of error in this case was filed January 27, 1905, and the license was granted July 1, 1904, and expired by its terms, if not sooner revoked, on the 1st day of July, 1905. The permit, even if illegally revoked prior to that time, became a dead letter on July 1, 1905, so far as constituting any authority to the company to remain in the state and do business therein. If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired, and the company would still be without power to do business in the state until another permit should be granted. To adjudge that the old permit remained good until the expiration of the year is to adjudge an abstract question, as no relief can be now awarded concerning it. The refusal on the part of the insurance commissioner to grant authority to plaintiff to transact business after the old permit had expired does not raise a Federal question. Since the writ of error was filed the permit has ceased to have any effect, and, therefore, an event has occurred which renders it impossible for this court to grant any effecutal relief in favor of plaintiff in error. In such case the court will dismiss the writ of error. *Mills* v. **Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. [450] Ct. Rep. 132; *Tennessee* v. *Condon*, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579; *Joncs* v. *Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611.

It would seem to be plain that the cancelation of a revocation of a permit when the permit itself has become of no effect by virtue of the lapse of time would be useless business, and would give no practical relief to the company.

Writ dismissed.

TRAVELERS INSURANCE COMPANY, of Hartford, Connecticut, *Plff. in Err.,*

v.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.

(See S. C. Reporter's ed. 450.)

This case is governed by the decision in *Security Mut. L. Ins. Co.* v. *Prewitt, ante,* 545.

[No. 184.]

Argued January 16, 1906. Decided February 19, 1906.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Jefferson County, in that state, dismissing, on demurrer, a petition to enjoin the threatened revocation of a permit to do business in the state, granted to a foreign insurance company. *Dismissed.*†

See same case below, 26 Ky. L. Rep. 1239, 83 S. W. 611.

Messrs. **Edmund F. Trabue** and **John G. Johnson** argued the cause, and, with *Messrs. John D. Doolan, Attilla Cox, Jr.,* and *William Bro Smith,* filed a brief for plaintiff in error:

†Dismissal set aside on rehearing May 14, 1906, and judgment affirmed. See *post,* p. 1013.

The doctrine of the state court is unsound and is in conflict with all the decisions of this court saving that of *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148, which we claim was overruled in *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

If, as held in *Home Ins. Co.* v. *Morse*, 20 Wall. 455, 22 L. ed. 369, the state cannot deprive a foreign insurance company of its right of access to the Federal courts, upon what principle can it impose upon it the penalty of expulsion from the state if it exercise that right?

By the 14th Amendment the state is forbidden to deprive a foreign corporation of due process and equal protection of the laws.

Smyth v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Due process includes access to all legal tribunals, state and Federal, and to an orderly and just administration of the laws. If the state could deny due process to a foreign corporation, it might decline to admit it except upon condition of its surrender of its right of access to either state or Federal courts, leaving it defenseless.

It has been repeatedly held by this court that a state cannot even limit to its own courts the enforcement of a controversy of a nature included within the grant of jurisdiction to the Federal courts by the Federal Constitution and laws.

Lincoln County v. *Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *George T. Smith Middlings Purifier Co.* v. *McGroarty*, 136 U. S. 237, 34 L. ed. 346, 10 Sup. Ct. Rep. 1017; *Madisonville Traction Co.* v. *St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Chicago & N. W. R. Co.* v. *Whitton*, 13 Wall. 270, 20 L. ed. 571.

Nor can the jurisdiction of the Federal courts be impaired by state legislation.

Hyde v. *Stone*, 20 How. 170, 15 L. ed. 874; *Wabash Western R. Co.* v. *Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Smyth* v. *Ames*, *supra*.

In respect to the nature or degree of discrimination which a state may make between her own corporations and those of other states, it belongs to the state to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.

Ducat v. *Chicago*, 10 Wall. 410, 19 L. ed. 792.

In *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 455, 456, 22 L. ed. 365, 369, this court gave warning that the general language in *Paul* v. *Virginia* must not be accepted as unmodified by the principle announced in *Lafayette Ins. Co.* v. *French*, 18 How. 407, 15 L. ed. 452.

This question is concluded by authority.

Com. v. *East Tennessee Coal Co.* 97 Ky. 238, 30 S. W. 608; *Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. ed. 451; *Home Ins. Co.* v. *Morse*, and *Barron* v. *Burnside*, *supra*; *Southern P. Co.* v. *Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Martin* v. *Baltimore & O. R. Co.* (*Gerling* v. *Baltimore & O. R. Co.*) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Dayton Coal & I. Co.* v. *Barton*, 183 U. S. 23, 25, 46 L. ed. 61, 64, 22 Sup. Ct. Rep. 5; *Bigelow* v. *Nickerson*, 30 L.R.A. 336, 17 C. C. A. 1, 34 U. S. App. 261, 70 Fed. 121; *Metropolitan L. Ins. Co.* v. *McNall*, 81 Fed. 888; *Mutual L. Ins.* v. *Boyle*, 82 Fed. 705; *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

Mr. **J. H. Hazelrigg** argued the cause, and, with *Messrs. N. B. Hays, H. R. Prewitt*, and *Hazelrigg & Hazelrigg*, filed a brief for defendant in error.

For their contentions see their brief as reported in *Security Mut. L. Ins. Co.* v. *Prewitt*, *ante*, 545.

Per Mr. Justice **Peckham:**

This case involves the same principle as that decided in the foregoing case, and, for the reasons stated in the opinion above, *the writ of error to the Court of Appeals of the State of Kentucky is dismissed.*

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*UNITED STATES OF AMERICA, *Appt.*, [451]

v.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), Anaconda Mining Company (a Corporation), Anaconda Copper Company (a Corporation), Anaconda Copper Mining Company (a Corporation), Margaret P. Daly, Margaret P. Daly as Executrix of the Last Will and Testament of Mareus Daly, Deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy *Appellees.*

(See S. C. Reporter's ed. 451–479.)

1. Equitable jurisdiction—remedy at law—difficulty of proving case.—Redress for the wrongful cutting, carrying away, and conversion of timber from the

NOTE.—*On the jurisdiction of equity where remedy at law exists*—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R.

public domain cannot be had in a court of equity on the theory that the remedy at law is inadequate because of various devices resorted to by the principal tort feasor by way of organizing different corporations to cover up his tracks and to render it more difficult for the United States to prove its case.

2. **Equitable jurisdiction—constructive trusts.**—The rule that proceeds of property obtained by theft or fraud may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith cannot successfully be invoked to sustain a bill filed on behalf of the United States, charging the cutting, carrying away, and conversion of timber from the public domain, where the allegations wholly fail to identify any specific, definite property as the proceeds of the timber wrongfully or fraudulently taken.

3. **Equitable jurisdiction—remedy at law—discovery.**—The alleged inability of the United States to state just when or by whom the wrongful cutting of timber on the public domain had been performed, or when or by whom the logs manufactured into lumber had been sold and the proceeds obtained, and when such proceeds were divided, shows no necessity for a discovery in equity which would render the remedy more adequate than in an action at law, in view of the law providing for the examination of defendants, and of the provision of U. S. Rev. Stat. § 724, U. S. Comp. Stat. 1901, p. 583, for the production of books and writings in actions at law under the same circumstances which would authorize their compulsory production under the ordinary rules of proceedings in chancery.

4. **Equitable jurisdiction—suit against executors.**—Relief cannot be had in equity for the wrongful cutting, carrying away, and conversion of timber from the public domain because one of the defendants is the executrix of the person alleged to have been the principal wrongdoer, whose estate is largely solvent.

5. **Equitable jurisdiction—trusts ex maleficio.**—The mere grant of licenses or permits to cut timber on certain described lands in the public domain did not make the cutting of timber on other lands by the licensees the act of trustees *ex maleficio*, so as to enable the United States to resort to a court of equity for redress.

6. **Equitable jurisdiction—accounting.**—Redress cannot be had in equity for the wrongful cutting, carrying away, and conversion of timber from the public domain on the theory that, because the wrongdoers had been granted permits to cut timber from other lands, a case was made for an accounting.

7. **Equitable jurisdiction—multiplicity of suits.**—The prevention of multiplicity of suits cannot successfully be relied upon to sustain a bill in equity, filed on behalf of the United States for redress for the acts of persons licensed to cut timber from certain described lands of the public domain, in wrongfully cutting, carrying away, and converting timber from other lands.

[No. 223.]

Argued January 8, 9, 1906. Decided February 19, 1906.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree affirming a decree of the Circuit Court for the District of Montana, dismissing a bill filed on behalf of the United States for the wrongful cutting, carrying away, and conversion of timber from the public domain, on the ground that complainant had an adequate remedy at law. *Affirmed.*

See same case below, 66 C. C. A. 652, 133 Fed. 274.

Statement by Mr. Justice **Peckham:**

The appellant filed this bill of complaint in the circuit court of the United States for the district of Montana, on the equity side of the court, for the purpose of recovering from the defendants the value of certain timber, alleged to have been wrongfully cut and taken by the defendants and converted to their own use from the public lands belonging to the complainant in the state of Montana. The defendants, those of them who appeared, demurred to the bill on the ground, among others, that a court of equity had no jurisdiction over the *cause of ac- [452]
tion set up in the bill, for the reason that complainant had a plain, full, and adequate remedy at law therefor. The circuit court sustained the demurrer and granted leave to the complainant to amend; but the complainant elected to stand by the bill, and the same was thereupon finally dismissed. The case was taken to the United States circuit court of appeals for the ninth circuit, where the judgment of the circuit court was affirmed (66 C. C. A. 652, 133 Fed. 274) and the complainant has appealed here.

(It appears from the return of the marshal that, after diligent search, no service of process could be made on the defendants Bitter Root Development Company, Anaconda Mining Company, and Anaconda Copper Company [corporations], as they could not be found.)

The bill alleged that on the 1st day of April, 1888, the complainant was, and at the time of the filing of the bill continued

Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

On equitable jurisdiction to prevent multiplicity of suits—see notes to Fuller v. Detroit F. & M. Ins. Co. 1 L.R.A. 801; and Corinth v. Locke, 11 L.R.A. 207.

As to the right to cut timber on public land—see note to King-Ryder Lumber Co. v. Scott, 70 L.R.A. 873.

to be, the owner in fee and in the possession of certain lands in the state of Montana, described in the bill. Description of the lands from which the timber was cut and carried off was given at great length, and a large number of sections of land were included therein.

"2. Your orator further shows that on the day and year last aforesaid, on these vast tracts of land, there were then growing and standing great forests of pine, fir, and other kinds of trees of various dimensions, fit to manufacture into lumber for mining, commercial, and all other purposes for which lumber is used; that said forests were of great value; to wit, of the value of two million dollars ($2,000,000) and upwards, the exact value thereof being to your orator unknown; that these forests and the land upon which they were growing and standing were the absolute property of the complainant, the United States of America, and was a portion of its public domain.

"3. Your orator further shows that on this, the day of filing its bill of complaint in this court, the lands above described have, for the most part, been stripped of the pine and other trees and timber that were standing and growing upon them as aforesaid, and, except very small portions thereof, were so denuded without license, authority, [453] or permission of the United States *or anyone authorized to represent the complainant; and this was done in violation of its laws, both civil and criminal, and thereby and in consequence of said spoliation the complainant has lost millions of dollars' worth of its property under circumstances named in the succeeding paragraphs of this bill of complaint.

"4. Your orator further shows that one Marcus Daly, who is now dead, but who was, on the date and year aforesaid, a citizen of the state of Montana, and a resident thereof, well knowing of the location of these lands, their accessibility, and the great value of the timber then growing thereon, did, on or about the 1st day of January, 1890, determine that he would convert and appropriate to his own use all of the merchantable and marketable timber growing and standing thereon, without buying said timber or obtaining any right or authority, except as hereinafter stated, from your orator, the United States of America. That in order to more effectually carry out these designs and purposes, to conceal his identity, to enrich himself individually, to escape personal liability, and to better deceive the public and the lawful officers and agents of the complainant, he determined that he would organize a corporation under the laws of the state of Montana; and for that purpose the said Daly called to his aid and assistance certain other persons, namely, John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcom B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long, and by conspiracy and confederation with said parties, and in pursuance of such fraudulent purpose, as aforesaid, they organized, on or about the 12th day of August, 1890, the Bitter Root Development Company, the defendant. In its articles of incorporation, which were duly filed with the secretary of state of Montana, said John R. Toole, William Toole, and James W. Hamilton were named as incorporators, and James W. Hamilton, William Toole, Daniel J. Hennessy, John R. Toole, and William W. Dixon were named as trustees to manage the affairs of the company *for the first [454] three months of its existence, and the town of Hamilton, in said state, was named as the principal office of said corporation. The capital stock of said corporation was fixed at the sum of three hundred thousand dollars ($300,000.00), divided into one hundred thousand shares, of the par value of three dollars ($3.00) per share.

"5. Your orator further shows that said incorporators and trustees had but a nominal interest in said incorporation, but certain of them were agents, and others, attorneys of said Marcus Daly, and, as such, conspired with him as to the manner and means by which his said purpose to denude said lands of your orator could be best carried out. In pursuance of such conspiracy it was necessary that a certain number should subscribe for stock in said corporation, which was done, but all of said shares were in fact subscribed for the use of and controlled by said Marcus Daly. Your orator charges that not only in the formation of said corporation and other corporations, to be hereinafter named, said John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long aided and assisted said Marcus Daly, but in many other ways up to the time of his death they engaged with him in the work of spoliation, which, in pursuance of such conspiracy, had been planned and was later carried out as hereinafter particularly described; and said parties other than Daly participated in the profits thereof, but just how and to what extent is to your orator unknown; and your orator shows that such of the above as are not made defendants herein are either dead, outside of the jurisdiction of this court, or have no estate.

"6. Your orator further shows that at once on the organization of this corporation, and under the corporate name thereof, said parties heretofore named commenced the work of cutting and carrying away from said lands the trees and timber then growing and standing thereon, using at first in their operations several portable sawmills, [455] but later, on or about the year 1892, *a large lumber and sawmill was erected at the town of Hamilton, on Bitter Root river, in close proximity to a portion of the lands above described and the timber growing thereon. The work of cutting, hauling, transporting to the river, and driving the timber to said mill, and manufacturing the same into lumber, was prosecuted with great and unremitting industry for several years thereafter, to the great profit and advantage of the said conspirators, and to the great loss of your orator.

"7. Your orator further shows that not only at the time of the organization of said corporation, but at all times while it was doing business, its officers, directors, trustees, and stockholders acted for and in behalf of said Marcus Daly, as his agents, and had knowledge of its principal operations, and well knew that the logs that were being brought to its mills and converted into lumber were taken, without right or authority, from the public domain of your orator, and that they had no legal right or title to the same, except as to a small fraction thereof, as hereinafter stated.

"8. Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by the other parties, and as aforesaid, under the name of the Bitter Root Development Company, did, at certain times during the several years of said depredations, apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and, under cover of such permits, said conspirators not only cut, carried away, and manufactured the timber growing upon the lands included in such licenses, but, well knowing that such permits gave them no right or authority to enter upon other lands of your orator, they wilfully and fraudulently entered upon large tracts of lands adjacent thereto, and cut, carried away, drove, and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown, and known only to Marcus Daly, his agents and the officers of said Bitter Root Development Company, and appropri- [456] ated *the proceeds of such sales to their own use: but just when such sales were made, just how much the proceeds, to whom beside said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time, it is impossible for your orator to say, as all books of account, of every kind and character, were then and are now in their possession, under their control, or with their assigns.

"9. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and the other parties before mentioned engaged the services of a large number of men, falsely representing that they had authority from your orator to cut the growing timber on tracts of land not included in any license, and made contracts with such men, by the terms of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts, and enable them to successfully prosecute the same.

"10. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, the said Daly and his associates, acting through and under the corporate name of the defendant Bitter Root Development Company, entered into other contracts or agreements with other parties, namely, Kendall Brothers, Harper Brothers, G. L. Shook, William Toole, Andrew Kennedy, D. V. Bean, John Ailport, and divers other persons, to your orator unknown, by the terms of which they were to be paid specified prices per thousand feet board measure for logs delivered at the sawmill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to your orator, and was to be unlawfully cut and removed. Said contractors, so called, acting for and in *be- [457] half of said Marcus Daly and his said confederates under the name of the Bitter Root Development Company, during the year 1891 and for several years next thereafter, wilfully trespassed upon the hereinbefore-described lands of the complainant, cutting millions of feet of logs, and hauling them to the Bitter Root river, and thence to the mill of the defendant Bitter Root Development Company, at Hamilton, where they were converted into lumber and sold to the general public, and the proceeds thereof appropriated in large part by said Marcus Daly, and the balance by his associates in

said conspiracy, but just how much, and in what proportion, your orator, for the reasons above stated, is unable to say.

"11. Your orator further shows that the said Marcus Daly and his associates, in further execution of said conspiracy, organized other corporations for the purpose of concealing their illegal acts and complicating and confusing the situation, so as to make detection and proof of the same difficult, if not impossible. One of these schemes was as follows: On or about the 14th day of January, 1891, they organized a corporation known as the Anaconda Mining Company, with an organized capital stock of $12,500,000, divided into 500,000 shares of the par value of $25 per share; that within less than one year thereafter, namely, on the 5th day of December, 1891, a stockholders' meeting was held in the city of Butte, Montana, and at said meeting the capital stock of said corporation was increased to twenty-five million dollars ($25,000,000.00) and the shares thereof increased to one million (1,000,000) shares; that at said stockholders' meeting it appeared that no one of the incorporators or the trustees that were named at the time of its incorporation a few months before had any substantial interest therein; and later, namely, on the 31st day of December, another meeting of said stockholders was held, at which time it was voted to extend the term of existence of said corporation for forty years from the date of its original incorporation, and at that meeting it appeared that Marcus Daly, either in his own person or as trustee or as a proxy, controlled nearly seven *hundred thousand (700,000) shares [458] of the million shares of the capital stock of said company, and in less than six months thereafter the capital stock was reduced from twenty-five million dollars ($25,000,000.00) to one million dollars ($1,000,000.00), and the shares from one million to forty thousand (40,000).

"12. Your orator further shows that in furtherance of the conspiracy aforesaid the said Marcus Daly, on the 27th day of April, 1894, through his agents, procured to be conveyed unto himself all of the property of said Bitter Root Development Company, receiving a deed from said Bitter Root Development Company, executed by William Toole as its president and Joseph Kerrigan as its secretary, which said deed was duly recorded on page 302 of book 16 in the proper office for the recording of deeds in the county of Ravalli, state of Montana. In said deed appear these words: 'The Bitter Root Development Company, for and in consideration of one dollar, transfers all of its property of every kind and description, real and personal, timber lands, timber cutting privileges and rights, timber, logs, mills, water rights, and water ditches, flumes, pipe lines, and rights of way—in fact, everything belonging to the Bitter Root Development Company—to Marcus Daly.'

"Your orator further says that four days after so receiving this deed, namely, on the 1st day of May, 1894, said Marcus Daly deeded this same property to the other of his corporations, the above-named Anaconda Mining Company, for the express consideration of one million, four hundred and forty-two thousand, three hundred and seventy-nine dollars and forty-six cents ($1,442,379.46), which said deed was duly recorded in said book 16, on page 280. Your orator expressly charges that said Marcus Daly did in fact receive the consideration named in said deed, the whole thereof being directly the result of the spoliation of the lands of your orator, as aforesaid, and that the moneys so received by him belonged in fact to your orator; but your orator charges on information that said Marcus Daly did not receive all of the same in cash, but a portion of same *was taken in stock in said [459] Anaconda Mining Company, but just how much he received in cash and how much was carried over and appeared in stock of said company, your orator is unable to state.

"13. Your orator further shows that in furtherance of the conspiracy aforesaid, said defendants, Moses Kirkpatrick, William Scallon, and Malcolm B. Bromley, acting for and in behalf of said Marcus Daly, on the 6th day of June, 1895, pursuant to and in conformity with the statutes of Montana relating to corporations for industrial and productive purposes, organized the Anaconda Copper Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into three hundred thousand (300,000) shares of the par value of one hundred dollars ($100.00) each, with an authorized term of existence of forty years, and the following-named persons were named as trustees for the first three months of its existence; to wit, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessey, and Joseph V. Long, with its principal office at Butte, Silverbow county, Montana.

"14. Your orator further shows that nine days thereafter the same persons, named as incorporators of the corporation last named, organized under the same law the defendant corporation the Anaconda Copper Mining Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into one million two hundred thousand shares (1,200,000) of the par value of twenty-five dollars ($25.00) each, with the

same seven trustees to manage the affairs of said corporation for the first three months of its existence, with its principal office at Anaconda, in said state.

"15. Your orator shows that in the execution of said conspiracy, and for the purpose of complicating the situation, said Marcus Daly, through his agents, did again, and within one year and twenty-nine days after having transferred his property to the Anaconda Mining Company, convey the identical property that was named in said
[460] deeds to the above-named *Anaconda Copper Mining Company for and in consideration of the sum of one dollar, the Anaconda Mining Company executing a deed through and by its president, W. W. Dixon, and its secretary, F. E. Sergeant, and said deed is recorded in the same book of records, on page 441.

"16. Your orator further shows and charges that these several conveyances were made in the main in furtherance of said conspiracy, and in pursuance of a purpose to so complicate the situation as to make detection difficult, if not impossible. That the conveyance by the Bitter Root Development Company to said Marcus Daly, for one dollar, of all of its property, was fraudulent, and that said Marcus Daly did, under the name of the Anaconda Mining Company, carry on the same work of spoliation of your orator's trees, timber, and lands, and that later, and from the time of the conveyance of all its corporate property to the Anaconda Copper Mining Company, he carried on the work under that name until the date of his death. That he continued to use the same means, the same mill at Hamilton, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and, so knowing, continued the same. And your orator expressly charges that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Marcus Daly and his assistants to their own use and benefit; but just how much was carried over in the said corporations, and how much was divided previous to the last deed named herein, and how much of the property of your orator was converted by said last-named company between the date of its organization and the death of said Marcus Daly hereinafter described, and how much thereof was appropriated by said company, and how much by Daly and his associates, it is impossible for your orator, with the means at hand, to state.

"17. Your orator further shows that by reason of such spoliation, continued and
[461] carried on during the period of about *ten years, it has lost property of great value, to wit, of the value of $2,000,000 and upwards; and that Marcus Daly and the other defendants named herein occasioned this loss by wilfully trespassing upon said lands of your orator, and without its consent, or the consent of any of its authorized officers, and in violation of its laws, both civil and criminal, appropriated and converted to their own use the trees and timber growing thereon. That said defendants, or some of them, have had at all times and now have possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales, and divided the same among them; but by reason of the frauds practised by said defendants, as aforesaid, and their acts performed for the express purpose of concealing from your orator the facts of the case by means of the formation and the dissolving and the reforming of corporations, and by reason of said defendants having possession of all books of account, it is impossible for your orator to set forth to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when and to whom the logs, when manufactured into lumber, were sold, or just when and by whom the proceeds thereof were obtained, and when the same were divided.

"18. Your orator further shows that at the time that these trespasses were committed the territory on which the same took place was but sparsely settled, and was thousands of miles away from the seat of government, and it was impossible, with the means that your orator had at hand, to properly patrol and protect its domain from the wilful trespasses of the defendants, and that the government of the United States used such care in the protection thereof as it had the means to do. That the agents employed by your orator were misled by the defendants' assertion of ownership, as aforesaid; that the frauds and trespasses of the defendants, which have resulted in the denuding of these lands of your orator, and in depriving your orator of property of the value of several millions of dollars,
[462] *were not discovered in their entirety until a comparatively short time ago.

"19. Your orator further shows that it has commenced several actions at law in this honorable court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court; but that, by reason of the frauds and conspiracies above set forth and the complications which have resulted therefrom, no plain, adequate, and

complete remedy can be given your orator by said actions at law, and your orator is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

"20. Your orator further shows that Marcus Daly died in the city of New York on the 12th day of November, A. D. 1900; that at the time of his death he was a resident of the county of Deerlodge, state and district of Montana, and left an estate worth about $12,000,000, consisting of real and personal property located in said county and state and elsewhere, and your orator expressly charges that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator, as hereinbefore charged, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit; that in his lifetime he made and published his last will and testament, whereby he appointed the defendant Margaret P. Daly executrix thereof; that on the 14th day of February, A. D. 1901, at the city of Anaconda, said last will and testament was duly proved and duly admitted to probate in the district court of the county of Deerlodge, district of Montana; that thereupon, on the 15th day of February, A. D. 1901, letters of administration were duly issued thereon to the said defendant Margaret P. Daly by the said court; that the said defendant Margaret P. Daly duly qualified and entered upon the discharge of her duties as executrix, and that the said letters testamentary have not been revoked, and are now in full force and effect.

[463] *"21. Your orator further shows that the said Margaret P. Daly, under and by virtue of the terms of said will, and as the wife of said Marcus Daly, is now the owner of a large portion of his estate.

"In consideration whereof, and forasmuch as your orator is, for the reasons stated, remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, to the end that your orator may have that relief which it can only obtain in a court of equity; and that each one of the defendants above named may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator prays the court as follows:

"First. That the defendant Margaret P. Daly, both in her own person and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for the use and benefit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

"Second. That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains, and advantages which the said defendants or either of them have received or made, or which have arisen or accrued to them, or either of them, by reason of the wilful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

"Third. That each of the defendants may make a full and true discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under the direction and decree of this honorable court *of [464] all the dealings and transactions between your orator and the defendants. That on such accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator, and cut and remove the trees and timber then growing thereon.

"Fourth. That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the sawmill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits, and advantages which the said defendants, or either of them, or the estate of said Marcus Daly, have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

"Fifth. That the said defendants and each of them discover and set forth full, true, and particular accounts of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their, use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from whom each and every of such sums were, respectively, received, and

how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

"Sixth. That the defendants, and each of them, may set forth a list or schedule and description of all books of account of every kind and character, and of all deeds, documents, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or where-
[465] upon *there is any note, memorandum, or writing relating in any manner thereto, which are now or ever were in their or either of their possession or power, and more particularly described, which now are in their or either of their possession or power, and may deposit the same with the clerk of this court or with the standing master in chancery thereof for the purposes of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your orator may ascertain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator, as aforesaid, that this court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require, and as may be agreeable to equity and good conscience.

"May it please the court to grant to your orator a writ of subpœna to be directed to the said Margaret P. Daly, Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased, Bitter Root Development Company, Anaconda Mining Company, Anaconda Copper Company, Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon, Daniel J. Hennessy, thereby commanding them, and each of them, at a certain time, and under a certain penalty to be fixed, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer to make to all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall be meet and agreeable to equity, and your orator will ever pray."

Messrs. **Marsden C. Burch** and **Fred A. Maynard** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for appellant:

The remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, practicable, and efficient to the ends of justice and its prompt administration as the remedy in equity.

Boyce v. *Grunty*, 3 Pet. 215, 7 L. ed. 657; *Kilbourn* v. *Sunderland*, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 12, 43 L. ed. 346, 19 Sup. Ct. Rep. 77.

The application of this principle must depend on the character of the case as disclosed by the pleadings and the circumstances of each case. If the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. When equity can give relief, complainant ought not to be compelled to speculate upon the chances of his obtaining relief at law.

Watson v. *Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Payne* v. *Hook*, 7 Wall. 425, 19 L. ed. 260; *Davis* v. *Wakelee*, 156 U. S. 680, 688, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 555; *Bank of Kentucky* v. *Stone*, 88 Fed. 391.

The mere fact of the existence of a legal remedy which may be made available is not a sufficient objection to the more convenient remedy in equity, and in many cases the latter court assumes jurisdiction on the grounds of the greater convenience and adaptability of its peculiar machinery.

1 Cyc. Law & Proc. p. 421; *Russell* v. *Clark*, 7 Cranch, 69, 3 L. ed. 271; *Wylie* v. *Coxe*, 15 How. 415, 420, 14 L. ed. 753, 755; *Jones* v. *Bolles*, 9 Wall. 364, 369, 19 L. ed. 734, 736.

Grounds for equitable relief may arise, other than by way of injunction, where equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in the legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground for exception from the general rule.

Root v. *Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975.

The court erred in sustaining the de-

murrer and dismissing the bill, for the reason that the defendants, having fraudulently converted the complainant's property, are, in equity, constructive trustees, and the complainant may follow the avails of such fraud through its various transmutations.

McMullen Lumber Co. v. *Strother*, 136 Fed. 295; Perry, Tr. 5th ed. chap. 6, § 166; *American Sugar Ref. Co.* v. *Fancher*, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; *Newton* v. *Porter*, 5 Lans. 416, 69 N. Y. 133, 25 Am. Rep. 152; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 25, 38 L. ed. 66, 14 Sup. Ct. Rep. 240; *Clews* v. *Jamieson*, 182 U. S. 461, 479, 45 L. ed. 1183, 1192, 21 Sup. Ct. Rep. 845; *Missouri Broom Mfg. Co.* v. *Guymon*, 53 C. C. A. 16, 115 Fed. 112.

Permits were made expressly subject to the condition that the company should submit monthly to the register and receiver at Missoula, Montana, a statement under oath, showing amount of each kind or kinds of timber cut or removed during each month, a description of the particular tract or tracts from which said timber was cut or removed, and how much timber was disposed of, and to whom. This brings it within the rule governing fiduciary relations, as it embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies on another.

3 Words & Phrases Judicially Defined, p. 2761, and cases there cited.

By reason of the duty of the Bitter Root Development Company to keep true and accurate accounts and monthly submit statements to the officers of the government, and by reason of its failure so to do, the proceeds of the lumber retained by it become in its hands trust funds belonging to complainant. There was a breach of this trust; its extent is peculiarly within defendants' knowledge. In such cases choice of remedy is with the party aggrieved, and he may proceed in equity for an accounting, and pursue the fund.

Northern P. R. Co. v. *Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831; *United States* v. *Denver & R. G. R. Co.* 191 U. S. 84, 48 L. ed. 106, 24 Sup. Ct. Rep. 33.

We are authorized to invoke the aid of equity by reason of the fraud, misrepresentations, and concealments practised by the defendants.

2 Pom. Eq. Jur. 3d ed. § 873; *Jones* v. *Bolles*, 9 Wall. 369, 19 L. ed. 734.

While every material fact to which plaintiff means to offer evidence ought to be distinctly stated, a general statement of the matter is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence, which need not be charged in order to put them in as proofs.

Story, Eq. Pl. § 28; 1 Dan. Ch. Pl. & Pr. p. 380.

The court erred in sustaining the demurrer and dismissing the bill, because an accounting is necessary.

Weymouth v. *Boyer*, 1 Ves. Jr. 416; *Carlisle* v. *Wilson*, 13 Ves. Jr. 278; *Fowle* v. *Lawrason*, 5 Pet. 495, 503, 8 L. ed. 204, 207; *Kilbourn* v. *Sunderland*, 130 U. S. 505–515, 32 L. ed. 1005–1009, 9 Sup. Ct. Rep. 594; 1 Story, Eq. Jur. §§ 450–495, 598; *Kirby* v. *Lake Shore & M. S. R. Co.* 120 U. S. 130, 134, 30 L. ed. 569, 571, 7 Sup. Ct. Rep. 430; 4 Pom. Eq. Jur. 3d ed. § 1421; Tiedeman, Eq. Jur. § 533; *Fenno* v. *Primrose*, 116 Fed. 49; *McMullen Lumber Co.* v. *Strother*, *supra*.

The court erred in sustaining the demurrer and dismissing the bill, for the reason that it shows that the complainant can invoke the aid of equity to avoid a multiplicity of suits.

Bailey v. *Tillinghast*, 40 C. C. A. 93, 99 Fed. 801; *DeForest* v. *Thompson*, 40 Fed. 375.

The necessity for discovery, as shown by the statements of the bill, is sufficient to give equity jurisdiction.

Tyler v. *Savage*, 143 U. S. 95, 36 L. ed. 88, 12 Sup. Ct. Rep. 340; *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200; *Brown* v. *McDonald*, 68 L.R.A. 462, 67 C. C. A. 59, 133 Fed. 897; *McMullen Lumber Co.* v. *Strother*, 136 Fed. 301; Bates, Fed. Eq. Proc. pp. 128–130; *Indianapolis Gas Co.* v. *Indianapolis*, 90 Fed. 197; *Ryder* v. *Bateman*, 93 Fed. 31; Adams, Eq., Am. ed. p. 444; *Continental Nat. Bank* v. *Heilman*, 66 Fed. 184; Pom. Eq. Jur. §§ 199, 203; *Evans* v. *Lancaster City St. R. Co.* 64 Fed. 626; *McClaskey* v. *Barr*, 40 Fed. 559; *Peck* v. *Ashley*, 12 Met. 482; *Trinity House* v. *Burge*, 2 Sim. 411; *Williams* v. *Farrington*, 3 Bro. Ch. 38; *Anonymous*, 1 Vern. 60; *Warren* v. *Holbrook*, 95 Mich. 185, 35 Am. St. Rep. 554, 54 N. W. 712.

The court erred in sustaining the demurrer and dismissing the bill, for the reason that it shows that the complainant can invoke the aid of equity in adjusting its claim against the estate of Marcus Daly.

Hambly v. *Trott*, 1 Cowp. 371; *Winchester* v. *Knight*, 1 P. Wms. 406; *Garth* v. *Cotton*, 1 Dick. 183; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Phillips* v. *Homfray*, L. R. 24 Ch. Div. 439, 52 L. J. Ch. N. S. 833; *Lee* v. *Alston*, 1 Bro. Ch. 194; *Monypenny* v. *Bristow*, 2 Russ. & M. 117; *Green* v. *Creighton* (*Kendall* v. *Creighton*) 23 How. 90, 16 L. ed. 419; *Kennedy* v. *Creswell*,

101 U. S. 641, 645, 25 L. ed. 1075, 1076; 1 Pom. Eq. Jur. § 156; *Beverly* v. *Rhodes*, 86 Va. 416, 10 S. E. 572; *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Martin* v. *Fort*, 27 C. C. A. 428, 54 U. S. App. 316, 83 Fed. 19; *Wickham* v. *Hull*, 60 Fed. 329; *Hale* v. *Tyler*, 115 Fed. 833; *Walker* v. *Brown*, 165 U. S. 655, 41 L. ed. 866, 17 Sup. Ct. Rep. 453.

Mr. **L. O. Evans** argued the cause, and, with *Messrs. A. J. Campbell, A. J. Shores, C. F. Kelley,* and *John F. Forbis,* filed a brief for appellees:

The complainant has a full, complete, and adequate remedy at law in an action for damages.

E. E. Bolles Wooden-Ware Co. v. *United States*, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398; 1 Pom. Eq. Jur. 2d ed. § 178; Foster, Fed. Pr. § 12; Bates, Fed. Eq. Proc. § 188; *Buzard* v. *Houston*, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; *Phœnix Mut. L. Ins. Co.* v. *Bailey*, 13 Wall. 616, 20 L. ed. 501; *Dowell* v. *Mitchell*, 105 U. S. 430, 26 L. ed. 1142; *Parkersburg* v. *Brown*, 106 U. S. 500, 27 L. ed. 243, 1 Sup. Ct. Rep. 442; *Ambler* v. *Choteau*, 107 U. S. 586, 27 L. ed. 322, 1 Sup. Ct. Rep. 556; *Litchfield* v. *Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975; *Thompson* v. *Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Texas P. R. Co.* v. *Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Hipp* v. *Babin*, 19 How. 278, 15 L. ed. 635; *Dumont* v. *Fry*, 12 Fed. 21; *White* v. *Boyce*, 22 Blatchf. 414, 21 Fed. 228; *Alger* v. *Anderson*, 92 Fed. 696.

Complainant, presenting only an unliquidated claim for damages, has no standing in a court of equity.

Swan Land & Cattle Co. v. *Frank*, 148 U. S. 603, 37 L. ed. 577, 13 Sup. Ct. Rep. 691; ***Cates* v. *Allen*, 149 U. S. 451, 37 L. ed. 804,** 13 Sup. Ct. Rep. 883, 977; *Scott* v. *Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712.

The bill cannot be sustained on the ground that it is brought to establish a trust.

1 Perry, Tr. 5th ed. § 128, p. 170; *Hawthorne* v. *Brown*, 3 Sneed, 462; 3 Pom. Eq. Jur. 2d ed. §§ 1048, 1051, 1058, 1080; *Ferris* v. *VanVechten*, 73 N. Y. 113.

A bill for discovery alone cannot be maintained, and where, as counsel for appellant states in his brief in this case, the case is for relief and discovery, when the facts stated are insufficient to entitle the complainant to relief, the discovery must fail also.

Preston v. *Smith*, 26 Fed. 885; *Venner* v. *Atchison, T. & S. F. R. Co.* 28 Fed. 581; *Everson* v. *Equitable Life Assur. Co.* 68 Fed. 258, Affirmed in 18 C. C. A. 251, 39 U. S. App. 34, 71 Fed. 570; *Cecil Nat. Bank* v. *Thurber*, 8 C. C. A. 365, 8 U. S. App. 496, 59 Fed. 913; *McClanahan* v. *Davis*, 8 How. 170, 12 L. ed. 1033.

The bill of complaint shows that the complainant has elected to proceed at law to recover the damages to which it is entitled.

1 Pom. Eq. Jur. 2d ed. § 179.

No equity jurisdiction arises by reason of the fact that Margaret P. Daly, appellee, is sued as executrix of the estate of Marcus Daly, deceased.

Walker v. *Brown*, 58 Fed. 23, Affirmed in 11 C. C. A. 135, 27 U. S. App. 291, 63 Fed. 204; *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

No jurisdiction is shown by the bill of complaint upon the ground that complainant is entitled to invoke the aid of equity for an accounting.

Whitwell v. *Willard*, 1 Met. 216; *Stringham* v. *Winnebago County*, 24 Wis. 594; *Conklin* v. *Bush*, 8 Pa. 514; *Brinsmaid* v. *Mayo*, 9 Vt. 31; *Sandeen* v. *Kansas City, St. J. & C. B. R. Co.* 79 Mo. 278; *Albertson* v. *Grier*, 4 Houst. (Del.) 541; *Atchison, T. & S. F. R. Co.* v. *Wilkinson*, 55 Kan. 83, 39 Pac. 1043; *Western & A. R. Co.* v. *Mead*, 4 Sneed, 107; Pom. Eq. Jur. 2d ed. § 1421; *Washburn & M. Mfg. Co.* v. *Freeman Wire Co.* 41 Fed. 410; *Baker* v. *Biddle*, Baldw. 394, Fed. Cas. No. 764; *Ely* v. *Crane*, 37 N. J. Eq. 157; *Paton* v. *Clark*, 156 Pa. 49, 29 Atl. 116; *Lafond* v. *Lassere*, 26 Misc. 77, 56 N. Y. Supp. 459; *Smith* v. *Bodine*, 74 N. Y. 30; *Badger* v. *McNamara*, 123 Mass. 117; *McCulla* v. *Beadleston*, 17 R. I. 20, 20 Atl. 11; *Hipp* v. *Babin*, *supra*.

The allegations in the bill of complaint as to the granting of licenses or permits by the appellant to cut upon certain small portions of the tracts of land described, and the cutting of timber upon other lands under cover of such permits, in nowise tend to show jurisdiction in equity of this case.

United States v. *Denver & R. G. R. Co.* 191 U. S. 85, 48 L. ed. 107, 24 Sup. Ct. Rep. 33; *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210; *Northern P. R. Co.* v. *Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831.

A bill for discovery alone cannot be maintained.

Safford v. *Ensign Mfg. Co.* 56 C. C. A. 630, 120 Fed. 480; *Brown* v. *Swann*, 10 Pet. 497, 9 L. ed. 508; *Rindskopf* v. *Platto*, 29 Fed. 130; *Preston* v. *Smith*, 26 Fed. 885; *United States* v. *McLaughlin*, 24 Fed. 823; *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200; *Paton* v. *Majors*, 46 Fed. 210; *Field* v. *Hastings & B. Co.* 65 Fed. 279; *Home*

Ins. Co. v. *Stanchfield*, 1 Dill. 424, Fed. Cas. No. 6,660.

Under the equity rules adopted by this court, particularly numbers 40, 41, 42, and 43, it is plainly required that, where a complainant desires to obtain a discovery of facts from the defendant, special interrogatories must be framed and directed to the defendants in the manner provided by those rules, and the rules plainly indicate that such interrogatories are not to be propounded to be answered otherwise than upon oath. Complainant, having failed to comply with those rules by propounding proper interrogatories, and having elected not to require any answer from any of the defendants which would be evidence in the case, has plainly shown its intention not to present this bill as a bill of discovery in this case, and has waived any right it might have had to a discovery.

Huntington v. *Saunders*, 120 U. S. 78, 30 L. ed. 580, 7 Sup. Ct. Rep. 356; *Patterson* v. *Gaines*, 6 How. 550, 12 L. ed. 553; *Union Bank* v. *Geary*, 5 Pet. 99, 8 L. ed. 60; *United States* v. *McLaughlin*, *supra*; *Field* v. *Hastings & B. Co. supra*; *Excelsior Wooden Pipe Co.* v. *Seattle*, 55 C. C. A. 156, 117 Fed. 140; *Tillinghast* v. *Chace*, 121 Fed. 435.

Under the general equity practice, and in the absence of any such specific and binding requirement as we find in the equity rules of this court, above referred to, the same rule is laid down,—that the waiving of an oath to the answer waives the discovery.

Harrington v. *Harrington*, 15 R. I. 341, 5 Atl. 502; *McCulla* v. *Beadleston*, *supra*; *Starkweather* v. *Williams*, 21 R. I. 55, 41 Atl. 1003; *Ward* v. *Peck*, 114 Mass. 121; *Badger* v. *McNamara*, *supra*; *Sheppard* v. *Akers*, 1 Tenn. Ch. 326; *Goodwin* v. *Bishop*, 145 Ill. 421, 34 N. E. 47.

And in addition, under equity rules 40 and 41, the mere failure to prepare and present special interrogatories directed to the defendants is fatal to any right to claim discovery in this action.

United States v. *McLaughlin*, *supra*; *Bailey Washing Mach. Co.* v. *Young*, 12 Blatchf. 199, Fed. Cas. No. 751.

There is a further ground for denying the complainant's right to maintain this bill for discovery, and that is, that the defendants cannot be compelled to answer upon any matters or to disclose any evidence which might subject them to, or might tend to subject them to, or in any way lay the basis for, criminal prosecutions or other proceeding which might result in the imposing of a penalty.

Bates, Fed. Eq. Proc. §§ 119, 199; 1 Foster, Fed. Pr. 3d ed. p. 290; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Lees* v. *United States*, 150 U. S. 476, 478, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; *Leggett* v. *Postley*, 2 Paige, 599; *Livingston* v. *Harris*, 3 Paige, 528; *United States* v. *Saline Bank*, 1 Pet. 100, 7 L. ed. 69; *Warren* v. *Holbrook*, 95 Mich. 185, 35 Am. St. Rep. 554, 54 N. W. 712.

Complainant is not entitled to a discovery for the further reason that the bill is insufficient to show that the discovery is sought in aid of any action at law, conceding, for the purpose of this argument, that a discovery could be maintained in aid of such action.

1 Bates, Fed. Eq. Proc. § 199, p. 266; Story, Eq. Pl. § 259.

Complainant cannot invoke the aid of equity by reason of any fraud, misrepresentation, or concealment alleged in its bill of complaint.

Buzard v. *Houston*, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249.

The bill is so general, uncertain, and indefinite that it presents no grounds for relief or discovery in equity.

Story, Eq. Pl. §§ 253, 257; *Tillinghast* v. *Chace*, *supra*.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy, and violation of trust, of which the pleader avers the defendants have been guilty *in various ways, yet, upon a care- [472
ful examination of the pleading itself, and the actual facts therein stated, we concur in the view of the courts below, that the action is really nothing but an action of trespass or troyer to recover damages sustained by the complainant by reason of the wrongful cutting, carrying away, and conversion of the property of the complainant, consisting of the timber on the land mentioned in the bill; and for the wrong thus done we think it clear that the complainant has a plain, adequate, and complete remedy at law, and consequently the court has no jurisdiction of this bill in equity.

It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature, equity has no jurisdiction, provided the complainant has full and adequate remedy at law for the wrongs complained of. *Buzard* v. *Houston*, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; *Scott* v. *Neely*, 140 U. S. 106, 110, 35 L. ed. 358, 360, 11 Sup. Ct. Rep. 712. A mere charge of fraud does not give equity jurisdiction. *Buzard* v. *Houston*, *supra*; *Ambler* v. *Choteau*, 107

U. S. 586, 27 L. ed. 322, 1 Sup. Ct. Rep. 556; *Safford* v. *Ensign Mfg. Co.* 56 C. C. A. 630, 120 Fed. 480, and cases cited in opinion. *Tyler* v. *Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340, bears no resemblance to the case at bar. As the court there said, there were in the case discovery, account, fraud, misrepresentation, and concealment. There was no demurrer for multifariousness, and no objection in the court below for want of equity, and the case was not one of a plain defect in equity jurisdiction. The suit was clearly one for equitable relief.

The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort feasors, and the various devices alleged to have been resorted to by the deceased, Daly, by way of organizing different corporations, in order to, as alleged, cover up his tracks, and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. It is simply a
[473] question of evidence to show *who did the wrong and upon that point the fact could be ascertained as readily at law as in equity.

The complainant is entitled in an action at law to an inspection of the books and records of these various corporations, and it has the same power to obtain the facts therefrom in that action as it would have in this suit in equity.

The complainant contends that where property has been stolen or obtained by fraud, equity recognizes the law to be that the property always belongs to the true owner, and therefore its proceeds must also belong to him, and may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith. The cases of *Newton* v. *Porter*, 69 N. Y. 133, 25 Am. Rep. 152, and *American Sugar Ref. Co.* v. *Fancher*, 145 N. Y. 552, 27 L. R. A. 757, 40 N. E. 206, are cited to sustain the contention. These cases it will be seen, upon examination, show that the plaintiff had no remedy at law, and he was able to fully identify the particular property into which the original property belonging to him had been converted, and which was in the hands of a voluntary assignee. It was a question of following the proceeds, and accurately and certainly identifying them, which the court held was necessary in order to permit of such following. The defendants were also insolvent. The case of *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, did not involve any question like the one herein. In that case the land had been granted to the Portage company by the state for the purposes named, and it was conceded by the demurrer that the officials of the Portage company had been bribed by the Omaha company to betray their trust, and the legislature had been induced by false allegations to revoke the grant to the Portage company and to bestow it upon the Omaha company. The plaintiff had obtained a judgment against the Portage company in an action at law, and the execution had been returned *nulla bona*, and the bill in equity was filed in the circuit court of the United States by the administratrix of the judgment creditor against the Omaha company to reach the land formerly owned by the Portage company, and then in the hands of the Omaha *company by reason of its own wrong-[474] doing. Thus there was the illegal and wrongful act of the Omaha company, by which the land once vesting in the Portage company had been taken away and that same land regranted to the Omaha company, and it was to reach that particular land which the Omaha company had obtained by its wrongful act that the bill was filed. Mr. Justice Brewer, delivering the opinion of this court, said:

"And when the Omaha company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha company, would have been paid by the Portage company, partially, at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.

These lands were identified, and were found in the hands of the actual wrongdoer, who had acquired them by reason of such wrong.

Now, there is no pretense in this case that any specific piece of property was in fact either the same timber or the proceeds of the timber wrongfully cut and disposed of by the defendants, or any of them. Nor was it averred that any particular timber had been taken from the land described in the bill. On the contrary, it is alleged in the bill that the complainant was unable to show just when or by whom the cutting

had been performed, or the logs manufactured into lumber had been sold, or just when and by whom the proceeds thereof were obtained, and when the same were divided. There is a general allegation in the bill of complaint that the deceased, Daly, left an estate worth $12,000,000, located in the state of Montana and elsewhere, and that a large [475] portion of that estate was the *result of the proceeds of Daly's illegal acts in his lifetime, in trespassing upon the lands of the complainant, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit. It is also averred that he made his will, appointing Margaret P. Daly, defendant, executrix; and the will was duly admitted to probate, and letters of administration were duly issued to the defendant Margaret P. Daly, on the 15th day of February A. D. 1901, and she duly qualified and entered upon the discharge of her duties as such executrix; that Margaret P. Daly, under and by virtue of the terms of the will, and as the wife of Marcus Daly, is the owner of a large portion of his estate. It is plain that such allegations fall far short of even a pretense of identifying specific, definite property as the proceeds of certain other property wrongfully or fraudulently taken by defendants from the lands described in the bill. Such allegations are totally inadequate for that purpose.

Under the law providing for the examination of defendants, and under § 724 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 583), providing for the production of books and writings in actions at law, under the same circumstances that defendants might be compelled to produce them under the ordinary rules of proceeding in chancery, there is nothing in these allegations which shows any necessity for a discovery in equity, such as would render the remedy more adequate therein than in an action at law.

Nor was there anything in the cases cited by complainant as showing a right to proceed in equity because one of the defendants is the executrix of a deceased person, who, it is alleged, was one of the parties guilty of the wrongdoing set forth in the bill. Upon the question of liability she is entitled to a trial at law and by jury, as well as the other defendants. In *Green* v. *Creighton* (*Kendall* v. *Creighton*) 23 How. 90, 16 L. ed. 419, it was said that a single creditor has been allowed to sue an administratrix for his demand in equity, and obtain decree for payment out of the personal estate, without taking a general account of the testator's debts. In that case the facts were [476] complicated; *the original debtor and his surety were dead, and had died insolvent, and a portion of the assets of the estate of the latter could be traced to the possession of his administratrix, and the authority of a court of equity was required to call for a discovery of the nature and amount of the assets in hand. It was said that the debtor, Tunstall, had died insolvent, and Whiting, his surety, had also died insolvent. A portion of the assets belonging to the estate of the latter was in the hands of the surety of this administrator. A discovery of the nature and amount of the assets in hand was necessary if they were subject to the application, and it was held that the circuit court was authorized to entertain the suit, and the decree dismissing the bill was reversed. Certainly there is nothing in that case which in the least degree aids the proposition that because there is an administratrix named as a party, equity has jurisdiction, even though no discovery of assets is sought, and the bill shows that the estate represented by the administratrix is largely solvent, and the demand is for unliquidated damages against others besides the administratrix, and no debt is admitted, the alleged cause of action having arisen against the deceased, among others, for a tort.

In *Kennedy* v. *Creswell*, 101 U. S. 641, 25 L. ed. 1075, it was held that the creditor of a deceased person had a right to go into a court of equity for a discovery of assets and the payment of his debt, and that when there he would not be turned back to a court of law to establish the validity of his claim. The basis of getting into a court of equity being a discovery of assets, the object of the bill was obtained, as the court held, by the admission of the executor that he had sufficient assets, and that if so, the jurisdiction of the court remained to give a decree for the payment of the debt. Here is no such case. Daly is alleged to have been the principal wrongdoer, out of several defendants, in cutting and converting the timber on these lands owned by the government. He died, leaving an estate of over $12,000,000, as averred in the bill of complaint, and the claim of the complainant is only for $2,000,000. Thus, by complainant's *own averment, the estate is largely solvent. [477] There is no endeavor to discover assets and no ground for jurisdiction in equity simply because one of the defendants is an executrix. The proposition of the complainant would confer jurisdiction in equity in every case of a legal cause of action for unliquidated damages for a tort where one of the wrongdoers had died and an administratrix had been appointed, and the existence of assets was alleged by complainant, largely in excess of the complainant's demand, and the other defendants remained parties. This has never been so held in any case to which our attention has been called.

and we are unable to find any principle of equity jurisdiction upon which to permit the maintenance of this suit on the special ground here asserted.

But it is averred there was a fiduciary relationship existing on account of the permits or licenses to cut timber, which, it is alleged, were given the defendant Bitter Root Development Company, and that in such permits there was set forth an obligation on the part of that company and others acting for it, to make, under oath, monthly returns of the amounts and kinds of timber cut, with a description of the particular tract or tracts from which it was cut, how much was disposed of, and to whom, and that a failure to do so was a failure in a fiduciary capacity on the part of the defendant company, and therefore there is jurisdiction in equity. The government contends that by reason of the duty of the Bitter Root Development Company to keep true and accurate accounts and to monthly submit statements to the officers of the government, and by reason of its failure so to do, the proceeds of the lumber retained by it became in its hands a trust fund belonging to the complainant; that there was a breach of this trust; its extent is in the defendants' knowledge; and in such cases choice of remedy is with the party aggrieved, and he may proceed in equity for an accounting and pursue the fund. It is doubtful, to say the least, whether an obligation to report as to timber cut on the permitted lands constitutes any fiduciary relationship between the
[478] licensees and the government, *with regard to an alleged wrongful cutting of timber on other and separate lands. It is not, in truth, alleged that the returns called for by the permit were not made. *Safford* v. *Ensign Mfg. Co.* 56 C. C. A. 630, 120 Fed. 480. However that may be, there is no such obligation (to render monthly accounts) set forth in the bill as being part of the permit or license referred to therein. The bill simply avers that Daly did, at certain times, during the several years of said depredations, apply to and obtain from the lawful agents of the government licenses to cut upon certain small portions of the tracts above described, and under cover of such permits the conspirators not only cut, carried away, and manufactured timber growing on the said lands included in such licenses, but, well knowing that such permits gave them no right or authority to enter upon other lands, they wilfully and fraudulently entered upon large tracts of land adjacent thereto and cut the timber therefrom. There is no mention of an obligation to render monthly accounts. The fact that the defendants had permission to cut timber on certain tracts of land described did not make their cutting of timber on other tracts the act of trustees *ex maleficio*. When they went outside of the tracts for which license was given, they committed a trespass for which they were liable at law. And, again, as the contents of the permits are not set forth, we cannot take judicial notice of such contents in any particular case. Different conditions may be contained in different permits, and they are the subject of the discretion of the department giving the permits.

It also argued that a court of equity has jurisdiction in such a case as this on the ground of an accounting. We do not think that this is any such case as gives a court of equity jurisdiction because of an accounting being necessary. There are no accounts between the parties. The cause of action is one arising in tort, and cannot be converted into one for an account. The case made is a plain trespass, for which the defendants are liable in damages. Or it might be termed an *action in trover, as stated. [479] Whatever books, if any, defendants may have kept, showing the amount and location of the timber cut and its value, can be perfectly well obtained by an inspection of these books in an action at law. No discovery is alleged to be necessary in aid of any action at law, although the bill shows that several such actions have in fact been commenced. The facts averred do not show jurisdiction for the general purpose of discovery.

Nor do we see that there is any jurisdiction on the ground of prevention of a multiplicity of suits. Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other. It is not a case where a few defendants may be made parties as representatives of a class holding under or claiming the same title or right, and so that a judgment against the representative defendants may bind all others of the class. There is no class and there can be no representatives.

We fail to see any fact alleged in this bill which constitutes a proper foundation for the jurisdiction of a court of equity. The government counsel, however, assert that since the filing of this bill new and material facts have been discovered by the government, which, in the judgment of counsel, would furnish foundation for a bill in equity, even though this bill is defective. In order to permit of the filing of such a bill, if counsel should be so advised, and so as not to run against a plea of *res judicata*, the

judgment of dismissal is affirmed, without prejudice, etc.

Mr. Justice **White** and Mr. Justice **McKenna** took no part in the decision of this case.

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[480]*MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, *Plff. in Err.*,

v.

METROPOLITAN RAILROAD COMPANY and Washington Railway & Electric Company.

(See S. C. Reporter's ed. 480–488.)

1. Master and servant—electric railways—negligence towards employee—contributory negligence.—A street railway pitman, by unnecessarily touching the uninsulated parts in adjusting the leads connecting the motive power of a street car with the overhead current, relieves the company from liability for his death from the resulting shock, although the conductor of the car may have been negligent in permitting the trolley pole to come in contact with the trolley wire.

2. Master and servant—electric railways—negligence towards employee—inference from lack of contributory negligence.—The existence of defects in the insulation which would render a street railway company liable for the death of an employee occasioned by a shock received in adjusting the leads connecting the motive power of a car with the overhead current cannot be inferred from the presumption of the exercise of due care on the part of the person killed, although, in the absence of a leak in the insulation, no shock could have been received unless he had unnecessarily touched the uninsulated ends of the leads.

[No. 173.]

NOTE.—*What acts of an employee amount to contributory negligence precluding a recovery from his employer for injuries caused by electric shock?*

LOONEY V. METROPOLITAN R. Co. in effect holds an employee to the same standard of care and caution in handling an electric wire which he has the right to assume is "dead" that he is bound to exercise in handling what is known to be a "live" wire. In cases presenting somewhat similar facts, other courts have held that the question of contributory negligence is for the jury.

Thus, the question of the contributory negligence of an inexperienced workman who received an electric shock while using his bare hands to connect the wires with the circuit after removing a street lamp is held to be for the jury to decide where there is evidence that the accident would not have happened had the current not been turned on earlier than usual. Colorado Electric Co. v. Lubbers, 11 Colo. 505, 7 Am. Rep. 255, 19 Pac. 479.

The question of the contributory negligence of an employee of an electric light company who was killed while splicing wires by a current sent through the wires in testing a dynamo after installing an armature which had been removed for repairs is for the jury, where the employee did not know that the armature had then been repaired and installed. Williams v. North Wisconsin Lumber Co. 124 Wis. 328, 102 N. W. 589.

The jury could properly find that the failure of a lamp trimmer to use rubber gloves in trimming an arc lamp in the daytime on a supposed dead wire was not negligence which contributed to his death from a shock due to a crossed wire, where it is only customary to wear such gloves when trimming a lamp at night, on live wires, and it would have been impossible for him to do the amount of work required if he had used such gloves. Harroun v. Brush Electric Light Co. 12 App. Div. 126, 42 N. Y. Supp. 716, Appeal dismissed in 152 N. Y. 212, 38 L.R.A. 615, 46 N. E. 291.

The finding of a jury that an experienced electric lineman, injured by coming in contact with two high-voltage wires improperly placed within a few inches of each other, on the same side of the pole, was not guilty of contributory negligence, was sustained by evidence that he had no knowledge that they were live wires, although he knew that the current would be turned on as soon as repairs then in progress should be completed, and testified that he might have escaped injury had he known the current was on, and that it was good practice to handle all wires as though they were live wires, unless they were positively known not to be charged, and that such was the general custom among linemen. General Electric Co. v. Murray, 32 Tex. Civ. App. 226, 74 S. W. 50.

Where the evidence tended to show that a lineman of an electric lighting company was injured by inadvertently passing between a pair of exposed splices situated within 2 feet of a post, on wires carrying a strong current of electricity, it was held that whether or not due care on the lineman's part required him to see and avoid contact with the exposed splices was properly left to the jury. New Omaha v. Thomson-Houston Electric Light Co. v. Rombold (Neb.) 93 N. W. 966, Reversed on other grounds in (Neb.) 97 N. W. 1030.

A lineman experienced in handling telephone and telegraph wires, but without previous experience with electric light wires, is not, as a matter of law, when employed by an electric lighting company, charged with the knowledge that the insulation on the live wires which he was attaching to glass insulators was, because of its age and wear, likely to crack open and expose the wire, where, before the wires were handed to him, the insulation was examined by other workmen, and taped wherever the wire was exposed. New Omaha Thomson-Houston Electric Light Co. v. Dent (Neb.) 94 N. W. 819, 103 N. W. 1091.

A break occurring in the insulation of an electric light wire which was being handled and fastened around a glass insulator by a lineman is not an open and obvious defect, notice of which will be imputed to him, where, under the evidence, there exists reasonable grounds for difference of opinion as to his being able to observe such break in the ordinary prosecution of the work in which he was engaged, and without making an extra effort specially for the purpose of ascertaining the condition of

Argued December 14, 15, 1905. Decided February 19, 1906.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, entered on a directed verdict in favor of the defendants in an action to recover damages for the alleged negligent killing of the plaintiff's intestate. *Affirmed.*

See same case below, 24 App. D. C. 510.

The facts are stated in the opinion.

Messrs. **Maurice D. Rosenberg** and **Alexander Wolf** argued the cause, and, with *Mr. Simon Lyon*, filed a brief for plaintiff in error.

Mr. **J. J. Darlington** argued the cause and filed a brief for defendants in error.

Mr. Justice **McKenna** delivered the opinion of the court:

Action brought by plaintiff as administratrix of the estate of James F. Looney, deceased, against the defendants, for damages for the death of her intestate, alleged to have been caused by defendants. Judgment went against plaintiff in the supreme court of the District of Columbia, which was affirmed by the court of appeals.

After the plaintiff had rested her case the court directed the jury to return a verdict for the defendants. The correctness of this ruling is the question in the case.

The declaration consists of four counts. The first three allege the employment of the deceased by each of defendant *companies [481] respectively. In the fourth the allegation is that he was rightfully and lawfully in the discharge of his duties.

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the insulation, the break occurring after the wire was fastened. *Ibid.*

Where the plaintiff was employed by a telegraph company in setting up its poles, affixing the crossarms, and stringing the wires, and, in the course of this occupation, he received a severe shock, which was probably caused by a current escaping from some electric light wires which had been strung on the telegraph company's poles in neighboring localities by the permission of the telegraph company, it was held that the question whether the plaintiff should have been warned of the nearness of these electric light wires, he never having worked in the same town before, and having only worked for the company one month, might be left to the jury. Western U. Teleg. Co. v. McMullen, 58 N. J. L. 155, 32 L.R.A. 351, 33 Atl. 384.

Of course, where the danger was obvious, neglect to take the ordinary precautions against a shock will defeat a recovery.

Neglect to use rubber gloves provided for the very work of handling electric wires when a lineman is making connection of wires on a high pole, and is killed by touching their exposed ends, constitutes contributory negligence which prevents liability of the employer. Junior v. Missouri Electric Light & P. Co. 127 Mo. 79, 29 S. W. 988.

A lineman cannot recover of an electric light company for injuries received from electric wires, occurring by reason of defect in his gloves, which it was his own business to inspect and keep in good condition, and to exchange, when necessary, for new ones, although the gloves were thrown to him from a wagon with directions to put them on, by a foreman, if the latter had no special charge of the gloves, and his direction was merely advisory. Smart v. Louisiana Electric Light Co. 47 La. Ann. 869, 17 So. 346.

Where an employee was sent to look for a break in the circuit while the current was on, and took with him a defective shunt cord which he himself selected from among others which were good, and after he found the break, grasped the shunt cord at its defective end, and, at the same time, with his other hand, grasped the naked end of the line wire, which was perfectly insulated a few inches from the end, and thereby received a deadly current which he would not have received by taking hold of the shunt cord if he had not taken hold of the line wire at the extreme end where it was not insulated, it was held that recovery could not be had against his employer. Piedmont Electric Illuminating Co. v. Patteson, 84 Va. 747, 6 S. E. 4.

The claim that the wires should have been made dead before a lineman began to take them down from their position on one arm of a pole to place them on another, in doing which he was killed, is answered by the court, where the testimony is uncontradicted that the lineman could order the opening of the circuit in case of necessity, by saying that the principle announced on this point is that an employee who has the opportunity to avoid the danger will have no recourse for the injury. Smart v. Louisiana Electric Light Co. *supra.*

Where the night inspector of an electric light and power company undertook to repair a lamp which was out of order because a cut-off screw was burnt out, and was killed, it was held, on a trial by the court without a jury, that his contributory negligence would prevent any liability on the part of the company. In this case his dead body was found lying on the ground near the lamp, which had been lowered to within about 3 feet from the ground and the hood taken off, while the insulating board was on the opposite side of the lamp, showing that when he received the electric shock he must have been standing on the ground, and not on the insulating board. Dixon v. Louisiana Electric Light & P. Co. 47 La. Ann. 1147, 17 So. 696.

A workman who undertakes to fix an arc light contrary to the express orders of his employer is not in the exercise of ordinary care. Illinois Steel Co. v. Kinnare, 100 Ill. App. 208.

A lineman employed by a telephone company, who receives a shock from a charged guy or span wire belonging to a street railway company, is chargeable with negligence which will preclude his recovery of damages from the telephone company, where he failed to test the insulation, although he had apparatus for the purpose, and knew that defects in the insulation of such guy or span

Looney was employed as a "pitman" by the Washington & Great Falls Railroad Company (now the Washington Railway & Electric Company), and was, on the day of his death—July 28, 1901—in one of the "plow pits" located on the lines of the company, near its terminus at Thirty-sixth street and Prospect avenue northwest.

The Metropolitan Company's line connects at this point with that of the Great Falls line. The latter company uses the overhead system. By this system the power is conveyed to the car by means of a "trolley pole" attached to the top of the car and made to touch the trolley wire when used to propel the car. The Metropolitan Company uses the underground system by means of a "plow," so called, projecting through a slot in the tracks to an underground current. The two companies have a trackage arrangement, whereby the cars of the Metropolitan Company run over the line of the other company. The cars of the Metropolitan Company, therefore, are equipped not only with a "plow" and mechanism for the underground system, but with a trolley pole and mechanism for an overhead system. To attach these mechanisms to their respective systems it is necessary to run a car over an excavation on the line of the Great Falls Company known as the "pit." The "pitman" is thus enabled to remove the "plow" from a car to be transferred from the Metropolitan line to the Great Falls line, and adjust or attach the wires or "leads" necessary for the operation of the car over the Great Falls line. While doing this Looney was killed, the plaintiff contends, through the negligence of the conductor of the car in permitting the trolley pole to come in contact with the trolley wire, whereby a current of electricity was transmitted to the motive machinery. And this is the ground of negligence charged in the declaration. In every count it is alleged "before said intestate entered said plow pit it became the duty of the defendants, and each of them, to keep, or cause to be kept, the electric current so cut *off from said pit as not to [482] injure the said intestate; and the plaintiff says that said intestate, having entered said pit in obedience to said direction to him as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off, as aforesaid, said electric current from said pit while said intestate was therein for the purpose aforesaid, whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died."

At the trial there was evidence given by the plaintiff of the arrangement between the defendant companies as to the exchange of cars, and to the relation of their respective employees. On this evidence the parties base opposing contentions, the defendants contending that the conductor and Looney were fellow servants, the plaintiff contending that they were not. Both of the lower courts sustained the contention of the de-

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wires were common, and that there were no persons but the linemen to make such tests. Anderson v. Inland Teleph. & Teleg. Co. 19 Wash. 574, 41 L.R.A. 410, 53 Pac. 657; Bergin v. Southern New England Teleph. Co. 70 Conn. 54, 39 L.R.A. 192, 38 Atl. 888.

A cable splicer for a telephone company, who, on climbing a telephone pole to repair the sheathing of a cable, took hold of a guy wire without noticing that it was in contact with an electric light wire at a point not a foot away from his eyes, is chargeable, as a matter of law, with such contributory negligence as defeats his recovery of any damages from the telephone company for injuries occasioned by the resulting shock, although his vision may have been hampered because the sun was in his eyes. Law v. Central Dist. Printing & Teleg. Co. 140 Fed. 558.

In Hart v. Allegheny County Light Co. 201 Pa. 234, 50 Atl. 772, where a line inspector for an electric light company was injured by a shock received from placing one hand on a telephone wire and the other on an electric light wire, both on the same pole, the court said that whether it be put upon the ground of the knowledge which he had or should have had of the relative position of the two wires, or be based upon his carelessness in failing to protect himself at the time of the accident by the use of the rubber gloves provided for that purpose, in either case the inference was unavoidable that, without his contributory negligence, the accident would not have occurred.

A charge in an action founded on the death of a telephone lineman and inspector, who was killed by coming in contact with a live span wire of a street car company, attached to a pole which he had ascended for the purpose of making repairs for the telephone company, that if he had no knowledge, either actual or by information, that the span wires were not properly insulated and reasonably safe, then he had a right to presume that they were properly and safely insulated unless the want of insulation, or the defective insulation, was so open and obvious that he ought, in the exercise of ordinary and reasonable care and caution, to have known it, is erroneous in that it relieves the employee of the duty to exercise active diligence for his own safety in an occupation peculiarly hazardous, and where the employee has the better opportunity of discovering and avoiding the danger. Jackson & Suburban Street R. Co. v. Simmons, 107 Tenn. 392, 64 S. W. 705.

See also note to Western U. Teleg. Co. v. McMullen, 32 L.R.A. 351, on *Liability of electric company to employee for injury caused by electric shock.*

On the question of negligence as to electric wires on or in buildings—see note to Griffin v. United Electric Light Co. 32 L.R.A. 400.

As to liability for injuries by electric wires in highways—see note to Denver Consol. Electric Co. v. Simpson, 31 L.R.A. 566.

fendants. The court of appeals beside intimated a belief that the testimony on behalf of plaintiff rather tended to show accident than negligence. If this be so, or if the evidence fails to establish whether the death was caused by accident or negligence, the judgment should be affirmed, and it will be unnecessary to decide whether Looney and the conductor were fellow servants. We will assume, for the purposes of the case, that they were not fellow servants.

The accident was seen by two persons, Margaret Mawson and Helen Gertrude Coon. The former testified that she was sitting in her room on the second floor of her house, which is on Prospect avenue, 75 feet or more from the "pit." She saw the car turn the curve from Thirty-sixth street into Prospect avenue, and "that the trolley pole was up and the trolley wheel against the overhead wire, all the time after the car got into Prospect avenue until it stopped over the pit; that while the car was coming from Thirty-sixth street down to the pit she saw Looney, the deceased, enter the pit through the south trapdoor. That after the car stopped over the pit she saw him go up under the car and take the plow off. That [483]*after he took the plow off she saw him go up under the car again and put the wires up in the car to connect with the overhead trolley, and that while he was in that position she heard him holler and drop down, and the motorman turned and said 'For God's sake, fix that trolley!' and the conductor then pulled the trolley down, but did not before that time. . . . That the accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires. That she saw the movements of the deceased under the car through the trapdoor. That she could see his hands taking off the plow; could see nothing but his hands then; that after he took off the plow and went up under the car, she could see a part of his body above the surfate of the street. That the pit was deep enough for a man to stand up in; that she heard no bell ring, nor signal of any sort; her hearing was good enough to hear a bell if one had been rung. That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock."

Helen Gertrude Coon testified that she was a daughter of the preceding witness and lived with her; that she saw the accident from the front porch of the house, which was about on the level with the sidewalk of Prospect avenue. She saw the car run around the curve from Thirty-sixth street, come down the avenue, and stop over the pit. She was not certain whether the pole was touching the wire before the car stopped over the pit, but the pole was touching the wire or came in contact with it while deceased was taking off the plow. "That her attention was directed to the fact of the trolley being in contact with the wire from the fact that the deceased gave a groan, and the motorman said 'For God sake, pull that trolley down!' That some one said 'Pull the car off the pit!' That she saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan. That she heard no bells or signals given. *That he had to [484] use his hands to remove the plow and also to put the overhead current on, and she saw him twist his hands when he got the shock. That she saw all this while looking under the car from where she was sitting on the porch. That they took the body up out of the pit over which the car had been standing."

A passenger on the car testified that he heard one bell ring, and immediately the conductor took the rope that holds the trolley rod in his hands, but he did not notice him do anything else. In about a minute and a half there "was a groan down in the hole and he jumped down and saw the man lying on his face. He heard some one say "For God's sake, hold the rod down; pull the pole down!"

Another witness testified that he lived on Prospect avenue, and was in front of his house, lighting the fire in his automobile. He did not notice the car before it stopped. While it was standing over the pit he heard an exclamation and a groan, and some one said "Pull that trolley down!" After the exclamation he looked up and saw the trolley against the wire. He was about 75 feet from the car.

Another witness testified as to the manner of adjusting the plow and "leads," and the way a shock could be received by the pitman. It was to the effect that the wires used to connect the motive power with the overhead trolley are called "leads." Where the pitman takes hold of them to adjust them they are insulated by a covering of india rubber; but at the ends where they connect with other wires they are uninsulated, and have to be so in order to take the current. If the pitman takes hold of them at the right place and there is no leak, he would not be shocked, even though they were connected with the trolley. "Wear and tear," a witness said who was experienced in removing and adjusting plows and wires, "will cause a leak in the insulation. A leak is when the electricity

comes through a hole in the insulation, caused by the wear and tear or from the insulation being old or imperfect."

The same witness also testified "that the [485] company furnishes *gloves in the pit with which to handle live plows and wires. But it is not customary or required to use the gloves except upon rainy days. On bright days, the car, when over the pit, is supposed to be 'dead,' and you don't take off the plows with gloves; you can't half do your work with them. That danger from electricity is increased from perspiration, rain, or other moisture. That the day of the accident was a bright, sunshiny day. The accident occurred between two and four o'clock P. M."

If the trolley was on before the plow was disconnected and removed, the plow would be charged with the full voltage on the line.

A witness who had experience with the construction of electric railway systems, and was familiar with the action of electricity generally, and had experience in superintending the work of disconnecting a plow from an electric car and adjusting the wires to move an overhead system, testified that, in his opinion as an expert, it would be the duty of a conductor to keep the trolley off the wire until he received some signal from the man beneath the car.

(1) It will be observed that the deceased did not meet his death while removing the plow. Of this the testimony leaves no doubt. (2) He received the electric shock while adjusting the leads. It follows from the first proposition that the trolley pole was not in contact with the trolley wire when the plow was removed. The argument of plaintiff assumes the contrary, and, indeed, is based entirely on the assumption that the deceased received his death stroke when removing the plow.

Two questions arise on the second proposition. The leads are insulated except at the ends that go into the connection; they are necessarily uninsulated there in order to take the current. But it was not necessary for the deceased to touch the uninsulated parts in making the connection, and, unless touched, no shock would have been received, even though they had been connected with the current by reason of the trolley being in contact with the wire, *un-* [486] *less there was a leak in the *insulation arising from defective construction or wear and tear in use.* Granting, therefore, that the conductor was negligent, one of two things was necessary to cause the accident,—a leak in the insulation, or the act of the deceased in touching the uninsulated ends of the leads. Either one or the other was a necessary condition. If the first existed, the defendants may be charged with liability. If the second, they are exonerated. The burden of proof becomes a factor. The plaintiff in the first instance is not required to prove that the deceased was free from contributory negligence; in other words, the burden of proof of contributory negligence is on the defendant. But, on the other hand, plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown.

In *Texas P. R. Co.* v. *Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, the plaintiff (defendant in error in this court) was a foreman in charge of a switch engine, and was injured by the explosion of a boiler of another engine. There was evidence tending to prove that the boiler was and had been in a weak and unsafe state by reason of the condition of the stay bolts, and that if a well-known test had been applied the condition of the bolts would have been discovered. The circuit court instructed the jury that the mere fact of the injury received from the explosion would not entitle plaintiff to recover: that, besides the fact of explosion, he must show that the explosion resulted from the failure of the railroad company to exercise ordinary care either in selecting the engine or in keeping it in reasonably safe repair. The court also instructed the jury that the burden of proof was on the plaintiff throughout the case to show that the boilers and engines that exploded were improper appliances to be used on its railroad by the defendant; that by reason of the particular defects pointed out and insisted *on by the plaintiff the boiler explod- [487] ed and injured him, and the plaintiff was ignorant of the defects, and did not, by his negligence, contribute to his injury. Passing on these instructions, this court said that they laid down the applicable rule with sufficient accuracy, and in substantial conformity with the views of this court expressed in prior cases which were cited.

Plaintiff in the case at bar introduced no evidence whatever of a defect in the leads or that leaks were likely to occur, or the amount or degree of inspection necessary to discover them, or that there was an omission of inspection. The case was probably brought and tried on a different theory. It was argued in this court on a different theory. It was argued on the assumption that the deceased was killed when removing the plow. The assumption is directly in the teeth of the testimony. "The accident did

not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires." (Testimony of Margaret Mawson.) And to like effect is the testimony of Miss Coon. "She saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan." And she saw him "twist his hands when he got the shock."

The declaration does not charge a defect in the leads. It charges the negligence to have been in the failure "to keep, or cause to be kept, cut off" the electric current while the deceased was in the pit, "whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died." In other words, the cause of death was the negligent act of permitting the trolley pole to come in contact with the trolley wire.

But granting plaintiff is not limited by her declaration, nevertheless she has not satisfied the requirements of law in her proof. A plaintiff in the first instance must
[488] show negligence *on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which speaks one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence. Thomp. Neg. § 401; *Baltimore & P. R. Co.* v. *Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; *Texas & P. R. Co.* v. *Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104. But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. *Douglass* v. *Mitchell*, 35 Pa. 440; *Philadelphia City Pass. R. Co.* v. *Henrice*, 92 Pa. 431, 37 Am. Rep. 699; *Yarnell* v. *Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1.

Judgment affirmed.

UNITED STATES, *Plff. in. Err.*,
v.
NEW YORK & CUBA MAIL STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 488–495.)

1. Internal revenue—recovery of stamp tax illegally imposed—voluntary payment.— The purchase of documentary stamps at various times without protest, and the affixing of such stamps to manifests of cargoes on vessels bound to foreign ports, cannot be deemed to have been under duress, so as to sustain a recovery from the United States of the amount of the illegal tax so collected, because clearance papers for vessels so bound could not be procured without delivery to the collector of the district of the stamped manifests, without which clearance papers the vessels would be prevented from sailing, or would be liable, under U. S. Rev. Stat. § 4197, U. S. Comp. Stat. 1901, p. 2840, for the penalty therein prescribed.

2. Internal revenue—recovery of stamp tax illegally imposed—voluntary payment.—The necessity of protest or notice to sustain the recovery of a stamp tax illegally collected on manifests of cargoes on vessels bound to foreign ports is not removed by the provision of the act of May 12, 1900 (31 Stat. at L. 177, chap. 393, U. S. Comp. Stat. 1901, p. 2276), authorizing the commissioner of internal revenue to redeem or make allowance for internal revenue stamps in any manner "wrongfully collected."

[No. 116.]

Argued January 22, 23, 1906. Decided February 19, 1906.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment overruling the demurrer to a petition for the recovery of the amount paid for documentary stamps used on manifests of cargoes on vessels bound for foreign ports, and granting the relief sought. *Reversed* and remanded with directions to sustain the demurrer.

See same case below, 125 Fed. 320.

The facts are stated in the opinion.

Assistant Attorney General **Robb** argued the cause and filed a brief for plaintiff in error.

Mr. **John G. Carlisle** argued the cause, and, with *Mr. William Edmond Curtis*, filed a brief for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

The defendant in error filed a petition in the district court to recover the amount paid by it for documentary stamps used on manifests of cargoes on certain vessels bound to foreign ports, as required by an act of Congress approved June 13, 1898 [30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286], entitled "An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes."

NOTE.—*As to when taxes illegally assessed may be recovered back*—see notes to Phelps v. New York, 2 L.R.A. 626; State *ex rel.* McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. Van Arsdale, 21 L. ed. U. S. 63.

The United States demurred to the petition on the ground [491] *that it did not state facts sufficient to constitute a claim against it. The demurrer was overruled and judgment entered for the sum of $240, the amount of claim. 125 Fed. 320.

It appears from the opinion of the district court that the constitutionality of the tax was alone submitted for decision, and the court, upon the authority of *Fairbank* v. *United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, held that the tax was unconstitutional.

In the *Fairbank Case* it was held that a stamp tax on bills of lading imposed by the act of June 13 was a tax on exports, and therefore void. In the case at bar the district court observed "that the essential character of the stamp tax on manifests was that of a tax on exports, in the same sense in which a stamp tax on a bill of lading was a tax on exports." The United States now concedes the correctness of this ruling, but urges, nevertheless, that the judgment for defendant in error was erroneous because, as is contended, the stamps were purchased and affixed voluntarily and without protest. For this, *Chesebrough* v. *United States*, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. Rep. 262, is adduced as controlling. In that case recovery was sought for the price of stamps affixed to a deed in compliance with Schedule A of the act of June 13, 1898. The unconstitutionality of the act was asserted by Chesebrough, but was not discussed by the court. The decision was based on the ground that the payment of the taxes was voluntary. Chesebrough contended that § 7 of the act, which made it a misdemeanor to omit to fix stamps to the instruments enumerated, constituted such coercion as made the payment involuntary; and, besides, that his vendee was unwilling to accept the deed without the stamps required by the act, and that he "under compulsion of said law," in order to receive the consideration for his conveyance, to enable his deed to be recorded and received in evidence, and to give a title free from doubt, purchased stamps from the United States collector of internal revenue, and placed them upon the deed.

What is the duress alleged in the case at bar? The averment of the petition is—

"That said act being in force, under com- [492] pulsion and through *fear of criminal prosecution, and in order to obtain clearance papers, which could not have been procured without the delivery to the collector of the port of New York, of outward foreign manifests of cargo, stamped as aforesaid, and without which clearance papers the vessels hereinafter named would have been prevented from sailing, or would have become liable for the penalty imposed by § 4197 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2840), said James E. Ward & Company, for and on behalf of your petitioner and as such general agents, as aforesaid, purchased and affixed to the said outward foreign manifests of cargo and canceled internal revenue documentary stamps of the United States of the face value of two hundred and forty dollars ($240), as appears more fully by the exhibit hereto annexed and made a part of this petition, and marked 'Exhibit A,' which contains the name of the vessel, the date of delivery to said collector of the outward foreign manifests of cargo, the alleged tax on which is sought to be recovered, and the face value of the documentary internal revenue stamp affixed thereto."

It is alleged that the stamps were purchased from Walter H. Stiner, a dealer in internal revenue stamps on various days subsequent to January 1, 1900, and that Stiner purchased them from the collector of internal revenue, and the proceeds thereof were duly paid over to the United States.

In this case, as in the *Chesebrough Case*, the collector was not informed at the time of the purchase of the particular purpose for which the stamps were to be used, and no intimation was given him, written or oral, that defendant in error claimed that the law regarding such stamps was unconstitutional, and that it was making the purchase under duress. And, expressing the principle to be applied, the court said, in the *Chesebrough Case*, "even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property *of the party making the payment, from [493] which the latter has no other means of immediate relief than such payment."

Applying that principle to the allegation that Chesebrough's vendee was unwilling to accept an unstamped conveyance, it was said "if that constituted duress as between Chesebrough and his building company, it was a matter with which the collector had nothing to do. On the face of the petition the purchase was purely voluntary and made under mutual mistake of law, if the law were unconstitutional."

It is, however, insisted that these observations are not apposite to the case at bar. The coercion, it is contended, that Chesebough alleged, was between him and some third party. In the case at bar the coercion was exerted "between the petitioner [defendant in error] and the very authori-

ties who demanded and compelled the payment of the tax," through § 4197 of the Revised Statutes of the United States. This section requires the master or person in charge of any vessel bound for a foreign port to deliver to the collector of the district a manifest, and upon its delivery the collector shall grant a clearance for such vessel and her cargo. It is provided:

"If any vessel bound to a foreign port departs on her voyage to such foreign port without delivering such manifest and obtaining a clearance, as hereby required, the master or other person having the charge or command of such vessel shall be liable to a penalty of five hundred dollars for every such offense." U. S. Rev. Stat. § 4197.

We do not think this section makes a difference in the cases. The destination of the stamps cannot affect the payment of the tax which they represent. It may be more or less of an inducement to submit to the tax, but who can determine the degree? The loss of a purchaser, as in the *Chesebrough Case*, may be of much more concern than the payment of the penalty for violating the provisions of § 4197. Besides, whatever element of coercion there was came from the United States, and it was not as immediate in the case of the manifests as in the case of the deed. The [494] applicable principle is expressed in *the extract from the *Chesebrough Case*, which we have given above. It is stated in *Union P. R. Co.* v. *Dodge County*, 98 U. S. 541, 25 L. ed. 196, and quoted from that case in *Little* v. *Bowers*, 134 U. S. at page 554, 33 L. ed. at page 1019, and 10 Sup. Ct. Rep. at page 621, as follows: "Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back."

There was no such imminence in the duress charged by defendant in error. It purchased the stamps of a dealer at various times. No information was given to the collector of internal revenue of the particular purpose, nor claim that the law was unconstitutional. There was no claim of the collector of the port from whom the clearances were asked that defendant in error was acting under the restraint of the law, and yielding only to enable his ships to depart to their destinations. All determining conditions, therefore, are the same as in the *Chesebrough Case*.

2. It is, however, contended that even though the stamps were purchased without any duress or coercion, that under the act of Congress of May 12, 1900 [31 Stat. at L. 177, chap. 393, U. S. Comp. Stat. 1901, p. 2276], entitled "An Act Authorizing the Commissioner of Internal Revenue to Redeem or Make Allowance for Internal Revenue Stamps," the Commissioner must make allowance for the stamps used by the petitioner, and the Commissioner having declined to do so, the defendant in error has a right of action under the Tucker act. The provision of the act of May 12, relied on, is as follows:

"That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal revenue tax, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no *use, or which, through mistake, may [495] have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected."

The argument is that by this provision "the question of duress or compulsion is taken entirely out of the case," because in most of the instances enumerated "it is inconceivable that there should be any protest or duress." And it is further alleged that the act of 1900 was not considered in the *Chesebrough Case*. It certainly does not follow that, because in some instances, protest or duress cannot exist, that they cannot exist in other cases, nor that the statute intended to destroy the difference between voluntary and involuntary payment of taxes. In the *Chesebrough Case*, § 3220 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2086) was considered. It authorized the Commissioner of Internal Revenue "to remit, refund, and pay back all taxes . . . that appear to be unjustly assessed or excessive in amount, *or in any manner wrongfully collected.*" The words in italics are identical with those in the act of May 12, which are relied on by defendant in error. Commenting on § 3220, the court said, in the *Chesebrough Case:* It is argued that the provision of § 3220, for the repayment of judgments against the collector, rendered protest or notice unnecessary for his protection; but it was clearly demanded for the protection of the government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there

would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances."

We, therefore, think that this case is governed by the *Chesebrough Case*, and on its authority *judgment is reversed* and case remanded with directions to sustain the demurrer.

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[496] *STATE OF MISSOURI, *Complainant*,
v.
STATE OF ILLINOIS and The Sanitary District of Chicago, *Defts.*

(See S. C. Reporter's ed. 496–526.)

Controversy between states—injunctive relief against drainage of sewage into water course.—The discharge into the Mississippi river, through an artificial drainage canal, of the sewage of Chicago, mixed with a large volume of pure water from Lake Michigan, will not be enjoined by the Federal Supreme Court on complaint by the state of Missouri that the result of such action is to poison the water supply of its inhabitants, where the evidence, though disclosing an increase in the deaths from typhoid fever in St. Louis, leaves it doubtful whether the typhoid bacillus can and does survive the journey and reach the intake of St. Louis in the Mississippi, and shows other possible sources of infection in the discharge of sewage above the St. Louis intake from other towns and cities, some of which are situated in Missouri.

[No. 4, Original.]

Argued January 2, 3, 4, 1906. Decided February 19, 1906.

ORIGINAL suit by the state of Missouri to restrain the discharge of the sewage of Chicago through an artificial drainage canal into the Mississippi river. Bill *dismissed* without prejudice.

See same case on demurrer, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331.

The facts are stated in the opinion.

Messrs. **Sam B. Jeffries, Charles W. Bates,** and **Herbert S. Hadley** argued the cause and filed a brief for complainant:

The inhabitants of a large and populous city have the right to use the water of the stream upon which the city is situated in its natural condition, free from infectious material deposited into it at points above. If the discharge of infectious sewage and filth in the stream renders the waters dangerous and harmful to the people living below, such municipality or person creating the nuisance and causing the danger or damage may be enjoined from continuing the infectious discharges.

30 Am. & Eng. Enc. Law, 2d ed. p. 378; *Indianapolis Water Co.* v. *American Strawboard Co.* 57 Fed. 1000; *Trevett* v. *Prison Asso.* 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373; *Atty. Gen.* v. *Birmingham*, 4 Kay & J. 528; *Platt Bros.* v. *Waterbury*, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; Wood, Nuisances, 3d ed. §§ 427–579.

Where there are several contributing causes of the pollution and infection of a water course, one cannot escape liability for those living below and using the waters for domestic purposes, because of such pollution by themselves. Eliminating from the case the fact that Chicago is situated upon the natural watershed of Lake Michigan, while complainant is situated upon the natural watershed of the Mississippi, and even though it be assumed that the same rights with reference to the disposal of its sewage belong to Chicago as to any other city upon the natural watershed of the Illinois river, it cannot be claimed by the defendants that they have the right to pollute the waters of the Mississippi because there are other cities situated upon its watershed which contribute to the pollution after or before the water reaches the Mississippi at Grafton.

Crossley v. *Lightowler*, L. R. 2 Ch. 478; *Tennessee Coal, Iron & R. Co.* v. *Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; *Watson* v. *New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; 30 Am. & Eng. Enc. Law, p. 383; *Hill* v. *Smith*, 32 Cal. 167; *Little Schuylkill Nav. R. & Coal Co.* v. *Richards*, 57 Pa. 142, 98 Am. Dec. 211; *Ferguson* v. *Firmenich Mfg. Co.* 77 Iowa, 579, 14 Am. St. Rep. 319, 42 N. W. 448.

The fact that Peoria, Pekin, Havana, La-Salle, Beardstown, and Joliet sewer into the Illinois river does not constitute the right of defendants likewise to discharge the sewage from the city of Chicago into the Illinois river.

Nolan v. *New Britain*, 69 Conn. 668, 38 Atl. 703; *Wheeler* v. *Fisher Oil Co.* 9 Ohio S. & C. P. Dec. 294; *Jackman* v. *Arlington Mills*, 137 Mass. 277; *Morgan* v. *Danbury*, 67 Conn. 484, 35 Atl. 499; *Fahnestock* v. *Feldner*, 98 Md. 335, 56 Atl. 785.

The right to continue a public nuisance cannot be acquired by prescription.

Wright v. *Moore*, 38 Ala. 598, 82 Am.

NOTE.—*On the pollution of water courses*—see note to Travis Placer Min. Co. v. Mills, 37 C. C. A. 538.

As to right of municipal corporation to drain sewage into waters—see note to Platt Bros. v. Waterbury, 48 L.R.A. 691.

Dec. 731; *Goldsmid* v. *Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 167; *Mills* v. *Hall*, 9 Wend. 316, 24 Am. Dec. 160; *Atty. Gen.* v. *Revere Copper Co.* 152 Mass. 452, 9 L.R.A. 510, 25 N. E. 605; *Com.* v. *Upton*, 6 Gray, 473; *Morton* v. *Moore*, 15 Gray, 573; *New Salem* v. *Eagle Mill Co.* 138 Mass. 8; *State* v. *Rankin*, 3 S. C. N. S. 448, 16 Am. Rep. 737.

No one has the right to increase the volume or hasten the flow of a stream against the wish and will of lower riparian owners. and especially is this true when damage or injury either results or is likely to result.

2 Farnham, Waters, 1052; *Ward* v. *Peck*, 49 N. J. L. 42, 6 Atl. 805.

Such an act is a trespass which may be resisted by the injured party, and for that purpose all the machinery of law is at his service.

Farnham, Waters, p. 487; *East Jersey Water Co.* v. *Bigelow*, 60 N. J. L. 207, 38 Atl. 631; Wood, Nuisances, pp. 499, 500; *Tillotson* v. *Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Gerrish* v. *New Market Mfg. Co.* 30 N. H. 478; *Plattsmouth Water Co.* v. *Smith*, 57 Neb. 579, 78 N. W. 275; *Evans* v. *Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *TenEyck* v. *Delaware & R. Canal Co.* 18 N. J. L. 200, 37 Am. Dec. 232; *Miller* v. *Miller*, 23 Me. 22, 39 Am. Dec. 597; *Norton* v. *Volentine*, 14 Vt. 239, 39 Am. Dec. 220; *Elliot* v. *Fitchburg*, 10 Cush. 191, 57 Am. Dec. 85; *Newhall* v. *Ireson*, 8 Cush. 595, 54 Am. Dec. 794.

Complainant is not estopped by laches.

Wood, Nuisances, § 806.

Decisions based upon the question of equitable estoppel or laches must be held to be inapplicable, for the reason that they apply more generally to questions affecting private nuisances, rather than those of public concern.

Mills v. *Hall*, *Com.* v. *Upton*, *Atty. Gen.* v. *Revere Copper Co.*, and *State* v. *Rankin*, *supra*; 1 Chitty, Crim. Law, 160; *New Salem* v. *Eagle Mill Co. supra*; *Burke* v. *People*, 23 Ill. App. 36; *Hoadley* v. *People*, 23 Ill. App. 39; Gould, Waters, 3d ed. § 121, p. 236, §§ 212, 532; *Cross* v. *Morristown*, 18 N. J. Eq. 305; *People* v. *Cunningham*, 1 Denio, 536, 43 Am. Dec. 709; *Waterloo* v. *Union Mill Co.* 72 Iowa, 438, 34 N. W. 197; *Rhodes* v. *Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Jersey City* v. *Morris Canal & Bkg. Co.* 12 N. J. Eq. 548; *Dygert* v. *Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Weld* v. *Hornby*, 7 East, 195.

An upper riparian owner has no right, by emptying into a stream an artificial supply of water, or the water of another water course, so as to increase the amount of water in the stream, so to injure a lower riparian owner; and where the water is ponded by a dam, the owner has no right, by discharging the contents of the pond, to increase the flow of the water course beyond its natural capacity, to the injury of the lower proprietors.

30 Am. & Eng. Enc. Law, 2d ed. p. 377.

Every riparian owner is entitled to have the water course flow by his land in an unpolluted condition, and one riparian owner has no right unreasonably to corrupt or pollute its waters to such an extent as essentially to impair its purity.

Indianapolis Water Co. v. *American Strawboard Co.* 53 Fed. 970; *Lewis* v. *Stein*, 16 Ala. 214, 50 Am. Dec. 179.

The above rule is applicable to riparian owners, and much stronger must be its application when applied to those persons who do not reside upon the watershed of the stream in question.

Atty. Gen. v. *Hackney*, L. R. 20 Eq. 626.

A city may be enjoined from discharging its sewage into a running stream by a riparian owner below the point of discharge.

Dwight v. *Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; Gould, Waters, § 546.

If this doctrine can be enforced against a municipality located upon a watershed of a stream involved, much greater is the reason and necessity of enforcing it as against the objectionable conduct of a municipality located upon an adjacent watershed, wherein an attempt is made to divert the sewage and filth from the basin prepared by nature for it into the adjoining drainage basin, thereby compelling the inhabitants residing upon a neighboring watershed to be subjected to the inconvenience and annoyance of the waste, filth, and objectionable refuse of their unnatural neighbors.

See *Spence* v. *McDonough*, 77 Iowa, 460, 42 N. W. 371; *Ferguson* v. *Firmenich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448.

In *Harris* v. *Mackintosh*, 133 Mass. 228, the court held that the owner of land on a natural stream may maintain a bill in equity to restrain another landowner on such stream from carrying on business in such a way as to pollute the water of the stream, to the injury of plaintiff.

In *Grey ex rel. Simmons* v. *Paterson*, 58 N. J. Eq. 1, 42 Atl. 749, the following propositions were determined:

1st. Owners of land on the banks of a stream are entitled to have the water flow to them unpolluted.

2d. Pollution of a river by the dicharge

of city sewage gathered from a large area, and caused to flow into the stream by artificially constructed grades, cannot be justified as a natural and reasonable use of the river.

3d. The public act authorizing a city to discharge its sewage according to maps exhibiting sewer outlets, etc., does not license a city in discharging such quantities of sewage as will pollute the river.

4th. Riparian owners who sue to restrain a city from discharging sewage into a river as soon as the sewage begins to contaminate the waters are not guilty of laches.

Every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his land does not change the rule, or permit him permanently to prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use.

When one riparian proprietor, by his use, causes deterioration of the water of a natural stream, the fact that others are using it in the same manner, instead of preventing relief, may require it; and even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction.

Strobel v. *Kerr Salt Co.* 164 N. Y. 304, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142.

A person owning land has no right to rid it of surface water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor. This rule is alike under the common and civil law.

Gould, Waters, § 271.

Defendants were without authority to construct the canal in question for the purpose of discharging the sewage of the great city of Chicago into the Illinois and Mississippi rivers, and thereby burdening the people of the Mississippi valley with the elements of danger to life, health, and society, contrary to the plan which nature has devised.

Anderson v. *Henderson*, 124 Ill. 164, 16 N. E. 232; *Dayton* v. *Drainage Comrs.* 128 Ill. 271, 21 N. E. 198; *Jackman* v. *Arlington Mills*, 137 Mass. 277; *White* v. *Chapin*, 12 Allen, 516; *Curtis* v. *Eastern R. Co.* 98 Mass. 428; *Carter* v. *Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Noonan* v. *Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *McCormick* v. *Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Barkley* v. *Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Hughes* v. *Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

The defendants occupy the position of absolute strangers, — trespassers, — having no rights in common to use the waters of the Mississippi for any purpose whatever, applicable to the law relating to riparian ownership, it having been held that the law with reference to riparian ownership and the use of a stream by persons residing upon its banks, or upon its watershed, applies alike to persons, individuals, and public municipal corporations.

Gould, Waters, 272; *Plummer* v. *Sturtevant*, 32 Me. 325; *New Albany* v. *Lines*, 21 Ind. App. 380, 51 N. E. 346; *O'Brien* v. *St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Aurora* v. *Love*, 93 Ill. 521.

Equity will not refuse to protect one in the possession and enjoyment of his property merely because his right is less valuable to him than the power to destroy it may be to another or the public.

Sullivan v. *Jones & L. Steel Co.* 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065.

All that is necessary—all that courts or defendants can reasonably ask—is that complainant make out a clear case, showing the injury inflicted, or the injury impending and about to fall. With such showing relief is always granted.

Lambeau v. *Lewinski*, 47 Ill. App. 656; *Owen* v. *Phillips*, 73 Ind. 284; *Mirkil* v. *Morgan*, 134 Pa. 144, 19 Atl. 628; *Holsman* v. *Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Powell* v. *Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085.

Where a nuisance is permanent, continuous, or constantly recurring, legal remedy is obviously inadequate, and the interference of a court of equity is necessary to prevent irreparable injury or a multiplicity of suits.

Nininger v. *Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Hamilton* v. *Whitridge*, 11 Md. 128, 69 Am. Dec. 184.

Where a city emptied sewage on plaintiff's land, thereby rendering his building unfit for inhabitation, it was held that he was not obliged to bring an action at law to abate the nuisance, but was entitled to an injunction.

Beach v. *Elmira*, 22 Hun, 158.

The opinions of witnesses contrary to physical facts and natural conditions and causes must be disregarded.

State v. *Cross*, 68 Iowa, 180, 26 N. W. 62; *People* v. *Augsbury*, 97 N. Y. 501; Underhill, Ev. §§ 189, 190.

When the opinion of an expert witness is not founded on facts explained in evidence, or applicable to the case at hand,

such an opinion is merely speculative, and should not be considered.

Storey v. *Union Bank*, 34 Ala. 687; *Ebos* v. *State*, 34 Ark. 520.

The opinion of experts must always be disregarded when contrary to established laws of nature, or contrary to facts admitted as true, or facts established. Such testimony is speculative, and never relevant or admissible for any purpose.

Filer v. *New York C. R. Co.* 49 N. Y. 42, 10 Am. Rep. 327; *Strohm* v. *New York, L. E. & W. R. Co.* 96 N. Y. 305; *Tozer* v. *New York C. & H. R. R. Co.* 105 N. Y. 617, 11 N. E. 369; *Turner* v. *Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Collins* v. *Janesville*, 99 Wis. 464, 75 N. W. 88; *Block* v. *Milwaukee Street R. Co.* 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; *Hopt* v. *Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Brown* v. *United States*, 113 U. S. 569, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648.

Expert opinions of witnesses cannot prevail against established evidence.

Highfill v. *Missouri P. R. Co.* 93 Mo. App. 219; *Gorman* v. *St. Louis Transit Co.* 96 Mo. App. 608, 70 S. W. 731.

The opinion of defendants' witnesses, being contrary to well-established scientific truths, must be disregarded by the court, being founded upon unsatisfactory data, so scanty that the witnesses' alleged inference should at once be pronounced absurd and extreme.

Wigmore, Ev. § 659.

The opinion of lay witnesses as to the value of the water for domestic purposes should be excluded.

Wigmore, Ev. §§ 1917, 1924; *McLean* v. *State*, 16 Ala. 679; *Atlanta Street R. Co.* v. *Walker*, 93 Ga. 462, 21 S. E. 48; *Atlanta Consol. Street R. Co.* v. *Bagwell*, 107 Ga. 157, 33 S. E. 191; *Zinn* v. *Rice*, 161 Mass. 571, 37 N. E. 747; *Lewis* v. *Bell*, 109 Mich. 189, 66 N. W. 1091; *Gray* v. *Brooklyn Heights R. Co.* 175 N. Y. 448, 67 N. E. 899; *Dushane* v. *Benedict*, 120 U. S. 647, 30 L. ed. 814, 7 Sup. Ct. Rep. 696; Wigmore, Ev. § 10; *Shaw* v. *Susquehanna Boom Co.* 125 Pa. 324, 17 Atl. 426; *Little Rock & Ft. S. R. Co.* v. *Bruce*, 55 Ark. 65, 17 S. W. 363; *State* v. *Punshon*, 133 Mo. 55, 34 S. W. 25; *Pfau* v. *Alteria*, 23 Misc. 693, 52 N. Y. Supp. 88; 1 Elliott, Ev. §§ 673, 674.

Messrs. Herbert S. Hadley, N. T. Gentry, Charles W. Bates, W. F. Woerner, and *Sam B. Jeffries* also filed a brief for complainant.

Mr. **James Todd** argued the cause, and, with *Messrs. W. H. Stead, Howland J. Hamlin*, and *John G. Drennan*, filed a brief for the Sanitary District of Chicago:

A party may, by laches, deprive himself of an equitable remedy against a nuisance.

2 Wood, Nuisances, §§ 804–806; Gould, Waters, §§ 530, 533.

It is the well-established doctrine of the Supreme Court of the United States that laches on the part of the complainant is a bar to the granting of equitable relief. This is especially so where the lack of diligence on the part of the complainant has led the defendant to place nimself in a position from which he cannot escape or recede without great loss and inconvenience.

The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did so.

McKnight v. *Taylor*, 1 How. 168, 11 L. ed. 89; *Badger* v. *Badger*, 2 Wall. 87, 17 L. ed. 836; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 23 L. ed. 328; *Hayward* v. *Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Harwood* v. *Cincinnati & C. Air-Line R. Co.* 17 Wall. 79, 21 L. ed. 558; *Speidel* v. *Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; *Galliher* v. *Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Hammond* v. *Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Willard* v. *Wood*, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176; *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324; *Lansdale* v. *Smith*, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350: *Lane & B. Co.* v. *Locke*, 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; *Mackall* v. *Casilear*, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; *Whitney* v. *Fox*, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713; *Gildersleeve* v. *New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; *Ware* v. *Galveston City Co.* 146 U. S. 102, 36 L. ed. 904, 13 Sup. Ct. Rep. 33; *Foster* v. *Mansfield, C. & L. M. R. Co.* 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; *Hoyt* v. *Latham*, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; *Hanner* v. *Moulton*, 138 U. S. 486, 34 L. ed. 1032, 11 Sup. Ct. Rep. 408; *Richards* v. *Mackall*, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; *Roberts* v. *Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Brown* v. *Buena Vista County*, 95 U. S. 157, 160, 161, 24 L. ed. 422, 423; *Johnston* v. *Standard Min. Co.* 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585: *Barnard* v. *Sherley*, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117.

Equity will not interfere to aid a plain-

tiff who has stood by in silence, and has acquiesced impliedly in the expenditure of large sums of money by the defendant in the belief that his work was rightful and would never be interfered with.

High, Inj. §§ 618, 643, 884, 885; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 344; *Dougrey* v. *Topping*, 4 Paige, 94; *Town* v. *Needham*, 3 Paige, 546, 24 Am. Dec. 246; *Blanchard* v. *Doering*, 23 Wis. 200; *Sprague* v. *Steere*, 1 R. I. 247; *Patterson* v. *Hewitt*, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552; *Swain* v. *Seamens*, 9 Wall. 254, 273, 274, 19 L. ed. 554, 560; 2 Pom. Eq. Jur. §§ 816–821, p. 2; *Niven* v. *Belknap*, 2 Johns. 573; *Bassett* v. *Salisbury Mfg. Co.* 47 N. H. 426; *Bliss* v. *Prichard*, 67 Mo. 181; *Landrum* v. *Union Bank*, 63 Mo. 48; *Atty. Gen. ex rel. Easton* v. *New York & L. B. R. Co.* 24 N. J. Eq. 49.

A court of equity will refuse to grant an injunction when it appears that greater injury and inconvenience will be caused to the defendant by granting the injunction than will be caused to the complainant by refusing it.

16 Am. & Eng. Enc. Law, 2d ed. pp. 363, 364; *Edwards* v. *Allouez Min. Co.* 38 Mich. 46, 31 Am. Rep. 301; *Clifton Iron Co.* v. *Dye*, 87 Ala. 468, 6 So. 192; *Richards's Appeal*, 57 Pa. 114, 98 Am. Dec. 202; *Hall* v. *Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Campbell* v. *Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Barnard* v. *Gibson*, 7 How. 650, 12 L. ed. 857.

If the complainant contributes to the conditions which it claims in its bill will injure it as a state, it cannot obtain equitable relief.

Harrington v. *Bigelow*, 11 Paige, 349; Gould, Waters, § 219, p. 433; *Ferguson* v. *Firmenich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; *Cassady* v. *Cavenor*, 37 Iowa, 300; *Richards* v. *Waupun*, 59 Wis. 45, 17 N. W. 975; *Mowday* v. *Moore*, 133 Pa. 598, 19 Atl. 626; *Comstock* v. *Johnson*, 46 N. Y. 615; *Creath* v. *Sims*, 5 How. 192, 12 L. ed. 111; *Sample* v. *Barnes*, 14 How. 70, 14 L. ed. 330; *Palmer* v. *Harris*, 60 Pa. 156, 100 Am. Dec. 557; *Parlett* v. *Guggenheimer*, 67 Md. 542, 1 Am. St. Rep. 416, 10 Atl. 81; 1 Spelling, Extr. Relief; *Jacksonville* v. *Doan*, 145 Ill. 23, 33 N. E. 878; *Topeka Water Supply Co.* v. *Potwin*, 43 Kan. 408, 23 Pac. 578.

Municipal corporations are agencies of the state.

Com. v. *Plaisted*, 2 L.R.A. 142, note, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Rogers* v. *Burlington*, 3 Wall. 654, 18 L. ed. 79; *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. ed. 197; *Tippecanoe County* v. *Lucas*, 93 U. S. 108, 23 L. ed. 822; *Chicago* v. *Chicago League Ball Club*, 196 Ill. 59, 89 Am. St. Rep. 243, 63 N. E. 695; *Holmes* v. *Mattoon*, 111 Ill. 30, 53 Am. Rep. 602; *Straus* v. *Com.* 1 Duv. 149; *State* v. *Crutcher*, 2 Swan, 504; *Piper* v. *Richardson*, 9 Met. 155; *Soady* v. *Wilson*, 3 Ad. & El. 248.

Mr. **Howland J. Hamlin** argued the cause, and, with *Messrs. John G. Drennan, W. H. Stead*, and *James Todd*, filed a brief for the state of Illinois:

Municipal authorities have the power to construct and maintain sewerage systems for the health and comfort of the inhabitants thereof, and may discharge the same into navigable streams and waters. It was and is a lawful act of the city of Chicago to discharge its sewers into the Chicago river and the branches thereof.

10 Am. & Eng. Enc. Law, 2d ed. pp. 248, 249, and notes; *Merrifield* v. *Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Strobel* v. *Kerr Salt Co.* 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142; *Valparaiso* v. *Hagen*, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062; *Hayes* v. *Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Lockwood Co.* v. *Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Tennessee Coal, Iron, & R. Co.* v. *Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; *Cary* v. *Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Townsend* v. *Bell*, 42 App. Div. 409, 59 N. Y. Supp. 203; *Red River Roller Mills* v. *Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; *Hazeltine* v. *Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66; *Greene* v. *Nunnemacher*, 36 Wis. 50; *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Morgan* v. *Danbury*, 67 Conn. 484, 35 Atl. 499; *Noonan* v. *Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Weston Paper Co.* v. *Pope*, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719; *Richmond* v. *Test*, 18 Ind. App. 482, 48 N. E. 610; *Valparaiso* v. *Hagen, supra; Barnard* v. *Sherley*, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; *Joplin Consol. Min. Co.* v. *Joplin*, 124 Mo. 129, 27 S. W. 406.

The acts of Congress of 1822 and 1827 duly authorized the state of Illinois to connect, by means of a canal, the waters of Lake Michigan with the waters of the Illinois river. Therefore the connection of the same and the waters thereof, as done, was a lawful act.

Wisconsin v. *Duluth*, 96 U. S. 379, 24 L. ed. 668.

In an action of this kind, where each party produces the evidence of a reasonable number of reputable experts, equally schooled in the questions of science at issue, and such evidence shows an irrecon-

cilable conflict, the evidence of numerous nonexpert witnesses (especially if uncontradicted), who, from personal experience by the actual use of the water, testify that, before and after the alleged contamination complained of, they continuously used the water for drinking and other domestic uses, and for the making of steam and other manufacturing purposes, and that since the doing of the acts complained of the water has been improved for such and all other purposes, the evidence of such nonexpert witnesses is of more weight than that of such experts, and should control the decision of the case.

Newark Aqueduct Board v. *Passaic*, 45 N. J. Eq. 393, 18 Atl. 106; *Rouse* v. *Martin*, 75 Ala. 514, 51 Am. Rep. 463; *Laughlin* v. *Lamasco City*, 6 Ind. 223; 1 Wood, Nuisances, §§ 539, 540, p. 732; 1 Wigmore, Ev. (1904) § 568.

An injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence is conflicting, and the injury doubtful, such conflict and doubt will be ground for withholding an injunction. Where interposition by injunction is sought to restrain that which it is apprehended will create a nuisance of which its complainant may complain, the proofs must show such a state of facts as will manifest the danger to be real and immediate.

Missouri v. *Illinois*, 180 U. S. 248, 45 L. ed. 515, 21 Sup. Ct. Rep. 331; 2 Story, Eq. Jur. 13th ed. §§ 924, 924*a*; 1 Wood, Nuisances, § 539, p. 732; *Columbia Ave. Sav. Fund, S. D. Title & T. Co.* v. *Prison Commission*, 92 Fed. 801; *Parker* v. *Winnipiseogee Lake Cotton & Woolen Co.* 2 Black, 545, 553, 17 L. ed. 333, 337; *District Attorney* v. *Lynn & B. R. Co.* 16 Gray, 245; *Robb* v. *LaGrange*, 158 Ill. 21, 42 N. E. 77; *Springer* v. *Walters*, 139 Ill. 419, 28 N. E. 761; *Gallagher* v. *Flury*, 99 Md. 181, 57 Atl. 672; *Manchester* v. *Smyth*, 64 N. H. 380, 10 Atl. 700; *Powell* v. *Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085; *Dunn* v. *Austin*, 77 Tex. 139, 11 S. W. 1125; *Rouse* v. *Martin*, *supra*.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the state of Missouri to restrain the discharge of the sewage of Chicago through an artificial channel into the Desplaines river, in the state of Illinois. That river empties into the Illinois river, and the latter empties into the Mississippi at a point about 43 miles above the city of St. Louis. It was alleged in the bill that the result of the threatened discharge would be to send 1,500 tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the bed of the last-named river belonging to the plaintiff, and so to poison the water of that river, upon which various of the plaintiff's cities, towns, and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing purposes. It was alleged that the defendant sanitary district was acting in pursuance of a statute of the state of Illinois, and as an agency of that state. The case is stated at length in 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, where a demurrer to the bill was overruled. A supplemental bill alleges that since the filing of the original bill the drainage canal has been opened and put into operation, and has produced and is producing all the evils which were apprehended when the injunction first was asked. The answers deny the plaintiff's case, allege that the new plan sends the water of the Illinois river into the Mississippi much purer than it was before, that many towns and cities of the plaintiff along the Missouri and Mississippi discharge their sewage into those rivers, and that if there is any trouble the plaintiff must look nearer home for the cause.

The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future, *with the general intima- [518]
tion that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate. The nuisance set forth in the bill was one which would be of international importance,—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether, as between the states of of the Union, this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt. But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than

heretofore how the evidence in it is to be approached.

The first question to be answered was put in the well known case of the Wheeling bridge. *Pennsylvania* v. *Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249. In that case, also, there was a bill brought by a state to restrain a public nuisance,—the erection of a bridge alleged to obstruct navigation,—and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges, but it was accepted by all as fundamental. The Chief Justice observed that if the bridge was a nuisance, it was an offense against the sovereignty whose laws had been violated, and he asked what sovereignty that was. 13 How. 561, 14 L. ed. 267; Daniel, J., 13 How. 599, 14 L. ed. 283. See also *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552. It could not be Virginia, because that state had purported to authorize it by statute. The Chief Justice found no prohibition by the United States. 13 How. 580, 14 L. ed. 275. No third source of law was suggested by anyone. The majority accepted the Chief Justice's postulate, and found an answer in what Congress had done.

It hardly was disputed that Congress [519] could deal with the *matter under its power to regulate commerce. The majority observed that although Congress had not declared in terms that a state should not obstruct the navigation of the Ohio by bridges, yet it had regulated navigation upon that river in various ways, and had sanctioned the compact between Virginia and Kentucky when Kentucky was let into the Union. By that compact the use and navigation of the Ohio, so far as the territory of either state lay thereon, was to be free and common to the citizens of the United States. The compact, by the sanction of Congress, had become a law of the Union. A state law which violated it was unconstitutional. Obstructing the navigation of the river was said to violate it, and it was added that more was not necessary to give a civil remedy for an injury done by the obstruction. 13 How. 565, 566, 14 L. ed. 268, 269. At a later stage of the case, after Congress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that "the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law." 18 How. 421, 429, 15 L. ed. 435, 436.

In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that state's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party. Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line; and, in doing so, must be governed by rules explicitly *or implicitly recognized. *Rhode* [520] *Island* v. *Massachusetts*, 12 Pet. 657, 737, 9 L. ed. 1233, 1265. It must follow and apply those rules, even if legislation of one or both of the states seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between states the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States.

The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new. Take the question of prescription in a case like the present. The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. See 1 Oppenheim, International Law, 293, §§ 242, 243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long (*Davis* v. *Mills*, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692), yet the fixing of a definite time usually belongs to the legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the lawmaking power.

It is decided that a case such as is made by the bill may be a ground for relief. The

purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a state upon a navigable river like the Danube, which
[521] would *amount to a *casus belli* for a state lower down, unless removed. If such a nuisance were created by a state upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the circuit court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between states.

The nearest analogy would be found in those cases in which an easement has been declared in favor of land in one state over land in another. But there the right is recognized on the assumption of a concurrence between the two states, the one, so to speak, offering the right, the other permitting it to be accepted. *Mannville Co.* v. *Worcester*, 138 Mass. 89, 52 Am. Rep. 261. But when the state itself is concerned, and by its legislation expressly repudiates the right set up, an entirely different question is presented.

Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. See *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

As to the principle to be laid down, the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into
[522] the river is *general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals, some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642. See *Boston Ferrule Co.* v. *Hills*, 159 Mass. 147, 150, 20 L. R. A. 844, 34 N. E. 85. Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it, that courts should not be curious to apportion the blame.

We have studied the plaintiff's statement of the facts in detail, and have perused the evidence, but it is unnecessary for the purposes of decision to do more than give the general result in a very simple way. At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretense that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses,—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan, which is mixed with the sewage at the start, has improved the Illinois river in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without evil results. The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations *have been dis- [523]
proved; and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are

produced are controverted. The plaintiff obviously must be cautious upon this point, for, if this suit should succeed, many others would follow, and it not improbably would find itself a defendant to a bill by one or more of the states lower down upon the Mississippi. The distance which the sewage has to travel (357 miles) is not open to debate, but the time of transit, to be inferred from experiments with floats, is estimated as varying from eight to eighteen and a half days, with forty-eight hours more from intake to distribution, and when corrected by observations of bacteria is greatly prolonged by the defendants. The experiments of the defendants' experts lead them to the opinion that a typhoid bacillus could not survive the journey, while those on the other side maintain that it might live and keep its power for twenty-five days or more, and arrive at St. Louis. Upon the question at issue, whether the new discharge from Chicago hurts St. Louis, there is a categorical contradiction between the experts on the two sides.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places. We give them mainly from the plaintiff's brief: 1890, 140; 1891, 165; 1892, 441; 1893, 215; 1894, 171; 1895, 106; 1896, 106; 1897, 125; 1898, 95; 1899, 131; 1900, 154; 1901, 181; 1902, 216; 1903, 281. It is argued for the defendant that
[524] the numbers *for the later years have been enlarged by carrying over cases which in earlier years would have been put into a miscellaneous column (intermittent, remittent, typho-malaria, etc., etc.), but we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected. But the plaintiff relies upon proof that such bacilli are discharged into the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the *bacillus coli communis*, which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference. To prove that the typhoid bacillus could make the journey an experiment was tried with the *bacillus prodigiosus*, which seems to have been unknown, or nearly unknown, in these waters. After preliminary trials, in which these bacilli emptied into the Mississippi near the mouth of the Illinois were found near the St. Louis intake and in St. Louis in times varying from three days to a month, one hundred and seven barrels of the same, said to contain one thousand million bacilli to the cubic centimeter, were put into the drainage canal near the starting point on November 6, and on December 4 an example was found at the St. Louis intake tower. Four others were found on the three following days, two at the tower and two at the mouth of the Illinois. As this bacillus is asserted to have about the same length of life in sunlight in living waters as the *bacillus typhosus*, although it is a little more hardy, the experiment is thought to prove one element of the plaintiff's case, although *the very [525] small number found in many samples of water is thought by the other side to indicate that practically no typhoid germs would get through. It seems to be conceded that the purification of the Illinois by the large dilution from Lake Michigan (nine parts or more in ten) would increase the danger, as it now generally is believed that the bacteria of decay, the saprophytes, which flourish in stagnant pools, destroy the pathogenic germs. Of course, the addition of so much water to the Illinois also increases its speed.

On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through, they would be scattered and enfeebled and would do no harm. The defendant also sets against the experiment with the *bacillus prodigiosus* a no less striking experiment with typhoid germs suspended in the Illinois river in permeable sacs. According to this the duration of the life of these germs has been much exaggerated, and in that water would not be more than three or four days. It is suggested, by way of criticism that the germs may not have been of normal strength, that the conditions were less favorable than if they had floated down in a comparatively unchanging body of water,

and that the germs may have escaped; but the experiment raises at least a serious doubt. Further, it hardly is denied that there is no parallelism in detail between the increase and decrease of typhoid fever in Chicago and St. Louis. The defendant's experts maintain that the water of the Missouri is worse than that of the Illinois, while it contributes a much larger portion to the intake. The evidence is very strong that it is necessary for St. Louis to take preventive measures, by filtration or other-
[526] wise, against the dangers of the *plaintiff's own creation or from other sources than Illinois. What will protect against one will protect against another." The presence of causes of infection from the plaintiff's action makes the case weaker in principle as well as harder to prove than one in which all came from a single source.

Some stress was laid on the proposition that Chicago is not on the natural watershed of the Mississippi, because of a rise of a few feet between the Desplaines and the Chicago rivers. We perceive no reason for distinction on this ground. The natural features relied upon are of the smallest. And if, under any circumstances, they could affect the case, it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance, not only of its own statutes, but also of the acts of Congress of March 30, 1822 (chap. 14, 3 Stat. at L. 659), and March 2, 1827 (chap. 51, 4 Stat. at L. 234), the validity of which is not disputed. *Wisconsin* v. *Duluth*, 96 U. S. 379, 24 L. ed. 668. Of course these acts do not grant the right to discharge sewage, but the case stands no differently in point of law from a suit because of the discharge from Peoria into the Illinois, or from any other or all the other cities on the banks of that stream.

We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop, of course we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause.

Bill dismissed without prejudice.

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[527] *JOHN STRICKLEY and Ellen Strickley, *Plffs. in Err.*,

v.

HIGHLAND BOY GOLD MINING COMPANY.

(See S. C. Reporter's ed. 527-532.)

Eminent domain—public use.—The condemnation of a right of way across a placer mining claim for the aërial bucket line of a mining corporation cannot be said to be a taking of private property for private use, in defiance of U. S. Const., 14th Amend., if authorized by the construction given by the state courts to the provisions of state legislation for the exercise of the right of eminent domain in behalf of certain uses declared to be public.

[No. 172.]

Argued and submitted January 25, 1906. Decided February 19, 1906.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court of Salt Lake County, in that state, condemning a right of way across a placer mining claim for the aërial bucket line of a mining corporation. *Affirmed.*

See same case below, 28 Utah, 215, 78 Pac. 296.

The facts are stated in the opinion.

Mr. **Arthur Brown** submitted the cause for plaintiffs in error. *Mr Frank Hoffman* was on his brief:

The question as to whether the use to which the person seeking to condemn the land of another puts the land so condemned is public or private is always a question to be determined by the courts.

Bankhead v. *Brown*, 25 Iowa, 540.

The use to which the defendant in error sought to condemn the property of the plaintiffs in error was a private use.

Consolidated Channel Co. v. *Central P. R. Co.* 51 Cal. 269; *People ex rel. Robinson* v. *Pittsburgh R. Co.* 53 Cal. 694; *Sholl* v. *German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; *Nesbitt* v. *Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Bankhead* v. *Brown*, *supra*; *Edgewood R. Co.'s Appeal*, 79 Pa. 257; *Waddell's Appeal*, 84 Pa. 90; *Pittsburg, W. & K. R. Co.* v. *Benwood Iron Works*, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Varner* v. *Martin*, 21 W. Va. 534; *Valley City Salt Co.* v. *Brown*, 7 W. Va. 191; *Coster* v. *Tide Water Co.* 18 N. J. Eq. 54; *Varick* v. *Smith*, 5 Paige, 137, 28 Am. Dec. 417; *Donnelly* v. *Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; 2 Kent, Com. p. 339; Lewis, Em. Dom. § 165, pp. 224, 225, § 167, p. 228; Mills, Em. Dom. 2d ed. §§ 23, 26, 27; Cooley, Const.

NOTE.—*As to what is a public use for which private property may be taken by eminent domain*—see notes to Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 2 L.R.A. 680; Barre R. Co. v. Montpelier & W. River R. Co. 4 L.R.A. 785; and Sweet v. Rechel, 40 L. ed. U. S. 188.

Lim. pp. 651–654; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 22 L. ed. 455; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42.

Mr. **George Sutherland** argued the cause, and, with *Messrs. Waldemar Van Cott* and *E. M. Allison, Jr.*, filed a brief for defendant in error:

The legislative declaration of a public use will be respected by the courts, unless such declaration is clearly without reasonable foundation.

Stockton & V. R. Co. v. *Stockton*, 41 Cal. 168; *Backus* v. *Fort Street Union Depot Co.* 169 U. S. 568, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; *Dayton Gold & S. Min. Co.* v. *Seawell*, 11 Nev. 399; 10 Am. & Eng. Enc. Law, 2d ed. p. 1070; *Tuttle* v. *Moore*, 3 Ind. Terr. 712, 64 S. W. 590; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Clark* v. *Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676; *Yunker* v. *Nichols*, 1 Colo. 551; *Overman Silver Min. Co.* v. *Corcoran*, 15 Nev. 147; *United States* v. *Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

The legislature of Utah adopted the Nevada statute after it had been held constitutional by the supreme court of Nevada.

Overman Silver Min. Co. v. *Corcoran, supra.*

It has been held in Georgia that the construction of an irrigation ditch for the development of mines for the purpose of furnishing more gold for circulation is a public use, and that, too, in a state where little gold is found.

Hand Gold Min. Co. v. *Parker*, 59 Ga. 419.

The Nevada statute has also been held constitutional by the Federal court for the district of Nevada.

Douglass v. *Byrnes*, 59 Fed. 29.

The doctrine of the Nevada and Georgia cases has been approved in Montana.

Butte A. & P. R. Co. v. *Montana Union R. Co.* 16 Mont. 526, 31 L.R.A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; *Ellinghouse* v. *Taylor*, 19 Mont. 462, 48 Pac. 757.

So in Arizona, it has been held that a right of way for an irrigation ditch is a public use.

Oury v. *Goodwin*, 3 Ariz. 255, 26 Pac. 376.

A great number of authorities as to the development of mines being a public use are collated in 10 Am. & Eng. Enc. Law, 2d ed. pp. 1086, 1087.

There are many states in the Union which would undoubtedly hold that an irrigation ditch is not a public use, and they would be entirely correct in so holding; but our own court, as well as other courts in the arid region, would be just as correct in holding, on principle, to the direct contrary, on account of the difference in the public good. The same has been held in Maryland in regard to a railway for the carrying of supplies and coal from a mine.

New Central Coal Co. v. *George's Creek Coal & I. Co.* 37 Md. 538.

In *Chicago & N. W. R. Co.* v. *Morehouse*, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849, it was held that a railway company is exercising a public use in condemning land for a spur track to one establishment.

To the same effect are *Stockdale* v. *Rio Grande Western R. Co.* 28 Utah, 201, 77 Pac. 849, and *Morrison* v. *Thistle Coal Co.* 119 Iowa, 705, 94 N. W. 507.

In *Ahern* v. *Dubuque Lead & Level Min. Co.* 48 Iowa, 140, it was held to be a public use to construct drains and levels for the purpose of draining mineral lands so that they would be available for mining purposes. On principle, there is no difference between this case and the one at bar.

A public use is not determined simply by the question whether a physical use is made by the public; but the question is deeper, and depends upon whether the use subserves the public good or tends to that end.

Olcott v. *Fond du Lac County*, 16 Wall. 688, 694, 695, 21 L. ed. 386, 388; *Gibson* v. *Mason*, 5 Nev. 308; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chesapeake & P. Teleph. Co.* v. *Manning*, 186 U. S. 245, 46 L. ed. 1147, 22 Sup. Ct. Rep. 881; *Ulmer* v. *Lime Rock R. Co.* 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001.

The state courts are in irreconcilable conflict as to what are public uses. For instance, this is well illustrated in the "mills acts." See 1 Lewis, Em. Dom. §§ 180 *et seq.*, and instances there given. The United States Supreme Court has never passed upon the constitutionality of these mills acts.

See *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 20, 28 L. ed. 893, 5 Sup. Ct. Rep. 441.

The court will not hold unconstitutional the Utah statute declaring tramways for certain purposes a public use, unless it is clearly, plainly, and palpably in conflict with the Federal Constitution. Even if there is a doubt, the law will be declared valid.

Fletcher v. *Peck*, 6 Cranch, 128, 3 L. ed. 175; *Munn* v. *Illinois*, 94 U. S. 123, 24 L. ed. 83; *Fairbank* v. *United States*, 181 U. S. 285, 45 L. ed. 863, 21 Sup. Ct. Rep. 648.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding begun by the defend-

ant in error, a mining corporation, to condemn a right of way for an aërial bucket line across a placer mining claim of the plaintiffs in error. The mining corporation owns mines high up in Bingham canyon, in West mountain mining district, Salt Lake county, Utah, and is using the line or way to carry ores, etc., for itself and others from the mines, in suspended buckets, down to the railway station, 2 miles distant, and 1,200 feet below. Before building the way it made diligent inquiry, but could not dis-
[530] cover the owner of the placer claim *in question, Strickley standing by without objecting or making known his rights while the company put up its structure. The trial court found the facts and made an order of condemnation. This order recites that the mining company has paid into court the value of the right of way, as found, and costs, describes the right of way by metes and bounds, and specifies that the same is to be used for the erection of certain towers to support the cables of the line, with a right to drive along the way when necessary for repairs, the mining company to move the towers as often as reasonably required by the owners of the claim for using and working the said claim. The foregoing final order was affirmed by the supreme court of the state. 28 Utah, 215, 78 Pac. 296. The case then was brought here.

The plaintiffs in error set up in their answer to the condemnation proceedings that the right of way demanded is solely for private use, and that the taking of their land for that purpose is contrary to the 14th Amendment of the Constitution of the United States. The mining company, on the other hand, relies upon the statutes of Utah, which provide that "the right of eminent domain may be exercised in behalf of the following public uses: . . . (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines." [Utah, Rev. Stat. 1898, § 3588.] In view of the decision of the state court we assume that the condemnation was authorized by the state laws, subject only to the question whether those laws, as construed, are consistent with the 14th Amendment. Some objections to this view were mentioned, but they are not open. If the statutes are constitutional as construed, we follow the construction of the state court. On the other hand, there is no ground for the suggestion that the claim by the plaintiffs in error of their rights under the 14th Amendment does not appear sufficiently on the record. The suggestion was not pressed.

The single question, then, is the constitutionality of the *Utah statute, and the [531] particular facts of the case are material only as showing the length to which the statute is held to go. There is nothing to add with regard to them, unless it be the finding that the taking of the strip across the placer claim is necessary for the aërial line, and is consistent with the use of all of the claim by the plaintiffs in error for mining, except to the extent of the temporary interference over a limited space by four towers, each about 7½ feet square and removable, as stated above.

The question, thus narrowed, is pretty nearly answered by the recent decision in *Clark* v. *Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th Amendment which prevents a state from requiring such concessions. If the state Constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aërial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff *is a carrier for it- [532] self and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears.

Judgment affirmed.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co., *Appt.*,
v.
EMMA B. DRESSER.

(See S. C. Reporter's ed. 532–536.)

Evidence—in bankruptcy cases—sworn proof of claim.—The sworn proof of a claim against a bankrupt's estate is prima facie evidence of its allegations, although objection is made under the bankrupt act of July 1, 1898 (30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 57, to its allowance.

[No. 180.]

Argued January 26, 1906. Decided February 19, 1906.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed an order of the District Court for the Southern District of New York, allowing a claim against the bankrupt's estate. *Affirmed.*

See same case below, 68 C. C. A. 207, 135 Fed. 495.

The facts are stated in the opinion.

Mr. **George H. Gilman** argued the cause and filed a brief for appellant.

Mr. **Adrian H. Joline** argued the cause, and, with *Messrs. Adrian H. Larkin* and *George E. Hargrave,* filed a brief for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from the allowance of a claim of Emma B. Dresser against the firm of Dresser & Company, bankrupts, the members of the firm being Daniel Le Roy Dresser and Charles E. Reiss. The allegations of the amended proof, so far as necessary to be stated, are that the bankrupts are justly and truly indebted to the deponent in the sum of $88,145, upon the following consideration: Before May, 1896, the deponent lent certain specified shares of stock to the firm of Dresser & Goodrich for the purpose of the firm's borrowing money upon the same, etc., and the firm did so. In May, 1896, the firm was dissolved, Daniel Le Roy Dresser took over its assets and assumed its liabilities, including that to the deponent with her consent, "and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said Daniel Le Roy Dresser, and used by him in his business." In May, 1897, the present bankrupts formed their partnership, taking over the assets and assuming the liabilities of said Dresser. At the request of said Dresser and Reiss, with deponent's knowledge and consent, the liability of Dresser *to the deponent was as- [534] sumed by the firm, "and used by said firm in its business." Evidently some words were omitted at this point, by mistake, and we agree with the court below that the most reasonable view is that it was intended to repeat the phrase quoted above in speaking of the transfer from Dresser & Goodrich to Dresser.

The trustee objected to the allowance of the claim against the assets of the partnership, and put in evidence before the referee, the main fact proved being that Dresser personally signed the notes on which were made the advances for which the stocks were pledged. This was relied on, in connection with the form of the proof of claim before it was amended, to show that the stocks really were lent to Daniel Le Roy Dresser alone. On the other hand, it appeared that some, at least, of the checks for the money lent went to the firm, and all the evidence was reconcilable with the averments of the amended claim. The referee ruled that the verified amended proof of claim was prima facie proof of the indebtedness of Dresser & Company to the claimant, held the evidence introduced insufficient to rebut it, and dismissed the objection. The district judge sustained the action of the referee, and his order was affirmed by the circuit court of appeals. 68 C. C. A. 207, 135 Fed. 495.

It is urged that the claim is bad on its face because it showed at most a promise to answer for the debt of another, required to be in writing by the New York statute of frauds, and no such writing was filed with the proof in accordance with the requirement of the bankruptcy law, § 57*b*. [30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3418.] It is unnecessary to consider whether the objection is open or otherwise sound, because, if it is, which we are far from intimating, the claim clearly imports a novation; that is to say, the giving and accepting of the responsibility of the present firm in place of that of Daniel Le Roy Dresser alone. The only question warranting the appeal is whether the sworn proof of claim is prima facie evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense,—a *burden [535] which does not change, whatever the state of the evidence,—but simply whether the sworn proof is evidence at all.

The circuit court of appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force.

In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that, on general principles, it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

Notwithstanding these forcible considerations, we agree with the circuit court of appeals. The prevailing opinion, not only in the second circuit, but elsewhere, seems to have been that way, *Re Sumner*, 101 Fed. 224; *Re Shaw*, 109 Fed. 780; *Re Cannon*, 133 Fed. 837; *Re Carter*, 138 Fed. 846; *Re Doty*, 5 Am. Bankr. Rep. 58. See also *Re Saunders*, 2 Low. Dec. 444, 446, Fed. Cas. No. 12,371; *Re Felter*, 7 Fed. 904, 906. The alternative would be that the mere interposition of an objection by any party in interest (§ 57*d*) would require the claimant to produce evidence. For if the formal proof is no evidence, a denial of the claim must have that effect. If it does not, then the formal proof is some evidence, even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: "Objections to claims shall be heard and determined as soon," etc. § 57*f*. It is the objection, not the claim, which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word "proof" as used in the act. Convenience undoubtedly is on the side of this view. Bankruptcy proceedings are more summary than ordinary
[536]*suits. Judges of practical experience have pointed out the expense, embarrassments, and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act, and convenient and just administration, all are on the side of treating a sworn proof of claim as some evidence, even when it is denied.

Order affirmed.

SOUTHERN PACIFIC COMPANY, Atchison, Topeka, & Santa Fe Railway Company, Santa Fe Pacific Railroad Company, and Southern California Railway Company, *Appts.*,

v.

INTERSTATE COMMERCE COMMISSION.

(No. 158.)

SOUTHERN CALIFORNIA RAILWAY COMPANY, *Appt.*,

v.

INTERSTATE COMMERCE COMMISSION.

(No. 159.)

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, *Appt.*

v.

INTERSTATE COMMERCE COMMISSION *et al.* (No. 160.)

SANTA FE PACIFIC RAILROAD COMPANY, *Appt.*,

v.

INTERSTATE COMMERCE COMMISSION *et al.* (No. 161.)

SOUTHERN PACIFIC COMPANY, *Appt.*,

v.

INTERSTATE COMMERCE COMMISSION.

(No. 162.)

(See S. C. Reporter's ed. 536–561.)

1. Carriers—Federal regulation—routing by initial carrier.—Nothing in the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154–3165), § 6, requiring joint traffic rates, when agreed upon, to be filed with the Interstate Commerce Commission, and made public when required, and empowering the Commission to prescribe forms of schedules of such rates, forbids the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments *en route* are usually allowed.

2. Carriers — Federal regulation — discrimination—routing by initial carriers.—A discrimination forbidden by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154–3165), § 3, is not made by the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its

own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments *en route*, are usually allowed.

3. **Commerce—enforcement by courts of orders of Interstate Commerce Commission.**—The enforcement of an order of the Interstate Commerce Commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a Federal circuit court if it finds such rule is, for any reason, in violation of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), although such reason may not have been the one relied upon by the Commission itself to invalidate the rule.

4. **Carriers—Federal regulation—pooling—routing by initial carrier.**— The pooling of freights of competing railroads, forbidden by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), § 5, is not accomplished by the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, even though the initial carrier promises fair treatment to the connecting lines, and carries out such promise, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments *en route* are usually allowed.

[Nos. 158, 159, 160, 161, 162.]

Argued January 23, 24, 1906. Decided February 26, 1906.

APPEALS from the Circuit Court of the United States for the Southern District of California to review a decree for the enforcement of an order of the Interstate Commerce Commission requiring carriers to desist from maintaining or enforcing a rule under which initial carriers, as a condition of guaranteeing a through rate, were given the right to designate the route beyond their own terminals. *Reversed* and remanded with instructions to dismiss the bill.

See same case below, 132 Fed. 829.

Statement by Mr. Justice **Peckham:**

These are appeals from orders or decrees of the circuit court of the United States for the southern district of California, in proceedings wherein that court affirmed, and ordered to be enforced, the determination of the Interstate Commerce Commission, relating to the above-named railroad companies, directing them to desist from maintaining or enforcing a rule adopted by them and pertaining to shippers of oranges and other citrus fruits in southern California, whereby those shippers were denied their alleged right of designating the routes for the transportation of their property from California to the Eastern markets, under a tariff of through rates, as mentioned in the orders or decrees.

The proceeding in each case was commenced before the Commission under §§ 13, 14, and 15 of the interstate commerce [538] act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165,) by the filing of a petition with the Commission, on the part of certain corporations of the state of California, called the Consolidated Forwarding Company, and the Southern California Fruit Exchange, engaged in the business of shipping oranges and other citrus fruit from southern California to the Eastern markets. The proceeding was continued in the circuit court under § 16 of the act. The petition charged the railroads with various violations of the interstate commerce act, including specially the agreement for "routing," hereinafter set forth, and asked the Commission to enjoin such companies from any further violation of the act. The companies put in answers to the petition, denying its material averments.

Testimony was then taken before the Commission, and the following, among other facts, were shown:

The through tariff of rates from California to the East, with the right of routing, which had been agreed upon between the companies complained of (hereinafter called the initial carriers) and their Eastern connections regarding the orange and other citrus fruit transportation, was in force January 1, 1900, and these proceedings were commenced February 26, 1900. Before the adoption of the rule for routing, there had been among the Eastern connections of the initial carriers under the through joint tariff rates then existing, the greatest rivalry to obtain the California fruit freight business; and this rivalry led, on the part of the connecting carriers, to a system of rebates from the through tariff rates, which was a clear violation of the commerce act, and was demoralizing in every way to honest business. Indeed, the president of one of complainants before the Commission admitted that his company (the Southern California Fruit Exchange) had in four years received rebates to an amount of over $174,000. The practice had become so general that the shippers came to regard a rebate as part of the legitimate returns from the orange business. Among those who participated in this

system of rebates were what is termed the car line companies, which were incorporated
[539] companies *owning cars in which the fruit was packed, described as ventilator or refrigerator cars, which were peculiarly adapted to the carriage of the fruit, and were hired by the initial carriers because they did not want to own equipment cars which they could keep in service only part of the year, while the car companies could use the cars for other purposes in other parts of the United States when the orange transportation was over. These car companies made arrangements with the connections of the initial carrier east of Chicago and New Orleans, by which a certain bonus, varying from $10 to $40 per car, was given the car line companies, in consideration of the car being routed over the line paying the bonus, a part of the bonus, varying from a quarter to a half, being usually turned over to the shipper by the car company, for the privilege allowed the latter of routing the shipment.

The initial carriers form two systems,—one called the Southern Pacific System, and the other the Santa Fé System. There are numerous points of junction on these lines of the defendants, where connection is made with other carriers, and at their termini in Chicago, Ogden, and New Orleans such connection is made, and through lines are formed over which the citrus fruit is transported to practically all the markets of the United States. The two systems are the only ones which reach the section of country where the orange industry in Southern California exists, and they about equally divide the transportation of the oranges therefrom. The Commission said the evidence was unsatisfactory as a basis for a conclusion whether the initial carriers pooled their citrus fruit traffic or divided the earnings therefrom; and it therefore retained such question for further hearing and investigation.

Prior to January, 1900, the rebates by the Eastern companies, already referred to, had become so great and demoralizing that the initial carriers at length determined to try and crush the whole thing. The connecting carriers were themselves dissatisfied with this state of things, but each felt it necessary in order to compete with the
[540] others. It had been *assumed that the car line companies were not common carriers, and were not within the commerce act, and therefore they were more ready to indulge in the practice of getting rebates whenever they could, and paying part of the amount to the shippers for giving them the right to route the shipment. Prior to the adoption of the through rate tariff with this rule under discussion, the shippers had been permitted by the initial carriers to control the routing of the freight, and also to divert it, *en route*, from the destination point named in the bill. In order to stop the rebating on these joint through rates it was proposed to agree upon a through rate tariff, to be assented to and accepted by the railroads interested in the fruit transportation, or by as many of them as possible, with the rule in question to form part of the agreement. Such a tariff agreement was made between some of the roads (and subsequently assented to and joined in by most of the roads) and filed with the Commission, for the transportation of oranges and other citrus fruit from Southern California at $1.25 per hundred pounds, to practically all points east of the Missouri river. The tariff agreed upon by the companies contains the rule complained of, which is part of such agreement, and by it the initial carriers agreed to guarantee the through rates to the shipper, but only on the following conditions:

"In guaranteeing the through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carrier giving the guaranty. In accordance with this rule, agents will not accept shipping orders or other documents, if routing instructions are shown thereon. Neither will agents accept verbal routing instructions."

Another rule reads:

"Initial carrier will route each car from point of origin to point of destination, and diversions in transit will not be permitted except by consent of initial carrier, who will thereupon designate new routing when diversion necessitates change therein."

Notwithstanding the rule thus published in regard to routing, *the initial carriers [541] generally thereafter permitted the shippers to route the cars containing their fruit as they desired. The right to divert freight from the destination point or route named in the bill of lading, and before the freight reached the billed destination, had been exercised generally by shippers, and had been allowed by the carriers throughout the country, and the practice was regarded of value to the shippers, as it enabled them sometimes to realize higher prices than they otherwise might if the freight were continued to the original destination. This diversion by the shippers also continued to be generally allowed.

The reason for the rule, reserving to the initial carrier this right to route the traffic, is stated to have been because it enabled the initial carriers to secure the discontinuance of the practice of paying rebates. Since the adoption of that rule the rebates which had been paid to shippers and to

owners of car lines were discontinued, and the Commission says there is no evidence that the practice has been resumed. They were discontinued for the obvious reason that the shippers could not control the route, and hence it would be useless for the Eastern railroad company to pay the shippers or the car line companies rebates on freight the Eastern company might not receive, and which the initial carrier alone had the routing of. As soon as the routing was agreed upon and the through tariff rates fixed, the Eastern connections had to do business with the initial carriers instead of the car company or the shipper. The shippers prepay or guarantee freight charges to destination. The initial carrier does not assume liability from damage resulting from negligence of any connecting line.

The Commission (the chairman, Mr. Commissioner Knapp, dissenting) ordered the defendants to cease from exacting from the shippers the right to themselves make the route which the freight should take. The ground taken by the Commission was that such routing by the initial carriers subjected the shippers to undue, unjust, and unreasonable prejudice and disadvantage, and gave to the carrier an undue and un-
[542] reasonable *preference and advantage, and was a violation of the 3d section of the act.

The initial carriers, believing the Commission had erred in its decision, refused to obey the order which it made, and thereupon the Commission, pursuant to the 16th section of the act, filed its bill in the circuit court for the purpose of enforcing its order.

The bill thus filed by the Commission was demurred to by the defendants, and the demurrer was overruled. 123 Fed. 598.

The railroad companies then answered, and the case, after the taking of further evidence, came up for final hearing, when the order of the Commission was affirmed and directed to be enforced (132 Fed. 829), although the circuit court put the affirmance on the ground that the agreement as to routing showed that there was a violation of § 5 of the interstate commerce act, in that such agreement amounted to a contract or combination for the pooling of freights. The court passed upon no other question raised in the case. A very full statement of facts is contained in the report in 132 Fed. *supra*.

A motion was made for a supersedeas pending the hearing of this appeal, which, for the reasons stated in the opinion of the circuit court, was denied. 137 Fed. 606.

Mr. **Maxwell Evarts** argued the cause, and, with *Mr. R. S. Lovett*, filed a brief for appellant, the Southern Pacific Company:

The court is not to decide whether the appellants have violated an order which the Commission might have lawfully made, but whether they have violated one which was lawfully made.

Interstate Commerce Commisson v. *Delaware, L. & W. R. Co.* 5 Inters. Com. Rep. 144, 64 Fed. 723; *Detroit, G. H. & M. R. Co.* v. *Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 73 Fed. 409; *Farmers' Loan & T. Co.* v. *Northern P. R. Co.* 83 Fed. 249.

At common law the appellants could route through freight beyond their own terminals, and they have not been deprived of such right by the interstate commerce act.

Atchison, T. & S. F. R. Co. v. *Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Louisville & N. R. Co.* v. *West Coast Naval Stores Co.* 198 U. S. 483, 497, 49 L. ed. 1135, 1140, 25 Sup. Ct. Rep. 745; *Post* v. *Southern R. Co.* 103 Tenn. 184, 55 L.R.A. 481, 52 S. W. 301.

The joint tariff is a matter entirely of private arrangement between the carriers, not governed in any way by the act.

Chicago & N. W. R. Co. v. *Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; *Little Rock & M. R. Co.* v. *St. Louis S. W. R. Co.* 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567.

Before the carrier can be deprived of its right to route freight beyond its own terminal, which it has at common law, it must so appear by the clear and specific terms of the act.

Little Rock & M. R. Co. v. *St. Louis S. W. R. Co. supra.*

There is nothing in the act which gives the Commission the power to change the tariff as filed, and say what sort of a joint tariff should be made.

Central Stock Yards Co. v. *Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, Affirmed in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.* 73 Fed. 438; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37.

When two carriers unite in a joint tariff, the requirement is only that such joint tariff shall be filed with the Commission, and nothing but the kind and extent of

publication thereof is left to the discretion of the Commission.

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 504, 42 L. ed. 243, 254, 17 Sup. Ct. Rep. 896.

Mr. **Robert Dunlap** also argued the cause, and, with *Messrs. Thomas J. Norton* and *Gardiner Lathrop*, filed a brief for appellants, the Atchison, Topeka, & Santa Fe Railway Company, Santa Fe Pacific Railroad Company, and Southern California Railway Company:

If the Commission have misconstrued or misapplied the provisions of this law, their order is invalid.

Interstate Commerce Commission v. *Lehigh Valley R. Co.* 74 Fed. 784; *Detroit, G. H. & M. R. Co.* v. *Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.* 5 Inters. Com. Rep. 146, 64 Fed. 723; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

The facts found by the Commission were insufficient to warrant its conclusions and orders, and it is therefore evident that the Commission erred in applying the law to the case before them.

Louisville & N. R. Co. v. *Behlmer*, 175 U. S. 674–676, 44 L. ed. 319–320, 20 Sup. Ct. Rep. 209.

The Commission erred in holding that the routing provision in question, made on condition or in consideration of the making the joint tariff rate, subjected the shippers to undue prejudice, and gave initial carriers an undue advantage.

Ilwaco R. & Nav. Co. v. *Oregon Short Line & U. N. R. Co.* 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673; *Little Rock & M. R. Co.* v. *East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. 771; *Mannheim Ins. Co.* v. *Erie & W. Transp. Co.* 72 Minn. 357, 75 N. W. 602.

The supposed right of the shipper to route is neither recognized nor protected by any provision of the interstate commerce act. It is purely a matter of agreement.

Hastings v. *Pepper*. 11 Pick. 43; *Snow* v. *Indiana, B. & W. R. Co.* 109 Ind. 422, 9 N. E. 702; *Chicago, I. & L. R. Co.* v. *Woodward* (Ind.) 72 N. E. 558; *White* v. *Ashton*, 51 N. Y. 280; *Hinckley* v. *New York C. & H. R. R. Co.* 56 N. Y. 429; *Indianapolis & C. R. Co.* v. *Remmy*, 13 Ind. 518; *Patten* v. *Union P. R. Co.* 29 Fed. 591; *Post* v. *Southern R. Co.* 103 Tenn. 220, 55 L.R.A. 481, 52 S. W. 301; *Lowe* v. *Seaboard Air Line R. Co.* 63 S. C. 248, 90 Am. St. Rep. 678, 41 S. E. 297.

As the assertion of the right to route by the initial carrier contrary to the wishes of the shipper is not "something done or omitted to be done in violation of the provisions" of the interstate commerce act, or any law cognizable by the Commission, the Commission had no authority to make the order in question, since its power and jurisdiction is confined to investigations concerning something done or omitted to be done in violation of the provisions of that law.

Wannan v. *Scottish C. R. Co.* 1 Nev. & MacN. (Railway & Canal Traffic Cases), 237; *Bennett* v. *Manchester, S. & L. R. Co.* 1 Railway & Canal Traffic Cases, 288, 6 C. B. N. S. 707.

Agreements between connecting carriers concerning the making of joint rates and conditions applicable thereto are purely matters of voluntary agreement between such carriers.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 629; 4 Elliott, Railroads, § 1685; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 400, 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *Oregon Short Line & U. N. R. Co.* v. *Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465, Affirmed in 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; *St. Louis Drayage Co.* v. *Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.* 73 Fed. 438; *Gulf, C. & S. F. R. Co.* v. *Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Louisville & N. R. Co.* v. *West Coast Naval Stores Co.* 198 U. S. 497, 498, 49 L. ed. 1140, 1141, 25 Sup. Ct. Rep. 745; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 559.

Beyond the requirement that such agreements or tariffs shall be filed with the Commission, and the tariffs may be required to be published, as the Commission may determine, they are not subject to any regulation or control by the Commission; nor are they otherwise affected by any provision of the interstate commerce act. No provision in that law forbids or makes unlawful the routing provision which was imposed by the initial carriers as a condition of their making or entering into the joint rate in question.

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 504–506, 42 L. ed. 254–256, 17 Sup. Ct. Rep. 896; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commisison*, 162 U. S. 197, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Nicholson* v. *Great*

Western R. Co. 7 C. B. N. S. 755; 1 Nev. & MacM. 149; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 21 C. C. A. 51, 5 Inters. Com. Rep. 685, 41 U. S. App. 453, 74 Fed. 723; *Interstate Commerce Commission* v. *Western & A. R. Co.* 35 C. C. A. 217, 93 Fed. 91; *Interstate Commerce Commission* v. *Western & A. R. Co.* 4 Inters. Com. Rep. 120, 88 Fed. 196.

Neither the Commission nor the court could make a different agreement or contract for these carriers than the one made by such carriers, and the attempt of the Commission to keep in force the joint rate, and strike out the condition or consideration therefor, would be equivalent to making a new agreement for the parties which they did not desire to make.

Little Rock & M. R. Co. v. *St. Louis S. W. R. Co.* 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 779; *Southern P. Co.* v. *Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 779; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co. supra; Pullman's Palace Car Co.* v. *Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 682, 683, 28 L. ed. 297, 14 Sup. Ct. Rep. 185; *Express Cases*, 117 U. S. 1, 29, 29 L. ed. 791, 803, 6 Sup. Ct. Rep. 542, 628.

Any restriction upon the supposed right of the shipper to divert his shipment while in transit would not be in violation of the interstate commerce law. The privilege of diverting this traffic, as practised by the shippers thereof, was merely a concession granted by the carriers, to which the shippers were not entitled as a matter of right.

Pinnix v. *Charlotte & S. C. R. Co.* 66 N. C. 34; *Ellis* v. *Willard*, 9 N. Y. 529; *Violett* v. *Settinius*, 5 Cranch, C. C. 559, Fed. Cas. No. 16,953; *Braithwaite* v. *Aiken*, 1 N. D. 455, 48 N. W. 354; Hutchinson, Carr. 2d ed. § 444*a*.

The initial carriers should have the right to route under the joint tariffs or joint through rates. The condition in question was lawful and valid and facilitated transportation.

Post v. *Southern R. Co.* 103 Tenn. 220, 55 L.R.A. 481, 52 S. W. 301.

Section 5 of the interstate commerce act does not prohibit a mere division of traffic between connecting lines, even if competitive. It only concerns agreements for a division of receipts or earnings, which are to be combined or pooled and afterwards distributed upon an agreed proportion or ratio.

United States v. *Trans-Missouri Freight Asso.* 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 65.

The word "freights" in § 5 has a meaning akin to "earnings" as it is used in the same connection.

4 Words & Phrases Judicially Defined, pp. 2973-2976; 3 Kent, Com. 12th ed. p. 219; *The Main* v. *Williams*, 152 U. S. 129, 38 L. ed. 383, 14 Sup. Ct. Rep. 486; *Giles* v. *The Cynthia*, 1 Pet. Adm. 203, Fed. Cas. No. 5,424; *Poland* v. *The Spartan*, 1 Ware, 130, Fed. Cas. No. 11,246; *Lord* v. *Neptune Ins. Co.* 10 Gray, 112; *Schenley's Appeal*, 70 Pa. 101; *Hadley* v. *Perks*, L. R. 1 Q. B. 455; Lewis's Sutherland, Stat. Constr. §§ 414-416; *Holman's Appeal*, 106 Pa. 502; *Newport News & M. Valley Co.* v. *United States*, 9 C. C. A. 579, 22 U. S. App. 145, 61 Fed. 488.

To justify a finding of undue preference either as between shippers or traffic it must be shown that they come in competition with each other so that injury results to the one by reason of the preference given the other.

Interstate Commerce Commission v. *Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37; *United States* v. *Chicago & N. W. R. Co.* 62 C. C. A. 465, 127 Fed. 785; *Hozier* v. *Caledonian R. Co.* 1 Nev. & MacN. 27; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 282-284, 36 L. ed. 705, 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Nicholson* v. *Great Western R. Co.* 1 Nev. & MacN. 150; Lees, Lancashire, R. Co. 1 Nev. & MacN. 352; *Nicholson* v. *Great Western R. Co.* 1 Nev. & MacN. 121; *Phipps* v. *London & N. W. R. Co.* [1892] 2 Q. B. 236.

As the initial carrier, by making a joint rate which, under the law, it could not be compelled to make, affords the shipper a concession, it has the right to stipulate for the consideration or condition upon which such joint rate shall be offered; and in imposing this condition it does not give itself an unjust advantage or subject the shippers of this traffic to an undue disadvantage. It is identical with a case in which the carrier affords to the shipper rates for carriage at "owner's risk" much less than rates applicable to carriage at "carrier's risk."

Mannheim Ins. Co. v. *Erie & W. Transp. Co.* 72 Minn. 357, 75 N. W. 602; *Post* v. *Southern R. Co. supra.*

The joint through rate is applicable where the carrier exercises the right to route. The sum of the locals is the through rate applicable where the shipper exercises the right to route.

Didcot R. Co. v. *Great Western R. Co.* 10 Railway & Canal Traffic Cases, 5.

In this proceeding the Federal courts have no power or authority to make another

or different order than that made by the Commission, or to modify the one made.

Interstate Commerce Commission v. *Louisville & N. R. Co.* 73 Fed. 409; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.* 5 Inters. Com. Rep. 146, 64 Fed. 723; *Detroit, G. H. & M. R. Co.* v. *Interstate Commerce Commission,* 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *Farmers' Loan & T. Co.* v. *Northern P. R. Co.* 83 Fed. 249; *Interstate Commerce Commission* v. *Western New York & P. R. Co.* 82 Fed. 192.

Mr. **L. A. Shaver** argued the cause and filed a brief for appellee:

Competition is favored by the laws.

East Tennessee, V. & G. R. Co. v. *Interstate Commerce Commission,* 39 C. C. A. 413, 99 Fed. 61; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 339, 341, 41 L. ed. 1027, 1028, 17 Sup. Ct. Rep. 540.

Defendants concede to the shipper the right to select the route on condition of his paying a higher rate (the sum of the locals) for the privilege.

The exaction of the sum of the locals as a through rate results in an unreasonable or excessive rate.

King v. *New York, N. H. & H. R. Co.* 3 Inters. Com. Rep. 272; *Augusta Southern R. Co.* v. *Wrightsville & T. R. Co.* 74 Fed. 527; *Minneapolis & St. L. R. Co.* v. *Minnesota,* 186 U. S. 262, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900; *Chicago, M. & St. P. R. Co.* v. *Tompkins,* 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Mr. **Joseph H. Call** also argued the cause and filed a brief for appellee:

The rule and practice of defendants reserving absolute control of routing, as found by the Commission, is, as matter of law, in violation of § 6 of the commerce act, providing for joint tariffs over connecting railroads showing "continuous lines of routes," and prohibiting a greater charge than tariff rates for shipments over such lines.

Cincinnati, N. O. & T. P. R. Co. v. *Interstate Commerce Commission,* 162 U. S. 184, 192, 40 L. ed. 935, 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Minneapolis & St. L. R. Co.* v. *Minnesota,* 186 U. S. 263, 264, 46 L. ed. 1156, 22 Sup. Ct. Rep. 900.

The provisions of § 5 of the interstate commerce act and of § 7 of the Sherman antitrust act both relate to the regulation of interstate commerce,—a subject within the plenary power of Congress under the Constitution.

They both prohibit combinations and agreements between individuals or corporations which have for their object the stifling of competition and obstruction of interstate commerce by simultaneous action between competing lines.

Section 5 of the interstate commerce act is expressly leveled against railroad corporations engaged in interstate commerce, while § 7 of the Sherman antitrust act includes all persons, and it has been held to include railways engaged in interstate commerce.

United States v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States* v. *Joint Traffic Asso.* 171 U. S. 505, 578, 43 L. ed. 259, 290, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 248, 44 L. ed. 136, 150, 20 Sup. Ct. Rep. 96; *W. W. Montague & Co.* v. *Lowry,* 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Swift & Co.* v. *United States,* 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 47, 48 L. ed. 860, 870, 24 Sup. Ct. Rep. 563.

These acts, being *in pari materia,* by a settled rule of construction are to be considered together and read as a single act, the latter being amendatory of the first.

Chew Heong v. *United States,* 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Chicago, M. & St. P. R. Co.* v. *United States,* 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; *District of Columbia* v. *Hutton,* 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369.

Whatever the method employed, if the defendant railways—they being different and competing lines—have actually accomplished, or have agreed or combined to accomplish, by the routing rule, a pool of freights or a division of the aggregate or net proceeds of the earnings, they clearly have violated the statute.

Tift v. *Southern R. Co.* 138 Fed. 753.

Statutes intended to prevent fraud and wrong, although containing penal provisions, are to be construed liberally in favor of the public.

Taylor v. *United States,* 3 How. 197, 210, 11 L. ed. 559, 564; *Smythe* v. *Fiske,* 23 Wall. 374, 380, 23 L. ed. 47, 49; *United States* v. *Stowell,* 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244.

Franchises, privileges, and powers claimed under authority of the state or nation are to be construed in favor of the public, and against the grantee, and nothing will be deemed to have been passed or taken against the public upon any implication, and all doubts and ambiguities are to be construed favorably to the government.

Dubuque & P. R. Co. v. *Litchfield,* 23 How. 83, 88, 16 L. ed. 507, 509; *Leavenworth, L. & G. R. Co.* v. *United States,* 92 U. S. 733, 740, 23 L. ed. 634, 637; *Coosaw*

Min. Co. v. *South Carolina*, 144 U. S. 550, 562, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689; *Holyoke Water Power Co.* v. *Lyman*, 15 Wall. 500, 512, 21 L. ed. 133, 137; *Slidell* v. *Grandjean*, 111 U. S. 412, 437, 28 L. ed. 321, 329, 4 Sup. Ct. Rep. 475; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 696, 41 L. ed. 1165, 1168, 17 Sup. Ct. Rep. 718.

Bill of complaint shows discrimination by defendant carriers forbidden by supplementary act of February 19, 1903. This suit is maintainable independently of any report by Commission.

Missouri P. R. Co. v. *United States*, 189 U. S. 274, 284, 47 L. ed. 811, 814, 23 Sup. Ct. Rep. 507.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

Although there are separate proceedings in these various cases, the question arising in all is identical, and the cases will hereafter be spoken of as if there were but one proceeding before the court. The single question presented is, Has the carrier that takes the fruit from the shipper in California the right, under the facts herein, to insist upon the rule permitting such carrier to route the freight at the time it is received from the shipper?

The Commission has decided that the carrier has not the right, and that the rule denies to shippers the use of their transportation facilities, which such shippers are entitled to, and that, in its application by the initial carriers to the fruit traffic, the shippers are subjected to undue, unjust, and unreasonable prejudice and disadvantage, and the carriers are given an undue and unreasonable preference and advantage.

[551] *If this be the necessary effect of the rule, it may be assumed to be a violation of § 3 of the interstate commerce act, and the Commission, therefore, rightly ordered the carriers to desist from observing it.

By § 16 of the act, the circuit court is given authority to enforce "any lawful order or requirement of the Commission." If the order be not a lawful one, the court is without power to enforce it. Whether or not such order was lawful is the matter to be determined.

The Commission does not find that any contract existed between the initial carrier and its Eastern connections to bill the fruit according to certain proportions among the connecting railroads. The Commission said:

"The situation warrants the inference, however, that these two initial carriers or systems, connecting with other carriers at various points, and they, in turn, connecting with numerous other carriers, as shown by the tariff, are able, by acting in concert, and routing as they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and some influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to."

Such statement simply shows that if any Eastern railroad with which an agreement for joint through rates existed should give rebates on the joint through rate tariff, thus carrying freight below the rates agreed upon as the through rate tariff, that road would not get the freight.

We see nothing in the initial carrier endeavoring to maintain the rates agreed upon as a through rate tariff, and thereby preventing the paying of rebates, which in itself is a violation of the act. The act especially prohibits, in the 6th section, any alteration of the rates agreed upon, in favor of any person or persons. There is no finding that there has in fact, as a result of the rule, been any discrimination or unjust action as between the initial carriers and the shippers themselves, and there is no evidence that any was ever practised.

[552] *In the examination of the rule it is well to bear in mind the situation of the companies and the business at the time of its adoption. It is fully set forth in the foregoing statement of facts. The payment of the rebates was a shame, and was in truth unsatisfactory to all the railroads, besides being plainly a violation of the commerce act.

We think there is nothing in the act which clearly prohibits the roads from adopting the rule in question. The decision turns upon the construction of a statute which at least does not in terms prohibit.

In cases such as this a court is bound to consider the bearing of the result of either construction upon the general purposes of the act. In enacting the commerce act this court has stated that the object of Congress was to facilitate and promote commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The importance of the rule in this case, so far as the shipper is concerned, is not so great as is its importance to the railroads in preventing rebates. If the right of routing be looked at alone, without any connection with the claimed right of diverting the freight, the rule itself would be gen-

erally of little importance to the shipper. In all probability the freight gets to its destination when routed by the carrier as early as if routed by the shipper, and in that event the particular route taken is not very important to the latter. The evidence before the circuit court shows that the routing, when done by the carrier, was fairly apportioned among the Eastern connections, having an eye to good service and expedition, and the roads that the routing was done over were the best roads in the country; the roads that have been eliminated were the roundabout roads; there were no roads that were insolvent, so far as known by the witnesses. Now, as the fact appears that the actual routing is generally conceded the shipper, and also his request for a diversion allowed, there is nothing in
[553] the mere *right of routing by the companies, separate from other facts, of which the shipper can properly complain. The Commission says it does not distinctly appear in testimony that a delivery by a particular terminal road has been denied in any particular case, yet the manifest evil results of an arbitrary application of the rule must be considered in determining its legality. If there is no such arbitrary application, we do not agree that the rule itself is to be held illegal because a violation of the act may be committed, while the evidence is that none in fact was committed. It does appear that the mere existence of the right to route on the part of the company has ended the practice of rebating. But the opportunity to obtain rebates on the part of the shipper is surely not a ground for action by the Commission or by the court. Of course, if, in attempting to cut off rebates, there is a violation of the act, the act must be followed, and that means of prohibiting them must he abandoned. Courts may well look with some degree of care before so construing a statute which confessedly does not in terms so provide, as to prohibit such a rule on the ground that it would be a violation of the statute. We are of opinion that the rule is not a violation thereof.

It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right, and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who, between each other, might be regarded as competing roads.

It is also undoubted that the common carrier need not contract to carry beyond its own line, hut may there deliver to the next succeeding carrier, and thus end its responsibility, *and charge its local rate for the [554]
transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Louisville & N. R. Co.* v. *West Coast Naval Stores Co.* 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745. This right has not been held to depend upon whether the original carrier agreed to he liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon; at least, so long as they are reasonable and do not otherwise violate the law. In this case, the initial carrier guarantees the through rate, but only on condition that it has the routing. It was stated by the late Mr. Justice Jackson of this court, when circuit judge, in the case of *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

This statement was approved hy this court in *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184–197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

Having this right to agree on a joint through tariff on terms mutually satisfactory, we cannot find anything in the commerce act which forbids the agreement with such a condition therein as to routing. It is said that the 6th section, properly construed, prohibits such condition. We confess our inability to find anything in that section which does so.

*The fact that the rate, when agreed up- [555]

on, must be filed with the Commission, and made public by the common carriers when directed by the Commission, does not prevent the adoption of an agreement for a through rate tariff with the condition as stated. Nor does the provision granting power to the Commission to prescribe forms of schedules of rates, as provided for in the 6th section, have any such effect. Where there is an agreed through rate tariff, and as part of such agreement, which is joined in by several railroads, the right to route cars is reserved to the initial carrier, we do not think that the shipper, by virtue of the 6th section, has the right to ignore the condition which is part of the agreement under which the through rate is made and is guaranteed.

We cannot see that the rule violates the 3d section of the act. All the facts referred to by the Commission are nothing but statements as to how, under such a rule, there might occur a violation of that section, but we find nothing in the facts stated by the Commission, showing that such violation had occurred. In truth, the companies did not always even enforce the rule; still less did they discriminate against shippers or in favor of carriers. On the contrary, the Commission stated that "while the initial carriers do not always route as requested by the shippers, they generally comply with their request." The mere failure to do so does not, however, prove a violation of the section.

The right to route is also complained of because the rule confined it to the fruit business, and therefore it was, as contended, a discrimination against those engaged in it or against the traffic itself. The transportation of this fruit is a special business; large interests are involved in it, and particular pains are taken to transport it as speedily as possible. With regard to all other freight it has substantially nothing in common. The cases are wholly unlike, and there has been no proof or complaint as to rebates being given in connection with other freight, and the witnesses for the railroad state if there were any evidence or complaint of such rebates, the
[556] same rule as to *routing would be immediately adopted. As has been said, there is no pretense of discrimination under this rule between the shippers of freight themselves. There seems to be unanimous agreement that all shippers are treated alike and are granted the same privileges, and the routing is generally accorded them. It is the power to route, which rests with the initial carrier, that really takes away the motive for a rebate in the manner indicated, and, therefore, the granting of the request of the shipper as to a particular route may be, and is, generally conceded without danger that the rebate business may be again practised.

The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract, the carrier may make such terms as it pleases; at least, so long as they are reasonable and do not otherwise violate the law. We think the routing rule is not unreasonable under the facts herein, and that it does not violate the 3d section of the act.

Because opportunities for the violation of the act may occur by reason of the rule is no ground for holding, as a matter of law, that violations must occur, and that the rule itself is therefore illegal. We are, consequently, unable to concur in the view taken by the Commission that the rule violates the 3d section of the act.

Upon the proceeding before the circuit court, that court did not pass upon the question decided by the Commission, but held that the routing rule agreed to between the initial carrier and the various Eastern companies, and forming a part of the subsequent joint through tariffs which were filed with the Commission, was in itself a contract or combination for the pooling of freights.

The defendants objected that the circuit court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the court was not confined to those grounds, and if it *found [557] the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held the rule to be a violation of one section, the order to desist might be valid if, instead of the section named by the Commission, the court should find that the rule was a violation of another section of the act. All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the circuit court.

That court found that the rule was adopted to uphold their published rates; or, in other words, to maintain the rates on the joint through tariff. Although, under the previous through rate tariff, these rates had been secretly cut by the Eastern connections of the initial carriers, yet, when the routing rule was agreed to as part of the through rate tariff, these re-

bates ceased. Hence, as the court said, the purpose of the rule was undoubtedly to maintain the through rate tariff, and that it was effectual. But the court held, as a result, that this routing provision, being part of the through rate tariff agreed to by the various Eastern roads, made a contract among those roads for the pooling of freights on competing railroads within the meaning of § 5 of the commerce act. It held that it was not necessary, in order to form a pool, in violation of that section, that the contract or agreement should fix the percentages of freight the several railroads were to receive, or that the railroads should know in advance what the percentages should be; that it was sufficient to constitute a pool if the contract or agreement provided for special means or agencies for apportioning freights, which would destroy the rivalry which would otherwise exist between the competing railroads; and an agreement by which the apportionment was left to the will of the initial carrier accomplished that purpose as effectually as though definite percentages were fixed in the contract; that defendant's plan to [558]maintain through rates *through the operation of the routing rule necessarily destroyed competition, and the adoption of the routing rule put the shippers in a position where their patronage could not possibly be competed for by the defendant's Eastern connections.

Thus the mere fact that the initial carrier was granted by this through tariff agreement the right to route the freight was held to result in the formation of a pool, in violation of the 5th section of the act. There was no other agreement proved in the case. It is stated by the Commission that the shipments are forwarded by the initial carrier so as to give certain percentages of the traffic to connecting lines. At the same time the Commission finds that initial carriers generally comply with the requests of the shippers to route the freight as desired. The substance of the report of the Commission is, therefore, that there is a certain percentage of the traffic given the connecting carriers when there is no request for routing given by the shippers. It amounts to the giving of fair treatment to the connecting carriers. It is true the Commission calls this a tonnage pool between the connecting carriers, to which the initial carriers give effect by their routing arrangement, and that its object was not so much to prevent rebates, which was but an incident, as to affect the tonnage division. We are of opinion, however, that the evidence is substantially one way, and that is, that the arrangement for routing was to break up rebating, and that it has been accomplished. The evidence before the circuit court was to the effect that there was no agreement whatever with the eastern connections that any of them should have any particular proportion of the freight, but the Eastern roads entered into the routing agreement because they were satisfied that it would be better that the then present practice of rebating, and they thought that they would get a fair share of the business; or, in other words, would be fairly treated by the initial carriers, who gave them to understand that they would be so treated. The tonnage pool was, as the witnesses said, a myth; and it was testified to that there was not one of the Eastern *companies that [559]knew what percentage of the whole business that company secured. They simply knew that the through rates were maintained under the operation of the routing agreement and that rebating ceased; and they were satisfied with the manner of their treatment by the initial carrier.

The circuit court, in order to arrive at its result, necessarily treated the connecting carriers as rival and competing transportation lines for this freight, and assumed that between these lines there would exist, but for the routing agreement, a competition for the fruit transportation which could not be extinguished by any agreement as to routing, as a condition for making through tariff rates; that as competition was destroyed by this rule, it was idle to say that such result was not intended by the defendant, and so it was held that the carrying out of the routing agreement violated the act.

We think these various roads were really not competing roads within the meaning of the 5th section of the commerce act, when the facts are carefully examined. That act recognizes the right of the carriers to agree upon, and provides for the publication of, joint through tariff rates between continuous roads, on such terms as the roads may choose to make, provided, of course, the rates are reasonable, and no discrimination or other violation of the act is practised. The initial carrier did not, on its line, reach the Eastern markets, but it reached various connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement for joint through rates with all or any one of these connecting companies, though such companies were competing ones among themselves. And the agreements could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provision of the act.

Prior to the adoption of the routing rule

these connecting railroads were already acting under a through rate tariff which continued up to the time when the agreement for the routing was adopted. When [560]so acting it was no longer possible to *compete with each other as to rates (and it is upon the rebates as to rates that this whole controversy is founded) provided the companies fulfilled their joint rate tariff agreements. The only way the rate competition could exist under the through rate tariff was by violating the law. This, unfortunately, was habitually done, and during that time the competition consisted in a rivalry between these roads as to which would be the greatest violator of the law by giving the greatest rebates.

In truth, the only way in which these connecting lines could legally become competing railroads for this California fruit trade would be in the absence of all joint tariff rate agreements. The moment they made such agreements, and carried them out, rate competition would cease.

All that would be needed for the total suppression of rate competition among the connecting railroads would be the honest fulfilment of their agreement as to joint through rates. And just here is where they failed and where they violated their agreement and the law by granting rebates; or, in other words, by competing, as to rates, for the freight, in violation of the joint rates. In such case we do not see any violation of the pooling section of the act, by putting in the agreement for joint through rates the provision for routing by the initial carrier. It achieved its purpose and stopped rebating, although it thereby also stopped rate competition which, in the presence of the through rate tariff, was already illegal. The railroads are no longer rate-competing roads after the adoption of a through rate tariff by them, and they have no right to privately reduce their rates.

Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the 5th section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

We must remember the general purpose [561]of the act, which is, *as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight, and the honest performance of duty, with no improper or unjust preference or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable.

We think that the agreement in question, upon its face, does not violate any provision of the commerce act, and there is no evidence in the case which shows that in fact there has been any such violation.

The decree of the Circuit Court is reversed and the case remanded with instructions to dismiss the bill.

Reversed, etc.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, *Plff. in Err.*,

v.

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* I. O. GRIMWOOD, F. L. O'Brien, and Joseph Eccles, as Commissioners of Drainage District No. One of the Town of Bristol, Kendall County, Illinois.

(See S. C. Reporter's ed. 561–601.)

1. **Error to state court—Federal question—decision on non-Federal ground.**—A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.
2. **Constitutional law — police power.** — The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public

NOTE.—*On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; A. Backus & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 853; and High Bridge Lumber Co. v. United States, 16 C. C. A. 468.

On the drainage of private lands as a public purpose for which the power of eminent domain may be exercised—see note to *Re* Tuthill, 49 L.R.A. 781.

As to what constitutes due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

health, the public morals, or the public safety.

3. **Constitutional law—due process of law—taking private property for public use.**—The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, does not amount to a taking of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution.

4. **Constitutional law—equal protection of the laws.**—The equal protection of the laws guaranteed by the Federal Constitution is not denied to a railway company by requiring it to stand the entire expense of removing and rebuilding its bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, to effect the drainage of low lands.

5. **Constitutional law—due process of law—taking private property for public use.**—The expense of removing the soil attendant upon the widening and deepening of the channel of a creek across a railroad right of way by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, cannot be imposed upon the railway company without denying it the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use.

[No. 157.]

Argued December 14, 1905. Decided March 5, 1906.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the Circuit Court of Kendall County, in that state, awarding mandamus in proceedings presenting the question as to the right to impose upon a railway company the expense attendant upon the removal and rebuilding of a bridge and culvert, made necessary by the widening and deepening of the channel of a creek to subserve the drainage of low lands. *Affirmed*, subject to the qualification that the expense attendant merely upon the removal of the soil cannot be cast upon the company.

See same case below, 212 Ill. 103, 72 N. E. 219.

The facts are stated in the opinion.

Mr. **A. J. Hopkins** argued the cause, and, with *Messrs. Robert Bruce Scott* and *Chester M. Dawes*, filed a brief for plaintiff in error:

A writ of error lies from the United States Supreme Court where the state court orders a writ of mandamus and a Federal question is involved.

Hartman v. *Greenhow*, 102 U. S. 672, 26 L. ed. 271; *McPherson* v. *Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Minneapolis & St. L. R. Co.* v. *Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396.

Even though the state court did not, in its opinion, expressly refer to the Federal Constitution, if the judgment of affirmance necessarily denied Federal rights specially set up by defendant, a writ of error will lie from the United States Supreme Court.

Roby v. *Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

The Supreme Court of the United States has jurisdiction in error over a judgment of the supreme court of a state when it necessarily involves the decision of the question—raised in that appellate court for the first time, and not noticed in its opinion—whether a statute of the state conflicts with the Constitution of the United States.

Arrowsmith v. *Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 579, 28 L. ed. 1084, 1086, 5 Sup. Ct. Rep. 681; *McCullough* v. *Virginia*, 172 U. S. 102, 116, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134; *Chapman* v. *Goodnow* (*Chapman* v. *Crane*) 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; *Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 68, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97.

Even where this court is left in doubt by the briefs whether the statute, as construed by the state supreme court, was objected to, or only its application under the facts of the case, still, if the statute was directly attacked in the answer, a motion to dismiss the writ of error for want of jurisdiction will be denied, and the court will consider whether the grounds of objection to the statute are substantial and sufficient.

Minneapolis & St. L. R. Co. v. *Minnesota*, 193 U. S. 53, 61, 48 L. ed. 614, 617, 24 Sup. Ct. Rep. 396.

A Federal question is involved if the effect of the state decision is to construe an act alleged to violate the Federal Constitution, although the state court does not mention the statute.

Houston & T. C. R. Co. v. *Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

There can be no doubt that the record fairly presented a Federal question for review.

Detroit, Ft. W. & B. I. R. Co. v. *Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

A railroad corporation is a person within the meaning of the 14th Amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Smyth v. *Ames*, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 690, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565.

Recognizing the difficulty in defining with exactness the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property or right of property shall be taken for the benefit of another or for the benefit of the state without compensation.

Holden v. *Hardy*, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

Since the adoption of the 14th Amendment, compensation for private property taken for public uses constitutes an essential element in "due process of law," and without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, violates the provisions of the Federal Constitution.

Scott v. *Toledo*, 1 L.R.A. 688, 36 Fed. 385.

Corporations existing for drainage purposes are public corporations, and, where property is sought to be taken for the purpose of a ditch, it is for a public use, and compensation must be made before property of an individual can be taken for public use.

Payson v. *People*, 175 Ill. 276, 51 N. E. 588.

The farm drainage act contemplates payment of full damage done, and, if it did not it would be unconstitutional, as a taking of private property for the public use without compensation.

Chronic v. *Pugh*, 136 Ill. 539, 27 N. E. 415.

The same rules for ascertaining damages which govern proceedings for the condemning of private property for public use apply to cases arising under the drainage statute.

Ginn v. *Moultrie Drainage District*, 188 Ill. 305, 58 N. E. 988.

Quasi public corporations are entitled to claim the protection of the Constitution for their property rights.

Monongahela Nav. Co. v. *United States*, 148 U. S. 313, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Western U. Teleg. Co.* v. *Pennsylvania R. Co.* 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133.

Where, long after the construction of a railroad, a street was extended so as to cross the same, and the city passed an ordinance requiring the railway company to make a safe and proper crossing by grading the approaches of the street at the crossing, it was held that the company was not liable for this new burden any further than might have been required of an individual; and that, as the whole burden was sought to be placed upon the company, without regard to benefits, the ordinance was in violation of the Constitution, and could not create any liability upon the company, and that the legislature itself could not impose such burden without making compensation.

Illinois C. R. Co. v. *Bloomington*, 76 Ill. 447. See also *Erie* v. *Erie Canal Co.* 59 Pa. 174; *Chicago & N. W. R. Co.* v. *Cicero*, 154 Ill. 656, 39 N. E. 574; *Old Colony & F. River R. Co.* v. *Plymouth County*, 14 Gray, 155.

In *Chicago & G. T. R. Co.* v. *Chappell*, 124 Mich. 72, 82 N. W. 800, it was held that a statute of the state of Michigan similar to the one before the court in the case at bar, requiring a railroad company to make and maintain a suitable culvert through its right of way for a drainage ditch, was unconstitutional.

A statute cannot deprive a railroad of compensation for outlays in building approaches and for fences and cattle guards made necessary by the laying out of highways across its tracks (*Chicago & G. T. R. Co.* v. *Hough*, 61 Mich. 507, 28 N. W. 532), nor compel the railroad company to build that part of a highway which would cross its right of way (*People* v. *Lake Shore & M. S. R. Co.* 52 Mich. 277, 17 N. W. 841).

And the damage done to a railroad by having a boulevard cross it must necessarily include all the additional expense entailed by such crossing, which, in a city, may involve the expense of erecting gates.

Parks & Boulevards v. *Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447; *Grand Rapids* v. *Grand Rapids & I. R. Co.* 58 Mich. 648, 26 N. W. 159; *Massachusetts C. R. Co.* v. *Boston, C. & F. R. Co.* 121 Mass. 124; *Perley* v. *Chandler*, 6 Mass. 453, 4 Am. Dec. 159.

The location and construction of a drainage ditch across the right of way of a railroad company is an appropriation of the company's property which entitles it to compensation for the value of the interest so taken; and when, in the construction of such a ditch, it becomes necessary to make an excavation under the tracks of the railroad, and for the company to incur expense in supporting the tracks or otherwise while the ditch is being constructed, such expense should be taken into account in estimating the damages of the company.

Lake Erie & W. R. Co. v. *Hancock County*, 63 Ohio St. 23, 57 N. E. 1009; *Re Tuthill*, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303.

Mandamus will not lie to compel the owner of a bridge across a water course to remove the same, so that the stream may be enlarged for drainage purposes.

State ex rel. Fadley v. *Henry County*, 157 Ind. 96, 60 N. E. 939.

The statute in question was passed after the railroad was constructed and its rights had become vested, and to enforce such statute would be to impair the obligation of a contract, and thereby to violate the Federal Constitution.

Cooley, Const. Lim. p. 721; *Bailey* v. *Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Washington Bridge Co.* v. *State*, 18 Conn. 53.

The doctrine of dominant and servient estates does not apply in this case. Petitioners do not seek to use the water course in its natural state, but seek to compel the railway company, at its own expense, to widen, deepen, and enlarge the channel, and by so doing to take and damage the bridge lawfully erected over said water course, and also the land adjacent thereto.

Dayton v. *Drainage Comrs.* 128 Ill. 271, 21 N. E. 198; *Groff* v. *Ankenbrandt*, 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; *Union Drainage District* v. *O'Reilly*, 132 Ill. 631, 24 N. E. 426; *Noonan* v. *Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *McCormick* v. *Horan*, 81 N. Y. 86, 37 Am. Rep. 479; Gould, Waters, 3d ed. p. 52; 2 Farnham, Waters, pp. 969, 1052; 24 Am. & Eng. Enc. Law, p. 925; *Hicks* v. *Silliman*, 93 Ill. 255; *State ex rel. Fadley* v. *Henry County*, *supra*.

If drainage work could be done under the police power, no assessment of benefits would be necessary. Proceedings by eminent domain and proceedings under the police power are entirely distinct and separate in character,—the one always implying compensation, the other never involving it.

22 Am. & Eng. Enc. Law, 2d ed. p. 916.

To require plaintiff in error so to remove its bridge, and to enlarge, widen, and deepen the natural channel of the creek, at its own expense, is to require it to bear the cost of drainage work, which should be paid for by special assessments upon the property benefited thereby.

Heffner v. *Cass & Morgan Counties*, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201.

If the statute, under the guise of police regulation, is an invasion of the property rights of an individual, it is the duty of the court to declare it void.

Chicago v. *Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707.

Laws enacted in the exercise of the police power must be reasonable; and are always subject to the provisions of both the Federal and state Constitutions, and to judicial scrutiny.

Re Wilshire, 103 Fed. 620.

Drainage for the purpose of private advantage, such as improving the quality of the land or rendering it more productive or fit for cultivation, cannot be justified under the police power.

Kinnie v. *Bare*, 68 Mich. 625, 36 N. W. 672.

Lands cannot be permanently appropriated for drains for the benefit of other lands, under the police power of the state or otherwise, without compensation.

Re Cheesebrough, 78 N. Y. 232.

Mr. **John K. Newhall** argued the cause, and, with *Mr. John M. Raymond*, filed a brief for defendants in error:

Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

Eustis v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Hale* v. *Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Hopkins* v. *McLure*, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; *Fowler* v. *Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112.

Where the state court based its judgment, not on law raising a Federal question, but on an independent ground, this court will not take jurisdiction of the case, even though it may think the decision of the state court an unsound one.

DeSaussure v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

This court has no jurisdiction of a judgment in a state court in which a Federal question was not decided, and in which, in the view which the court below took of the case, such a decision was not necessary.

McManus v. *O'Sullivan*, 91 U. S. 578, 23 L. ed. 390.

It must appear that the decision of a Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Brown v. *Atwell*, 92 U. S. 327, 23 L. ed. 511.

In the state of Illinois it is the common-law duty of a railroad, when it constructs its railway across any stream of water, to restore such stream or water course to its former state or to such a state as not unnecessarily to impair its usefulness, and keep such crossing in repair.

Ligare v. *Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934; *Ohio & M. R. Co.* v. *Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

This duty of restoration and provision for keeping such crossing in repair, and constructing the necessary culverts or sluices for the necessary drainage, is a continuing duty; and if, by the increase of population, establishment of lawful drainage districts, or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is then the duty of the railroad to make such alterations as will meet the present necessities of the public.

Chicago & N. W. R. Co. v. *Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ohio & M. R. Co.* v. *McClelland*, 25 Ill. 140; *Chicago, R. I. & P. R. Co.* v. *Moffitt*, 75 Ill. 524; *People ex rel. Bloomington* v. *Chicago & A. R. Co.* 67 Ill. 118; *Illinois C. R. Co.* v. *Willenborg*, 117 Ill. 203, 57 Am. Rep. 862, 7 N. E. 698; *Cleveland* v. *Augusta*, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584; *State ex rel. Minneapolis* v. *St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; *Atchison, T. & S. F. R. Co.* v. *Henry*, 57 Kan. 154, 45 Pac. 576; *Cooke* v. *Boston & L. R. Corp.* 133 Mass. 185; *Lake Erie & W. R. Co.* v. *Smith*, 61 Fed. 885; *Indiana ex rel. Muncie* v. *Lake Erie & W. R. Co.* 83 Fed. 284.

An obligation to keep up a crossing, imposed as a condition of a right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road, as long as the right is exercised. It is a continuing condition, inseparable from the enjoyment of the franchise.

People ex rel. Bloomington v. *Chicago & A. R. Co. supra.*

Where authority was conferred upon a railroad company to cross any stream of water in the line of its road, coupled with the duty to restore the stream so crossed to its former state, or such state as not unnecessarily to impair its usefulness, it was held to apply to streams not navigable as well as to those that were navigable; as legislative authority was as necessary to cross the one as the other.

Chicago, R. I. & P. R. Co. v. *Moffitt, supra.*

When a franchise is granted to construct ways or streets across a water way, there is no implied right to destroy the water way, but it must be so bridged that its use will not be unnecessarily impaired.

Ligare v. *Chicago, supra.*

Federal courts follow state decisions as to the rights and liabilities respecting surface water, as a matter of local law.

Walker v. *New Mexico & S. P. R. Co.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.

In Illinois it is the common-law duty of plaintiff in error, in constructing a bridge or culvert across a natural water course, to anticipate that upper riparian proprietors may, by artificial drainage, increase the flow in such natural water course, and plaintiff in error must provide against such increased flow by giving enough room for the water to flow freely across the right of way.

Kankakee & S. R. Co. v. *Horan*, 131 Ill. 288, 23 N. E. 621.

A railroad constructing its road over a water course must make suitable bridges, culverts, or other provisions for carrying off the water effectually. The duty imposed by statute upon such company to restore the stream crossed to its former state, or so to restore it as not to impair its usefulness, exists also in the absence of statutory requirements.

Angell, Water Courses, 7th ed. § 465*b*; Pierce, Railroads, p. 203; *Ohio & M. R. Co.* v. *Thillman, supra.*

The statutes in question are valid constitutional enactments, being simply reasonable police regulations, and apply with equal force to corporations whose roads are already built and to those hereafter constructed.

Illinois C. R. Co. v. *Willenborg*, *Chicago & N. W. R. Co.* v. *Chicago*, and *People ex rel. Bloomington* v. *Chicago & A. R. Co. supra.*

Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the railroad corporations, and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to them the equal protection of the laws nor making any unjust discrimination against them, all railroad corporations in the state being treated alike in this respect.

Charlotte, C. & A. R. Co. v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255.

Railroads are public highways, and, in their relations as such to the public, are subject to legislative supervision and the police power of the state.

Chicago & N. W. R. Co. v. *Chicago, supra.*

The adjudication of the highest court of a

state that a law enacted in the exercise of the police power of the state, to protect the public from danger, is valid, will not be reversed by this court, on the ground of an infraction of the Constitution of the United States.

New York & N. E. R. Co. v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

The police power is a power coextensive with self-protection, and is not inaptly termed "the law of overruling necessity."

Chicago & N. W. R. Co. v. *Chicago, supra; Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71.

It is well settled that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation, destined to secure the common welfare.

Chicago & A. R. Co. v. *Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799; *Chicago & N. W. R. Co.* v. *Chicago, supra.*

In granting a charter to a private corporation, the state does not part with its powers to enact proper police regulations, operating upon such corporations the same as upon natural persons; and these bodies accept their charters upon the implied condition that they are to exercise their rights subject to the power of the state to regulate their action as it may individuals.

Ohio & M. R. Co. v. *McClelland*, 25 Ill. 140.

It is in the power of the state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts and of levees to prevent inundations.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Since the amendment to the Illinois Constitution, adopted in 1878, the Illinois court has held that corporations formed for drainage purposes are public corporations.

Heffner v. *Cass & Morgan Counties*, 193, Ill. 439, 58 L.R.A. 353, 62 N. E. 201.

The right of drainage through a natural water course or a natural water way is the natural easement appurtenant to the land of every individual through whose lands such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course. For the drainage of large areas of land, drainage districts were authorized by the Illinois Constitution, to be provided for by proper legislative action. But the constitutional amendment was not solely to authorize drainage along the line of natural water courses; the constitutional provision was an express declaration of the people of the right of one man to drain his land over and across the lands of the other. It was the declaration of the people of the state, that, in a country such as the state of Illinois, the rights of drainage of the lands where such large portions were swamp and overflowed lands, were paramount to the right of the individual who sought to deny such drainage.

Chicago, B. & Q. R. Co. v. *People*, 212 Ill. 103, 72 N. E. 219.

A natural water course is not required to be used only in its natural state, but may be improved either by being deepened or widened by artificial means or by the construction along its course of a channel or drain for the purpose of more effectually carrying off the surface water from the land. The construction of such improvement does not create a substantially new water course, nor amount to an abandonment of the natural water course.

Lambert v. *Alcorn*, 144 Ill. 313, 21 L.R.A. 611, 33 N. E. 53.

The public, represented by defendants in error, have the right to have the surface water, falling or coming naturally upon the district in question, pass off the same through the natural and usual channel or outlet, and over the right of way of plaintiff in error, and have the right to construct ditches or drains for the purpose of carrying such surface water into the natural and usual channel or outlet, even though the water thus carried across the right of way is thereby increased.

Graham v. *Keene*, 143 Ill. 425, 32 N. E. 180; *Kankakee & S. R. Co.* v. *Horan*, 131 Ill. 288, 23 N. E. 621.

This is one of the inevitable results experienced in the drainage and improvement of land, which the development of the country cannot always permit to remain in a state of nature.

Ribordy v. *Murray*, 177 Ill. 134, 52 N. E. 325.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a contest between certain drainage commissioners in Illinois and the Chicago, Burlington, & Quincy Railway Company, as to the validity of a demand made by the former that the latter should remove the bridge and culvert now maintained by it over Rob Roy creek, in Kendall county, Illinois, and, if it continues to maintain a bridge and culvert at the same point, that one be substituted that will meet the requirements of a certain plan of drainage adopted by *those[563]

commissioners. Let us see in what way the dispute arises.

This suit or proceeding is based in part on what is known as the farm drainage act of Illinois, in force July 1st, 1885, entitled, "An Act Provided for Drainage for Agricultural and Sanitary Purposes, etc." Hurd's Rev. Stat. (Ill.) 1901, p. 712. By that act the commissioners of highways in each town, in the several counties under township organization, are constituted drainage commissioners for all drainage districts in their respective towns, with power as a body politic to sue and be sued, contract and be contracted with. § 1. Owners of lands are authorized to "drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, or into some drain on the public highway, with the consent of the commissioners thereto; and when such drainage is wholly upon the owner's land, he shall not be liable in damages therefor to any person or persons or corporation." § 4.

The act also provided: "When the case involves a system of combined drainage in one town, and it is proposed that the cost shall be borne proportionately by the several parties benefited, a petition addressed to the drainage commissioners shall be presented to the town clerk, signed by a majority in number of the adult owners of land lying in a proposed district, and they shall be the owners in the aggregate of more than one third of the lands lying in the proposed district, or by the owners of the major part of the land and who constitute one third or more of the owners of the land in the proposed district, setting forth the boundaries, or a description of the several tracts of land thereof or fractions as usually designated: . . . Said petition shall state that the lands lying within the boundaries of said proposed district require a combined system of drainage or protection from wash or overflow; that the petitioners desire that a drainage district [564] may be *organized, embracing the lands therein mentioned, for the purpose of constructing, repairing, or maintaining a drain or drains, ditch or ditches, embankment or embankments, grade or grades, or all or either, within said district, for agricultural and sanitary purposes, by special assessments upon the property benefited thereby." § 11. Again: "Upon the organization of a drainage district, the commissioners shall go upon the land and determine upon a system of drainage, which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies, as well as the present. . . . The maps and papers showing the final determination as to the system of drainage shall be filed in the clerk's office and be recorded in the drainage record." § 17. Hurd's Rev. Stat. (Ill.) 1901, pp. 713, 714, 717.

Section 40½ has, however, a more special application to the present case. It is in these words: "The commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, *or by the railroad company*, as the case may be: *Provided, however*, notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall have thirty days in which to build or construct the same, such bridges or culverts shall, in all cases, be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorney's fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual landowners." § 40½. Ibid., 723.

*It is contended by the defendants in error [565] that § 56 of what is known as the levee act has a bearing on the case. That section need not, however, be set out, as the supreme court of the state adjudged in this case that a district organized under the farm drainage act was subject only to the provisions of that act, and that the drainage commissioners could not claim any authority under the other act. 212 Ill. 103, 72 N. E. 219. See also *Gauen* v. *Moredock & I. L. Drainage Dist. No. 1*, 131 Ill. 446, 23 N. E. 633; *Drainage Comrs.* v. *Volke*, 163 Ill. 243, 45 N. E. 415; *McCaleb* v. *Coon Run Drainage & Levee District*, 190 Ill. 549, 60 N. E. 898.

The present proceeding was instituted in the circuit court of Kendall county, Illinois, by the defendants in error as drainage commissioners for the Bristol drainage district in that county, against the Chicago, Burlington, & Quincy Railway Company. It is a petition for mandamus.

Besides a general demurrer, the railway

company demurred specially upon the ground that a judgment in favor of the commissioners would take its property for public use without compensation, and therefore without due process of law, as well as deny to it the equal protection of the laws, in violation of the Constitution of the United States. The demurrer was overruled. The defendant having elected to stand by its demurrer, judgment was rendered ordering a writ of mandamus as prayed for in the petition. That judgment was affirmed by the supreme court of Illinois, 212 Ill. 103, 72 N. E. 219, and hence the present writ of error.

As the case was determined upon the demurrer, the facts are to be taken as alleged in the petition. The case, thus presented, is as follows:

The drainage district in question was organized under the farm drainage act above referred to and contains about 2,000 acres of land on both sides of Rob Roy creek, across which are the road and right of way of the railway company. For more than fifty years before the district was established, that creek had been, as it now is, [566] a natural water course. Prior *to June 24th, 1903, the commissioners located a ditch or drain on the line of the creek for the purpose of enlarging its channel or water course, and thereby enabling the lands in the drainage district to be better drained and made more tillable.

The railway company operated and maintained its road across Rob Roy creek, not under any specific grant of authority, but under its general corporate power to construct, operate, and maintain a railroad. It placed a bridge or culvert 12 by 30 feet at the point where the road crosses the creek. In constructing a foundation for the bridge or culvert the company sank or placed in the creek at the point of crossing huge wooden timbers and stones, thereby preventing the deepening and enlarging of the creek by the commissioners, unless they removed such timber and stones; and if that be done the result will be the destruction of the bridge or culvert. The present channel or water way of the creek, under the bridge or culvert; is 3 feet in depth and 12 feet in width. It is insufficient to allow the natural flow of water in the ditch or drain proposed to be constructed by the commissioners. The estimated cost of this ditch or open drain is $20,000. The present bridge across the creek does not exceed $8,000 in value, and a new bridge, conforming to the plan of the Commissioners, will cost not exceeding $13,000.

On the 24th of June, 1903, the drainage commissioners notified the railway company in writing that a bridge was necessary at the point where the company's right of way would be crossed or intersected by the proposed ditch; that it was necessary to enlarge the opening under the present bridge; that the proposed improvement was to be the water way of a combined system of drainage established in the vicinity under the charge and direction of the drainage commissioners of the district; that the main ditch of the drainage, where it will intersect the company's right of way, must be of the width of 23 feet and of the depth of 9½ feet, the bridge constructed to be of the width of 23 feet *in the clear at the sur- [567] face or level of land, and to permit at least sixteen feet in the clear at the bottom of the ditch. The notice stated that the company was required, in pursuance of the statute in such case made and provided, to build and construct such bridge within thirty days from the date of the notice, in default whereof the commissioners would construct the same at the cost and expense of the company.

The company disregarded the notice and failed to build and construct the required bridge or culvert at the point of intersection with the creek, in accordance with the dimensions specified in the notice, and so as to permit such enlargement of the channel under the bridge as would be sufficient for the natural flow of water in the proposed ditch or drain.

The petition averred that a majority of the lands of the drainage district were swamp or slough lands, and in their present condition were not subject to cultivation, but by means of the proposed deepening and enlarging of Rob Roy creek, and as a result of the removal of the timbers and stones in the creek and the enlargement and deepening of the creek, all the lands in the drainage district would be "greatly improved, and made good, tillable land, subject to cultivation;" that the proposed location of the ditch or drain along the creek was the best route or means for drainage of the district, constituting the only natural water course of the drainage district, and affording the only natural outlet or way of drainage of the lands to make them tillable; that if said improvement and enlargement of the ditch was made and the timbers and stones removed from the creek at the point of crossing, all of the lands of the district would be made good, tillable lands for general farming purposes; and that the proposed construction of a ditch or drain along Rob Roy creek, when completed in accordance with said plans, would "not divert or carry waters which by nature of force of gravity would flow or drain into any other natural water course in

said drainage district or the vicinity thereof."

The commissioners allege in their peti-
[568] tion that the neglect, *failure, and refusal of the railway company to remove the timbers and stones it had placed in the creek, and to construct and enlarge the opening under its bridge or culvert, had prevented them from completing the construction of the ditch or drain in accordance with the plans adopted by them; that it was necessary for the use and protection of the proposed drainage work that the opening underneath the bridge or culvert be constructed and enlarged in the manner indicated in order that the lands in the district might be drained in accordance with said plans; which plans "are reasonable for the suitable and proper drainage of said district."

The relief asked was a writ of mandamus commanding the railway company to forthwith enlarge, deepen, and widen the water way over and across the company's right of way across Rob Roy Creek.

1. The first question is one of the authority of this court to review the judgment below. As we have seen, the railway company insisted in the court of original jurisdiction that the statute under which the
[580] drainage commissioners proceeded *could not be applied in this case without taking its property for public use without compensation, and therefore depriving it of property without due process of law, or without denying to it the equal protection of the laws, guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the supreme court of the state the railway company, by its assignments of error, preserved its objection based on constitutional grounds. That court did not, in words, refer to the Constitution of the United States, and its opinion concluded: "Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of § 40½ of the farm drainage act." [212 Ill. 120, 72 N. E. 225.]

The contention is that as the state court based its judgment on the common-law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any *denial* of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575.

Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed *action of the drainage commis-
[581] sioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control. Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right.

For these reasons we are of opinion that this court has jurisdiction to re-examine the final judgment of the state court so far as it involved the Federal right or immunity specially set up by the railway company.

2. The concrete case arising upon the petition and the demurrer is this: A public

corporation, charged by law with the duty of causing a large body of lands, principally swamp and slough lands, to be drained [582] and made capable of cultivation, *has, under direct legislative authority, adopted a reasonable and suitable plan to accomplish that object. That plan requires the enlarging and deepening of the channel of a natural water course running through the district, which is the only natural outlet or way of drainage of the lands of the district,— the best and only practicable mode by which the lands can be made tillable. But that plan cannot be carried out unless the timbers and stones in the creek—placed there by the railway company when it constructed the foundation for its present bridge—are removed. The timber and stones referred to cannot, however, be removed without destroying the foundations of the present bridge and rendering it necessary (if the railway company continues to operate its road, which we assume it intends to do) to construct another bridge with an opening underneath wide enough to permit a channel sufficient to carry off the waters of the creek as increased in volume under the drainage system adopted by the commissioners.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate, and maintain a railroad in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows,—the foundation of the bridge cannot be removed and its use of the bridge disturbed unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

The importance of these questions will justify a reference to some of the adjudged cases; referring first to those recognizing [583] *the distinction between an incidental injury to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the *taking*, within the meaning of the Constitution, of private property for public use.

In *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 642, 25 L. ed. 336, 338, which involved a claim for damages directly resulting from the construction by the city of Chicago of a tunnel under Chicago river, whereby for a very long time the plaintiff was prevented from using its dock and other property for purposes of its business; in *Mugler* v. *Kansas*, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273, which related in part, to the lawful prohibition by the state of the use of private property in a particular way whereby its value was materially diminished, if not practically destroyed; in *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 557, 571, 38 L. ed. 269, 272, 274, 14 Sup. Ct. Rep. 437, which involved the question whether a railroad company could be required, at its sole expense, to remove a grade crossing which it had lawfully established and used, and to establish another crossing at a different place; in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 252, 41 L. ed. 976, 990, 17 Sup. Ct. Rep. 581, in which one of the questions was whether it was a condition of the exercise by the state of its authority to regulate the use of property owned by individuals or corporations, that the owner should be indemnified for the damage or injury resulting from the exercise of such authority for legitimate public purposes; in *Gibson* v. *United States*, 166 U. S. 269, 271, 276, 41 L. ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578, in which the owner of a farm on an island in the Ohio river, at which there was a landing, sought to recover compensation for the injury done to the farm by reason of the construction by the United States of a dike for the purpose of concentrating the waterflow in the main channel of the river; and in *Scranton* v. *Wheeler*, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48, which involved the question whether the United States was required to compensate an owner of land fronting on a public navigable river, when his access from the shore to the navigable part of such river was permanently obstructed by a pier erected in the river under *the authority of Congress for the purpose [584] of improving navigation,—in each of those cases this court recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this class belongs the recent, and, as we think, decisive case of *New Orleans Gaslight Co.* v. *Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep.

471, to be hereafter adverted to in another connection. In this class may also be placed *Mills* v. *United States*, 12 L. R. A. 673, 46 Fed. 738. That was the case of an improvement by the United States of the navigation of Savannah river, which resulted in so raising the water in that river as to make it impossible to prevent the flooding of adjacent rice fields that were ordinarily and naturally drained into the river, and rendering it necessary that expense be incurred in order to provide new drainage from those fields into a back river, where the water levels were suitable. In commenting upon that case, this court said, in *United States* v. *Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349: "Obviously there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense, as alleged, of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained." See also *Bedford* v. *United States*, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238, and *Manigault* v. *Springs*, 199 U. S. 473, *ante*, 274, 26 Sup. Ct. Rep. 127.

We refer also, as having direct application here, to some of the cases, familiar to the profession, that recognize the possession by each state of the power, never surrendered to the government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the Constitution of the state or the Constitution of the United States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 530; *Patterson* v. *Kentucky*, 97 U. [585] S. 501, 503, 24 L. ed. 1115, 1116; *Morgan's L. & T. R. & S. S. Co.* v. *Board of Health*, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Hennington* v. *Georgia*, 163 U. S. 299, 308, 309, 41 L. ed. 166, 170, 171, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628–631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418.

We assume that the drainage statute in question is entirely consistent with the Constitution of Illinois. It is so regarded by the supreme court of the state, and that is all-sufficient in this case. We assume, also, without discussion—as from the decisions of the state court, we may properly assume—that the draining of this large body of lands so as to make them fit for human habitation and cultivation is a public purpose, to accomplish which the state may, by appropriate agencies, exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by "the subjection of such lands to cultivation, they are made to bear their proper proportionate burden to the support of the inhabitants and the commerce of the state. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased." 212 Ill. 103, 119, 72 N. E. 219. It is conceded that this public purpose cannot be certainly and effectively attained except through the plan adopted by the drainage commissioners. Further, the regulations against which the railway company invokes the Constitution have a real, direct, and obvious relation to the public objects sought to be accomplished by them; in no sense are they arbitrary or unreasonable. Indeed it is admitted that the plan of the commissioners, is appropriate and the best that can be devised for draining the lands in question. But the railway company, in effect, if not in words, insists that the rights which it asserts in this case are superior and paramount to any that the public has to use the water course in *question for the [586] purpose of draining the lands in its vicinity, although such water course was in existence, for the benefit of the public, long before the railway company constructed its bridge. This contention cannot, however, be sustained, except upon the theory that the acquisition by the railway company of a right of way through the lands in question, and the construction on that right of way of a bridge across Rob Roy creek at the point in question, carried with it a surrender by the state of its power, by appropriate agencies, to provide for such use of that natural water course as might subsequently become necessary or proper for the public interests. If the state could part with such power, held in trust for the public,—which is by no means admitted,—it has not done so in any statute, either by express words or by necessary implication. When the railway company laid the foundations of its bridge in Rob Roy creek, it did so subject to the rights of the public in the use of that water course, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the state, reasonably require a material change in the methods used in crossing the creek with cars. It may be—and we take it to be true— that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek. Angell, Water Courses, 6th ed. § 465*b*, p. 640.

The supreme court of Illinois said in this case: "The right of drainage through a natural water course or a natural water way is a natural easement, appurtenant to the land of every individual through whose land such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course." Again, in the same case: "Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained; and, in the absence of any constitutional provision in relation to such laws they have been sustained. upon high author-
[587] ity, as the exercise of the *police power." Further: "A natural water course, being a natural easement, is placed upon the same ground, in many respects as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a natural water course or a public highway, such highway or railroad must be so constructed across the existing highway or water way, and so maintained, that said highway or water way, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time. . . . The great weight of authority is, that where there is a natural water way, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or water way, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand." The court said that the implied authority of the company to build its present bridge was coupled with its common law duty "to build its bridge over the natural water course with a view of the future as well as the present contingencies and requirements of such water course, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use." Still further: "The subject [the draining of lands] was deemed of such importance that the people, by § 31 of article 4 of the Constitution of 1870, conferred upon the general assembly plenary powers in making provision for drainage for agricultural and sanitary purposes, and pursuant to that power the general assembly passed the act under which the appellees are proceeding, declaring that the organization should be for agricultural and sanitary purposes. The drainage districts organized as are the appellees, under that law are invested with the right of eminent domain and the power of taxation, upon the theory that they are public utilities and are held to be quasi public corporations. In their organic character *they do not repre-[588] sent merely the individual property owners or themselves, but they represent the state in carrying out its policy, as found in the common law and declared by its Constitution and statutes. It has been so often said that it need only be adverted to here, that corporations such as appellant do not hold their property and exercise their franchises strictly in a private right, but that from the nature of their business and their relation to society they are public corporations in a sense, and are subject to public control and regulation, though with their grant of power to traverse the state with their lines of railroad it cannot be said that their right of private property attaches to every highway and water course over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the state, obstacles to its progress and a menace to its general welfare. . . . Of course, in the exercise of the right of the public interest, as against such corporations, the demand must be reasonable, and must clearly appear to be for the public welfare. In this case it is not questioned that the improvement of Rob Roy creek, as proposed, is necessary for the proper drainage of the lands comprising the drainage district. The petition alleges that such enlargement is necessary and that the same cannot be carried on with the obstructions placed in the bed of said creek by appellant. This the appellant does not deny." 212 Ill. 109–111, 114, 118, 72 N. E. 219.

In *Ohio & M. R. Co.* v. *McClelland*, 25 Ill. 140, 144, it was said—indeed, all the cases hold—that "the power to enact police regulations operates upon all alike;" that that power "is incident to and a part of government itself, and need not be expressly reserved, when it grants rights or property to individuals or corporate bodies, as they take subservient to this right."

A case quite in point is that of *Kankakee & S. R. Co.* v. *Horan*, 131 Ill. 288, 23 N. E. 621. That was an action against a railroad company to recover for damage from the backing of water upon plaintiff's land by reason of an insufficient culvert constructed *by it for the passage of water from a certain[589] natural water course. The contention of the company was that the culvert when constructed was sufficient for the flow of water at the time, and that it was not bound to make such provision as was necessary for an increase of water in the slough subsequently arising from the drainage into it of the

lands along its course. Upon this point the supreme court of Illinois said: "We do not subscribe to this doctrine. The Parker slough was a water course, and it was the legal right of anyone along its line for miles above the railroad, where the water naturally shed toward the slough, to drain into it, and no one below, owning land along the slough, would have any legal remedy against such person so draining water into the slough above him, for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal water course for the drainage of all the land the natural tendency of which was to cast its surplus water, caused by the falling of rain and snow into it; and this whether the flow was increased by artificial means or not. It would seem legitimately to follow that the railroad company, in providing a passageway for the slough, was bound to anticipate and provide for any such legal increase of the water flow. If it did not, it was doing a wrong and legal injury to any one situated like the appellee, who received injury in consequence of a failure on its part to do its duty." See also the following Illinois cases: *People ex rel. Bloomington* v. *Chicago & A. R. Co.* 67 Ill. 118; *Chicago, R. I. & P. R. Co.* v. *Moffitt*, 75 Ill. 524; *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ohio & M. R. Co.* v. *Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Frazer* v. *Chicago*, 186 Ill. 480, 486, 51 L. R. A. 306, 78 Am. St. Rep. 296, 57 N. E. 1055.

Many cases in other courts are to the same general effect. They negative the suggestion of the railway company that the adequacy of its bridge and the opening under it for passing the water of the creek at the time the bridge was constructed determines its obligations to the public at all subsequent periods. In *Cooke* v. *Boston & L. R.* [590] *Corp.* 133 Mass. 185, 188, *it appeared that a railroad company had statutory authority to cross a certain highway with its road. The statute provided that if the railroad crossed any highway it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. And one of the contentions of the company was that the statute limited its duty and obligation to provide for the wants of travelers at the time it exercised the privilege granted to it. The court said: "The legislature intended to provide against any obstruction of the safe and convenient use of the highway, for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway." In *Lake Erie & W. R. Co.* v. *Cluggish*, 143 Ind. 347, 42 N. E. 743, the court said (quoting from *Lake Erie & W. R. Co.* v. *Smith*, 61 Fed. 885): "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public." So, in *Indiana ex rel. Muncie* v. *Lake Erie & W. R. Co.* 83 Fed. 287, which was the case of an overhead crossing lawfully constructed on one of the streets of a city, the court said: "If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway."

The cases to which we have referred are in accord with the declarations of this court in the recent case of *New Orleans Gaslight Co.* v. *Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471. That case would seem to be decisive of the question before us. It there appeared that a gas company had acquired an exclusive right *to [591] supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a drainage commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some places of the mains and pipes laid by the gas company. The contention of that company was that it could not be required, at its own cost, to shift its pipes and mains so as to accommodate the drainage system; that to require it to do so would be a taking of its property for public use without compensation, in violation of the Constitution of the United States. This court said: "The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require, for a necessary public use, that changes in location be made. . . . There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such further regu-

lations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Waterworks Co.* v. *Kansas City*, 28 Fed. 921, in which the opinion was delivered by Mr. Justice Brewer, then circuit judge; *Columbus Gaslight & Coke Co.* v. *Columbus*, 50 Ohio St. 65, 19 L. R. A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; *Jamaica Pond Aqueduct Corp.* v. *Brookline*, 121 Mass. 5; *Re Deering*, 93 N. Y. 361; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 254, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the
[592] streets, as chosen *by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for the purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; *Gilman* v. *Philadelphia*, 3 Wall. 713, 729, 18 L. ed. 96, 100; *Pound* v. *Turck*, 95 U. S. 459, 464, 24 L. ed. 525, 527; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 470, 24 L. ed. 529. And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating *strictly to the public health, [593]
the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Carthage* v. *Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, has always been exercised by municipal corporations, "by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare." The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; *Sweet* v. *Rechel*, 159 U. S. 380, 399, 402, 40 L. ed. 188, 196, 197, 16 Sup. Ct. Rep. 43; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States* v. *Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. If the means employed have no real, substantial relation to public objects which government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there

has been or will be in the particular case, within the true meaning of the Constitution, a "taking" of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then
[594] there is *no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation "is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." Sedgw. Stat. & Const. Law, 434.

It remains to deal with a particular aspect of the case. The opening under the present bridge, we assume from the record, was sufficient, when the bridge was constructed, to pass all the water naturally flowing in the creek from lands in that locality. It is sufficient if the channel of the river be left as it is now. The commissioners demand, however, as they may rightfully do in the public interest, a larger, deeper, and wider channel in order to accommodate the increased volume of water in the creek that will come from the proposed plan of the commissioners. But that is a matter which concerns the public, not the railway company. The duty of the company will end when it removes the obstructions which it has placed in the way of enlarging, deepening, and widening of the channel. It follows, upon principles of justice, that while the expense attendant upon the removal of the present bridge and culvert and the timbers and stones placed by the company in the creek, as well as the expense of the erection of any new bridge which the company may elect to construct in order to conform to the plan of the commissioners, should be borne by the railway company, the expense attendant merely upon the removal of soil in order to enlarge, deepen, and widen the channel must be borne by the district. The expense to be borne by the
[595] district and the railway *company, respectively, can be ascertained by the state court in some appropriate way, and such orders made as will be necessary to facilitate the execution of the plan of the commissioners.

Without further discussion, we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers, and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws.

Leaving it to the state court to give effect to these views by appropriate orders, and subject to the above qualifications, *the decree of the state court is affirmed.*

Mr. Justice **Holmes**, concurring:

I concur in the main with the judgment of the court. I agree that the public authority has a right to widen or deepen a channel if it sees fit, and that any cost that the railroad is put to in rebuilding a bridge the railroad must bear. But the public must pay for the widening or deepening, and I think that it does not matter whether what it has to remove is the original earth or same other substance lawfully put in the place of the original earth. Very likely in this case the distinction is of little importance; but it may be hereafter. I suppose it to be plain, as my brother Brewer says, that, if an expense is thrown upon the railroad unlawfully, its property is taken for public use without due compensation. *Woodward* v. *Central Vermont R. Co.* 180 Mass. 599, 62 N. E. 1051.

*I am authorized to say that my brothers [596] **White** and **McKenna** agree with my view.

Mr. Justice **Brewer**, dissenting:

The question in this case is a narrow one, yet of profound importance, and, involving, as in my judgment it does, a grievous wrong to owners of private property, I am constrained to dissent. Conceding the regularity of the proceedings and the power of the state to drain the lands in the drainage district, and, if necessary therefor, to compel the building of a new and enlarged bridge over Rob Roy creek, I dissent from the conclusion that the state may cast the entire cost of such rebuilding upon the railroad company.

It appears from the petition, which was demurred to, and whose allegations of fact must therefore be taken as true, that the drainage district consists of about 2,000 acres on both sides of Rob Roy creek; that a majority of the lands of said drainage

district are swamp or slough lands, and, under natural conditions, not subject to cultivation, but by drainage will all be greatly improved and made good tillable lands. The railroad company has for forty years maintained a bridge or culvert over Rob Roy creek which has answered and does answer all its purposes and necessities. The cost of the ditches and drains in the drainage district in accordance with the plans adopted by the commissioners is estimated at $20,000. The railroad bridge or culvert across the creek does not exceed in value $8,000, and a new bridge or culvert can be constructed at a cost of not exceeding $13,000. The drainage act provides for an appraisement of the damage done to any tract by the construction of the proposed work, and a judgment in favor of the owner against the commissioners of the district for that amount. It also provides for an assessment of the benefits to the different tracts, upon the basis of which assessments taxes are to be levied to pay for the construction and maintenance of the drainage system. In
[597] other words, any damage done to *any particular tract by the construction of the drainage system is to be paid to the owner of that tract, if a private individual, and the tracts which are benefited are to be charged with the cost in proportion to the amount of benefit received. Section 40½ of the drainage act then provides:

"The commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, *or by the railroad company*, as the case may be: *Provided, however*, notice shall first be given to the road or railroad authorities to build or construct such a bridge or culvert, and they shall have thirty days in which to build or construct the same, such bridges or culverts shall, in all cases, be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorney's fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual landowners."

According to this, if any bridge or culvert on any public highway is needed in order to perfect the drainage system, the cost of it is to be paid out of the public funds; but if a bridge or culvert is required on a railroad, the cost of it must be paid by the railroad company. And this is arbitrary, without any appraisement of benefits or damages.

Now, the property of a railroad company is private property. It cannot be taken for public uses without just compensation. True, it is used by the owners in performing the quasi public work of transportation, but it is not given up to public uses generally. It is not devoted to education or the improvement of farm lands, or, indeed, any other use than that of transportation. *If [598] taken therefrom and devoted to other public uses it is the taking of private property for public uses. That this can be done may be conceded, but only upon just compensation.

When private property is taken for public uses compensation must be paid. That is the mandate of the Federal Constitution and of that of nearly every state in the Union. Independently of such mandate, compensation would be required. In 2 Kent, Com. 12th ed. p. 339, it is said:

"A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law." See also cases cited in the note; especially *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 166, 7 Am. Dec. 526.

In *Sinnickson* v. *Johnson*, 17 N. J. L. 129, 145, 34 Am. Dec. 184, referred to approvingly by this court in *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 178, 20 L. ed. 557, 560; and *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 324, 37 L. ed. 463, 467, 13 Sup. Ct. Rep. 622, 625, it was said:

"This power to take private property reaches back of all constituted provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

If this be true when the taking is for that which is solely a public use, how much more true is it when the taking is largely for the benefit of private individuals, and at best only incidentally for the benefit of the public? Now the sole purpose of this proceeding, as admitted by the demurrer, was the transformation of these swamp and untillable

lands into good tillable lands; in other words, to that extent, increasing the value of the farms in the hands of their private
[599] owners. While the statute *under which these proceedings were had contemplates drainage for agricultural and sanitary purposes, there is nothing in this record to show that any sanitary result was contemplated, and the only object disclosed is the direct beneficial result to the owners of these swamp lands. There is not the slightest intimation that the health, morals, or safety of the community will be promoted, or is intended to be promoted, by the drainage. I quote the exact language of the petition:

"And the petitioners aver that the aforesaid location of the ditch or drain along the said Rob Roy creek was for the purpose of enlarging the channel or water course of the aforesaid Rob Roy creek, and thereby enabling the land in said drainage district to be better drained and render the soil in said district more tillable.

. . . . . .

"And your petitioners aver that a majority of the lands of said drainage district are what is known as swamp or slough land, and under the present condition are not subject to cultivation, but by means of the proposed deepening and enlarging of said Rob Roy creek, as herein described, and as a result of the removal of said timbers and stones in said Rob Roy creek, at the place aforesaid, and of the enlargement of and deepening of said Rob Roy creek, all of the lands in said drainage district will be greatly improved, and made good, tillable land, subject to cultivation."

If it be a principle of natural justice that private property shall not be taken for public purposes without just compensation, is it not equally a principle of natural justice that no man shall be compelled to pay out money for the benefit of the public without any reciprocal compensation? What difference in equity does it make whether a piece of land is taken for public uses or so many dollars for like purposes? *Cary Library* v. *Bliss*, 151 Mass. 364, 378, 379, 7 L. R. A. 765, 25 N. E. 902; *Woodward* v. *Central Vermont R. Co.* 180 Mass. 599, 603, 62 N. E. 1051.

But it is said that this is done under the police power of the state, and that that can
[600] be exercised without any provision for *compensation. It seems to me the police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection, nor should it override the demands of natural justice. The question in the case is not how far the state may go in compelling a railroad company to expend money in increasing its facilities for transportation, but how far it can go in charging upon the company the cost of improving farms along the line of its road.

Again, it will be perceived that by the section quoted, if, in consequence of the drainage, a bridge or culvert is required on any public highway, its cost is paid out of the public funds; but whenever a bridge or culvert is required along or across a railroad the company is charged with the cost. In the one case the public pays, and in the other a private owner. It is not pretended that the railway is in any way benefited by the drainage. Its property is not improved, its revenues are not increased. The reconstruction of the bridge or culvert is not needed by it in its work of transportation. It has used this present bridge for over forty years, meeting in that time all the demands of the public for transportation. So that, receiving no benefit, it is charged with the cost of reconstruction,—about $13,000,—in order to improve the value of the lands belonging to private owners in this drainage district, when if a highway crossed at the same place and a new bridge or culvert was required, the cost of it would be paid out of the public funds. I cannot conceive how this can be looked upon as "the equal protection of the laws."

Further, even under the conclusion reached by the court, the plaintiff in error should recover its costs, and in accord with the common practice in this court, the order should be that the judgment be reversed and the case remanded for further proceedings *not
[601] inconsistent with our opinion. *Stanley* v. *Schwalby*, 162 U. S. 255, 282, 40 L. ed. 960, 969, 16 Sup. Ct. Rep. 754. Why should it be compelled to pay two or three hundred dollars in costs when it has shown that the decision below placed an improper charge upon it, the amount of which is not disclosed, and which may be a very substantial sum?

I am, therefore, constrained to dissent from both the opinion and judgment.

UNITED STATES, *Appt.*,
v.
WILLIAM A. CLARK.

(See S. C. Reporter's ed. 601-609.)

1. Public lands—bona fide purchaser—notice.—A purchaser of timber lands after receivers' final receipts have issued is entitled to protection, under the Act of June 3, 1878 (20 Stat. at L. 89, chap. 151, § 2, U. S. Comp. Stat. 1901, p. 1545), as a bona fide purchaser, against the cancelation, for the original frauds of the entrymen, of the patents afterwards issued, unless he is shown to have had actual notice of such fraud.

2. Appeal—review of findings of fact—concurrent findings.—The concurrent findings of the two lower courts that a purchaser of timber lands had no actual knowledge or notice of the original frauds of the entrymen will be adopted by the Supreme Court of the United States, on appeal, unless clearly erroneous.

[No. 359.]

Argued January 9, 10, 1906. Decided March 5, 1906.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Montana, dismissing a bill filed on behalf of the United States to cancel certain patents for timber lands for the frauds of the entrymen. *Affirmed.*

See same case below, 138 Fed. 294.

The facts are stated in the opinion.

Messrs. **Marsden C. Burch** and **Fred A. Maynard** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for appellant:

It is not possible, under any circumstances whatever, for a man to become vested with the rights of a bona fide purchaser, who completes his purchase before patents have issued.

Hawley v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; *Parsons* v. *Venzke*, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; *Orchard* v. *Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; *Guaranty Sav. Bank* v. *Bladow*, 176 U. S. 448, 454, 44 L. ed. 540, 542, 20 Sup. Ct. Rep. 425; *Thayer* v. *Spratt*, 189 U. S. 350, 47 L. ed. 847, 23 Sup. Ct. Rep. 576; *Cogswell Case*, 3 Land Dec. 23; *United States* v. *Steenerson*, 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 507.

Th courts acquire jurisdiction the moment the Interior Department loses it.

Peyton v. *Desmond*, 63 C. C. A. 651, 129 Fed. 1; *Knight* v. *United Land Asso.* 142 U. S. 161, 178, 35 L. ed. 974, 980, 12 Sup. Ct. Rep. 258.

In case the entryman defrauds the government, he can be proceeded against as well after patent has issued as before.

United States v. *Iron Silver Min. Co.* 128 U. S. 673, 676, 32 L. ed. 571, 572, 9 Sup. Ct. Rep. 195; *Maxwell Land-Grant Case* (*United States* v. *Maxwell Land-Grant Co.*) 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States* v. *Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; *United States* v. *Minor*, 114 U. S. 233, 241, 29 L. ed. 110, 113, 5 Sup. Ct. Rep. 836.

In all cases of statutory forfeitures ensuing from acts done or omitted, an innocent purchaser without notice cannot claim precedence of the title of the United States.

United States v. *Grundy*, 3 Cranch, 338, 2 L. ed. 459; *United States* v. *1,960 Bags of Coffee*, 8 Cranch, 398, 3 L. ed. 602; *The Distilled Spirits* (*Harrington* v. *United States*) 11 Wall. 356, 20 L. ed. 167.

A man who claims to be a bona fide purchaser must, among other facts, allege and prove that his vendor was seised in fee and in possession. The title purchased must be apparently perfect, good at law, a vested estate in fee, for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity.

Boone v. *Chiles*, 10 Pet. 179, 209, 9 L. ed. 388, 399.

It cannot be said that, on the issue of a patent, the title, by relation, always dates as of the time when the certificate of location was issued. A title by relation extends no further backward than to the inception of the equitable right.

Hussman v. *Durham*, 165 U. S. 144, 148, 41 L. ed. 664, 665, 17 Sup. Ct. Rep. 253.

Where a person has not actual notice, if the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him, and that he would have acquired it but for his gross negligence in the conduct of the business in question, he will be treated as if he had notice.

Wilson v. *Wall*, 6 Wall. 83, 91, 18 L. ed. 727, 730.

The rule is universal and elementary that, if a purchaser in any form receives notice before he has completely acquired or perfected his own interest under the purchase,

NOTE.—*On bona fide purchasers of public lands*—see note to United States v. Detroit Timber & Lumber Co. 67 C. C. A. 13.

his position as bona fide purchaser is thereby destroyed, though he may have paid a valuable consideration.

Pom. Eq. Jur. §§ 753, 762.

Messrs. **Walter M. Bickford** and **George F. Shelton** argued the cause and filed a brief for appellee:

The defense of bona fide purchaser for a valuable consideration, without notice, was available to the defendant. This defense was absolute, and precluded a recovery by the government, for the reason that, prior to the commencement of suit, patents had issued from the government for said lands, and the full legal title to the same had vested in the defendant.

United States v. *Stinson*, 197 U. S. 200, 204, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426.

When the purchaser of the equitable right or interest obtains the legal estate in addition to his equitable claim, he becomes a bona fide purchaser, and entitled to maintain his defense as such in the courts.

1 Pom. Eq. Jur. §§ 417, 740; *Fitzsimmons* v. *Ogden*, 7 Cranch, 2, 17 L. ed. 249; *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Newton* v. *McLean*, 41 Barb. 287; Story, Eq. Jur. §§ 64, 411, 436; 1 Fonblanque, Eq. chap. 4, § 25; Sugden, Vend. & P. 2d Am. ed. p. 519; *Boone* v. *Chiles*, 10 Pet. 209, 9 L. ed. 399; *Hoult* v. *Donahue*, 21 W. Va. 300; *Basset* v. *Nosworthy*, 2 White & T. Lead. Cas. in Eq. 1; *Young* v. *Young*, L. R. 3 Eq. 801; *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259; *Willoughby* v. *Willoughby*, 1 T. R. 763; *Blake* v. *Hungerford*, Prec. in Ch. 158; *Charlton* v. *Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Ves. Jr. 609; *Warner* v. *Winslow*, 1 Sandf. Ch. 430; 2 Pom. Eq. Jur. §§ 738, 739; *Knobloch* v. *Mueller*, 123 Ill. 554, 17 N. E. 696; *United States* v. *California & O. Land Co.* 148 U. S. 31, 40, 37 L. ed. 354, 359, 13 Sup. Ct. Rep. 458.

The fraud charged in the bill of complaint as against the entrymen was not such a fraud as prevented the passing of the legal title by the patents, and the patents conveyed the legal title.

Colorado Coal & I. Co. v. *United States*, 123 U. S. 313, 31 L. ed. 185, 8 Sup. Ct. Rep. 131; *United States* v. *Detroit Timber & Lumber Co.* 67 C. C. A. 1, 131 Fed. 668.

The patent is conclusive that the Land Department had jurisdiction and that all the steps requisite and necessary to that end had been taken, and the adjudication of the land office is conclusively presumed from the issuance of the patent

Irvine v. *Irvine*, 9 Wall. 617, 625, 19 L. ed. 800, 802; *Silver Bow Min. & Mill. Co.* v. *Clark*, 5 Mont. 424, 5 Pac. 570; *Aurora Hill Consol. Min. Co.* v. *85 Min. Co.* 12 Sawy. 359, 34 Fed. 520; *Morgan* v. *Daniels*, 153 U. S. 124, 38 L. ed. 658, 14 Sup. Ct. Rep. 772; *Widdicombe* v. *Childers*, 124 U. S. 405, 31 L. ed. 430, 8 Sup. Ct. Rep. 517; *Coleman* v. *Hill*, 44 Ark. 455; *Scott* v. *Lockey Invest. Co.* 60 Fed. 35; *Shanklin* v. *McNamara*, 87 Cal. 378, 26 Pac. 345; *Chever* v. *Horner*, 11 Colo. 72, 7 Am. St. Rep. 217, 17 Pac. 495; *Aspen* v. *Aspen Town & Land Co.* 10 Colo. 201, 15 Pac. 794, 16 Pac. 160; *United States* v. *California & O. Land Co.* 148 U. S. 44, 37 L. ed. 360, 13 Sup. Ct. Rep. 458; *Astiazaran* v. *Santa Rita Land & Min. Co.* 148 U. S. 83, 37 L. ed. 377, 13 Sup. Ct. Rep. 457; *Heath* v. *Wallace*, 138 U. S. 575, 34 L. ed. 1065, 11 Sup. Ct. Rep. 380; *Northern P. R. Co.* v. *Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 260; *United States* v. *Dalles Military Road Co.* 41 Fed. 497; *Sioux City & St. P. R. Co.* v. *United States*, 36 Fed. 612; *Glidden* v. *Union P. R. Co.* 30 Fed. 661; *Smith* v. *Hollis*, 46 Ark. 24; *Plummer* v. *Brown*, 70 Cal. 546, 12 Pac. 464; *Keane* v. *Brygger*, 3 Wash. 349, 28 Pac. 653; *United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States* v. *Mackintosh*, 29 C. C. A. 176, 56 U. S. App. 483, 85 Fed. 338; *Hatch* v. *Ferguson*, 57 Fed. 965; *Lewis* v. *Shaw*, 57 Fed. 518, 70 Fed. 294; *Carroll* v. *Safford*, 3 How. 441, 461, 11 L. ed. 671, 680; *Witherspoon* v. *Duncan*, 4 Wall. 210, 18 L. ed. 339; *United States* v. *American Bell Teleph. Co.* 167 U. S. 240, 42 L. ed. 154, 17 Sup. Ct. Rep. 809; *United States* v. *King*, 27 C. C. A. 509, 48 U. S. App. 542, 83 Fed. 191; *Penn Mut. L. Ins. Co.* v. *Union Trust Co.* 83 Fed. 893; *United States* v. *Northern P. R. Co.* 37 C. C. A. 290, 95 Fed. 882; *Stimson Land Co.* v. *Rawson*, 62 Fed. 429; *Miller* v. *Donahue*, 96 Wis. 509, 71 N. W. 904; *Johnson* v. *Bridal Veil Lumbering Co.* 24 Or. 185, 33 Pac. 528; *United States* v. *Meeker*, 50 Fed. 147; *Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 640, 26 L. ed. 876; *Minter* v. *Crommelin*, 18 How. 87, 15 L. ed. 279; *Hussman* v. *Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; *Pacific Coast Min. & Mill. Co.* v. *Spargo*, 8 Sawy. 645, 16 Fed. 348; *Coleman* v. *Peshtigo Lumber Co.* 30 Fed. 317; *Northern P. R. Co.* v. *Myers*, 172 U. S. 589, 43 L. ed. 564, 19 Sup. Ct. Rep. 276; *Kern Oil Co.* v. *Clarke*, 30 Land Dec. 550; *French* v. *Spencer*, 21 How. 228, 16 L. ed. 97.

The right to a patent, once vested, is treated by the government, when dealing with public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.

Stark v. *Starr*, 6 Wall. 402, 18 L. ed.

925; *Barney* v. *Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. ed. 86; *Lytle* v. *Arkansas*, 9 How. 314, 13 L. ed. 153; *Simmons* v. *Wagner*, 101 U. S. 260, 25 L. ed. 910; *Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; *Deffeback* v. *Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

The issuing of the patent is conclusive as to all things which lead up to the issuing of patents by the officers having charge thereof.

Talbott v. *King*, 6 Mont. 103, 9 Pac. 434; *Chambers* v. *Jones*, 17 Mont. 162, 42 Pac. 758; *Lewis* v. *Shaw*, 70 Fed. 289; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States* v. *California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458.

The issuance of the patent conveyed a full title from the government as of the date of the inception of proceedings to obtain title from the government, and related back as if it had been issued on the date when the final receipt was given to the entryman by the receiver of the land office.

United States v. *Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; *United States* v. *Sierra Nevada Wood & Lumber Co.* 79 Fed. 691; *Boone* v. *Chiles*, 10 Pet. 177, 9 L. ed. 388; *United States* v. *Winona & St. P. R. Co.* 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; *United States* v. *Southern P. R. Co.* 76 Fed. 134; *United States* v. *American Bell Teleph. Co. supra; Thurston* v. *Alva*, 45 Cal. 16; *Hudson* v. *Johnson*, 45 Cal. 302; *Witcher* v. *Conklin*, 84 Cal. 504, 24 Pac. 302; *Cady* v. *Eighmey*, 54 Iowa, 615, 7 N. W. 102; *McDaniel* v. *Large*, 55 Iowa, 312, 7 N. W. 632; *Cavender* v. *Smith*, 3 G. Greene, 349, 56 Am. Dec. 541; *Lang* v. *Morey*, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88; *Lewis* v. *Wetherell*, 36 Minn. 386, 1 Am. St. Rep. 674, 31 N. W. 356; *McKean* v. *Crawford*, 6 Kan. 112; *Stewart* v. *Powers*, 98 Cal. 514, 33 Pac. 486; *Frink* v. *Hoke*, 35 Or. 17, 56 Pac. 1093; *Norris* v. *Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121; *People* v. *Swift*, 96 Cal. 165, 31 Pac. 16; *Fariss* v. *Deeming Invest. Co.* 5 Okla. 496, 49 Pac. 926; *Richards* v. *Snyder*, 11 Or. 501, 6 Pac. 186; *Myers* v. *Croft*, 13 Wall. 291, 20 L. ed. 562; *United States* v. *Detroit Timber & Lumber Co.* 124 Fed. 393.

There is an absolute failure of proof on the part of the government to establish that any fraud whatever was committed.

Maxwell Land-Grant Case (*United States* v. *Maxwell Land-Grant Co.*) 121 U. S. 325, 379, 30 L. ed. 949, 958, 7 Sup. Ct. Rep. 1015; *United States* v. *Stone*, 2 Wall. 535, 17 L. ed. 767; *Atlantic Delaine Co.* v. *James*, 94 U. S. 207, 24 L. ed. 112; Story, Eq. Jur. § 157; *Lyman* v. *United Ins. Co.* 2 Johns. Ch. 632; *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290; *Colorado Coal & I. Co.* v. *United States*, *supra*; 1 Greenl. Ev. § 78; *Lewis* v. *Shaw*, 70 Fed. 289; *United States* v. *Detroit Timber & Lumber Co. supra*; *United States* v. *Stinson*, 197 U. S. 204, 49 L. ed. 725, 25 Sup. Ct. Rep. 426; *United States* v. *Budd*, 144 U. S. 154, 162, 36 L. ed. 384, 386, 12 Sup. Ct. Rep. 575.

The defendant did not have notice of the alleged violations of the law in the inception of title to the lands purchased by him.

United States v. *Detroit Timber & Lumber Co.* 67 C. C. A. 1, 131 Fed. 674; *Jones* v. *Simpson*, 116 U. S. 609, 615, 29 L. ed. 742, 744, 6 Sup. Ct. Rep. 538; *Wilson* v. *Wall*, 6 Wall. 83, 91, 18 L. ed. 727, 730; *Ware* v. *Egmont*, 4 De G. M. & G. 460; Sugden, Vend. & P. 722; *Meehan* v. *Williams*, 48 Pa. 238; *Townsend* v. *Little*, 109 U. S. 511, 27 L. ed. 1014, 3 Sup. Ct. Rep. 357; *Maxwell Land-Grant Case* (*United States* v. *Maxwell Land-Grant Co.*) 121 U. S. 378, 30 L. ed. 958, 7 Sup. Ct. Rep. 1015; *Crawford* v. *Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759.

The burden of proof rests upon the government to show, not only the fraud charged, by the most satisfactory and convincing proof, but also that the defendant had notice of the alleged frauds which would put him on inquiry, and lead to his discovery of such frauds, if any.

Colorado Coal & I. Co. v. *United States*, 123 U. S. 307, 317, 318, 31 L. ed. 182, 186, 187, 8 Sup. Ct. Rep. 131; *United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 300, 31 L. ed. 747, 756, 8 Sup. Ct. Rep. 850; *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *United States* v. *American Bell Teleph. Co.* 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; *United States* v. *Marshall Silver Min. Co.* 129 U. S. 579, 589, 32 L. ed. 734, 738, 9 Sup. Ct. Rep. 343; *United States* v. *Iron Silver Min. Co.* 128 U. S. 673, 676, 32 L. ed. 571, 572, 9 Sup. Ct. Rep. 195.

It is doubtful whether, in this case, there is such an allegation of fact in the bill as would warrant the court in an investigation of the question of whether the defendant Clark was a purchaser with notice.

United States v. *Throckmorton*, 98 U. S. 61, 64, 25 L. ed. 93, 94.

The rights of a bona fide purchaser cannot and will not be disturbed unless the testimony is conclusive of the facts alleged. There must be no question as to the conclusive character of the proof. He is favored in equity. His rights are to be

protected at all hazards. A forfeiture of those rights can only be decreed when there is no other course left, by reason of the conclusive character of the proof adduced in support of the claim of the government. *Lewis* v. *Shaw*, 57 Fed. 516; *United States* v. *Meeker*, 50 Fed. 146; *Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill for the cancelation of eighty patents for timber lands in Montana, now owned by the defendant, on the ground that the patentees did not purchase the same in good faith for their own exclusive use and benefit, but for speculation, and under agreement by which their title should inure to the benefit of another, and that the defendant knew the facts in a general way, if not in detail. Act of June 3, 1878, chap. 151, § 2, 20 Stat. at L. 89 (U. S. Comp. Stat. 1901, p. 1545), extended to all public-land states by act of August 4, 1892, chap. 375, § 2, 27 Stat. at L. 348. The defendant pleaded that he was a bona fide purchaser, excepted as such from the invalidation of the patents by the act, and denied the material allegations of the bill. Voluminous evidence was taken, and at the hearing the bill was dismissed by the circuit court. 125 [607] *Fed. 774. That court found that Clark had no actual knowledge of the alleged frauds or of facts sufficient to put him on inquiry (125 Fed. 776, 777), and, considering the requirement of clear proof, according to the statement of this court in the *Maxwell Land-Grant Case* (*United States* v. *Maxwell Land-Grant Co.*) 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015, further was of opinion that the original frauds alleged were not made out. The circuit court of appeals, in view of the pendency of indictments, did not discuss the alleged original frauds, but, assuming for the purposes of decision that they had been committed, confirmed the findings of the circuit court with regard to Clark. One judge dissented on the ground that Clark knew enough to be put upon inquiry. 138 Fed. 294. The United States then appealed to this court.

The bill proceeds upon the footing that Clark has the legal title to the lands in question. The entrymen conveyed to one Cobban, the alleged partner in their frauds, and Cobban conveyed to Clark, all by warranty deeds. It is true that they conveyed before the patents issued, shortly after obtaining the receiver's receipt, but it is assumed that the legal title, when created, followed the deeds. We make the same assumption. *Landes* v. *Brant*, 10 How. 348, 13 L. ed. 449; *Bush* v. *Person*, 18 How. 82, 15 L. ed. 273; *Myers* v. *Croft*, 13 Wall. 291, 20 L. ed. 562; *United States* v. *Detroit Timber & Lumber Co.* 200 U. S. 321, *ante*, 499, 26 Sup. Ct. Rep. 282. See further, *Ayer* v. *Philadelphia & B. Face Brick Co.* 159 Mass. 84, 34 N. E. 177. But the position is that Clark is privy to the original frauds, and that, even if he is not, inasmuch as he did not purchase on the faith of the patents, he has no better title than the entrymen would have had if the title had remained in them. No distinction is attempted on the ground that the deeds, as well as the bargain, preceded the patents.

We may assume for the purposes of decision, as did the circuit court of appeals, that the original frauds are made out, although there is a great amount of testimony to good faith. But the point of law just stated has been disposed of by *United States* v. *Detroit Timber & Lumber Co. supra.* The United States is attempting to upset a legal title. In order to do that it must charge Clark with notice of the original frauds. The fact that Clark, while he had a merely equitable or personal *claim against the gov- [608] ernment, held it subject to any defect which it might have, whether he knew it or not, as generally is the case with regard to assigned contracts not negotiable, was not equivalent to actual notice of the defect. It is recognized in the act of March 3, 1891, chap. 561, § 7, 26 Stat. at L. 1098 (U. S. Comp. Stat. 1901, p. 1521), that there may be a bona fide purchaser before a patent issues. The title when conveyed related back to the date of the original entries. Therefore actual notice must be proved.

But so far as actual knowledge or notice on the part of Clark is concerned, both of the courts below found in explicit terms that the proof failed. We perceive no sufficient reason for departing from the rule that, except in a very clear case, where both courts have concurred, we do not disturb their findings of fact. *United States* v. *Stinson*, 197 U. S. 200, 207, 49 L. ed. 724, 726, 25 Sup. Ct. Rep. 426; *The Germanic* (*Oceanic Steam Nav. Co.* v. *Aitken*) 196 U. S. 589, 595, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317. If ever this rule is to be applied, it should be when those findings are against a charge of fraud, and when the effort is to overthrow a patent of the United States. The requirement that the proof should be clear in such a case has been repeated in a series of decisions, from the *Maxwell Land-Grant Case* (*United States* v. *Maxwell Land-Grant Co.*) 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015, to *United States* v. *Stinson*, 197 U. S. 200, 204, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426. There is nothing sufficient to show that Clark had actual knowledge of the arrangement by which Cobban got the lands. The allegation

that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price, and a substantial profit even on the government's calculation. So far as any inference was to be drawn from the nearness of the respective dates of the receiver's receipts, the deeds of the entrymen to Cobban, and the deeds of Cobban to Clark, it was as open to the officers of the government as to Clark, if indeed, he knew anything about those dates; yet they seem to have suspected nothing, and he was advised by reputable counsel that the titles were good, and bought only on his advice. Clark, his agents and advisers, testify that they did not know or suspect anything wrong.

With regard to constructive notice in addition to the facts *just mentioned, the government relies on an argument that Cobban began negotiations with Clark before he had acquired title to the lands, not, however, identifying those lands. Assuming this to be true, it requires Clark to have kept that fact in mind when the conveyances were made to him, and noticing the date of the conveyances to Cobban, and of the receiver's receipts, to infer that the negotiations were begun upon a scheme to get the lands from the government by fraud. It requires an actual and not necessary inference from knowledge with which Clark may have been chargeable, but which he probably, or at least possibly, did not actually possess. It is argued further that Clark's inspector must have gone upon the land about the time of the entries in order to do the necessary work of estimating the timber. If, for the purposes of argument, we assume that knowledge of a timber inspector of facts affecting the title, with which he had nothing to do, was chargeable to Clark, still the knowledge is a mere guess. There was nothing present or required to be present on the face of the earth to indicate when the entry took place. We cannot infer fraud merely from more or less familiar relations between some of Clark's agents and Cobban. When suspicion is suggested, it is easily entertained. But bearing in mind, as was said in *United States* v. *Detroit Timber & Lumber Co.*, that Clark was not bound to hunt for grounds of doubt, and recurring to the canons of proof laid down by the decisions, and to the findings of the courts below, we are of opinion that the decree dismissing the bill must be affirmed.

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Decree affirmed.

Justice **McKenna** concurs on the law on the authority of *United States* v. *Detroit Timber & Lumber Co.* and concurs on the facts.

Justices **Harlan** and **Brown** dissent.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

BEHN, MEYER, & CO., *Appellant*, *v.* CAMPBELL & GO TAUCO. [No. 107.]

(See S. C. Reporter's ed. 611.)

Appeal from the Supreme Court of the Philippine Islands.

Messrs. Henry E. Davis, C. C. Carlin, and *Louis C. Barley* for appellant.

Messrs. A. B. Browne and *Alex. Britton* for appellee.

December 18, 1905. *Dismissed* for the want of jurisdiction. Act July 1, 1902 (32 Stat. at L. 691, chap. 1369, § 10, U. S. Comp. Stat. Supp. 1903, p. 93); *Deland* v. *Platte County*, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82; *Comstock* v. *Eagleton*, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210; *Oklahoma City* v. *McMaster*, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; *Walker* v. *Dreville*, 12 Wall. 440, 20 L. ed. 429.

IN THE MATTER OF THE PETITION OF J. W. ROBINSON AND MARIE CARRAU for a Writ of Habeas Corpus. [No. 111.]

(See S. C. Reporter's ed. 611.)

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Joseph W. Robinson and *Milton W. Smith* for petitioners.

Messrs. Samuel H. Piles, George Donworth, Jas. B. Howe, and *Frederic D. McKenney* opposed.

December 18, 1905. Certificate *dismissed*. *United States* v. *Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *Fire Ins. Asso.* v. *Wickham*, 128 U. S. 426, 32 L. ed. 503, 9 Sup. Ct. Rep. 113; *Jewell* v. *Knight*, 123 U. S. 426, 31 L. ed. 190, 8 Sup. Ct. Rep. 193; *United States* v. *Perrin*, 131 U. S. 55, 33 L. ed. 88, 9 Sup. Ct. Rep. 681; *Cross* v. *Evans*, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733.

AH SOU, *Appellant*, *v.* UNITED STATES. [No. 339.]

(See S. C. Reporter's ed. 611.)

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 138 Fed. 775.

Mr. John M. Thurston for appellant.

The Attorney General and the *Solicitor General* for appellee.

December 18, 1905. *Dismissed* for the want of jurisdiction. 132 Fed. 878, 138 Fed. 775; *Barry* v. *Marcein*, 5 How. 103, 120, 12 L. ed. 70, 78; *Kurtz* v. *Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Lau Ow Bew* v. *United States*, 144 U. S. 58, 36 L. ed. 344, 12 Sup. Ct. Rep. 517; *Western U. Teleg. Co.* v. *Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Farrell* v. *O'Brien* (*O'Callaghan* v. *O'Brien*) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730, 37 L. ed. 905, 919, 13 Sup. Ct. Rep. 1016; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *Tom Hong* v. *United States*, 193 U. S. 517, 48 L. ed. 772, 24 Sup. Ct. Rep. 517; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719.

J. L. CONGDON, *Plaintiff in Error*, *v.* PEOPLE OF THE STATE OF MICHIGAN. [No. 117.]

(See S. C. Reporter's ed. 612.)

In Error to the Supreme Court of the State of Michigan.

See same case below, 137 Mich. 133, 100 N. W. 266.

Messrs. Wm. G. Howard, Thos. J. Cavanaugh, and *H. T. Cook* for plaintiff in error.

Messrs. John E. Bird, Chas. A. Blair, Henry E. Chase, Russell M. Chase, and *David Anderson* for defendant in error.

January 2, 1906. *Dismissed* for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

MUTUAL RESERVE LIFE INSURANCE COMPANY, *Plaintiff in Error, v.* HENRY C. BIRCH. [No. 344.]

(See S. C. Reporter's ed. 612.)

In Error to the Supreme Court of the State of New York.

See same case below in Appellate Division, 91 App. Div. 384, 86 N. Y. Supp. 872; in Court of Appeals, 181 N. Y. 583, 74 N. E. 1115.

Messrs. Gordon T. Hughes and *J. H. Ralston* for plaintiff in error.

Mr. Gilbert E. Roe for defendant in error.

December 18, 1905. Judgment *affirmed*, with 10 per cent damages, in addition to interest and costs. *Mutual Reserve Fund Life Asso.* v. *Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Richardson* v. *Louisville & N. R. Co.* 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; *Young* v. *Valentine*, 177 N. Y. 347, 69 N. E. 643; *Woodward* v. *Mutual Reserve L. Ins. Co.* 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10; *Birch* v. *Mutual Reserve L. Ins. Co.* 181 N. Y. 583, 74 N. E. 1115, 91 App. Div. 384, 86 N. Y. Supp. 872.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, *Appellant, v.* BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY. [No. 175.]

(See S. C. Reporter's ed. 613.)

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 66 C. C. A. 99, 131 Fed. 591.

Messrs. George Turner, W. B. Heyburn, and *F. T. Post* for appellant.

Messrs. Curtis H. Lindley, Henry Eickhoff, and *M. A. Folsom* for appellee.

January 8, 1906. *Dismissed* for the want of jurisdiction. *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co.* v. *Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

IN THE MATTER OF THE CHICAGO TITLE & TRUST COMPANY, *Petitioner.* [No. —, Original.]

(See S. C. Reporter's ed. 613.)

Motion for Leave to File Petition for a Writ of Mandamus.

Messrs. Joseph E. Paden and *Newton Wyeth* for petitioner.

Mr. James G. Elsdon opposed.

January 2, 1906. *Denied.*

JOHN S. MCCALLA, *Appellant, v.* ALMA MAZO ACKER, Executrix of Calvin S. Acker, Deceased. [No. 114.]

(See S. C. Reporter's ed. 613.)

Appeal from the Supreme Court of the Territory of Oklahoma.

See same case below (Okla.) 78 Pac. 223.

Messrs. S. H. Harris and *Fred Beall* for appellant.

Mr. Chester Howe for appellee.

January 8, 1906. Decree *affirmed* with costs. *Winebrenner* v. *Forney*, 189 U. S. 148, 47 L. ed. 754, 23 Sup. Ct. Rep. 590.

LOTTIE R. RUSSELL, *Appellant, v.* BENJAMIN RUSSELL *et al.* [No. 307.]

(See S. C. Reporter's ed. 613.)

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 67 C. C. A. 436, 134 Fed. 840.

Messrs. John H. Hazelton and *John G. Carlisle* for appellant.

Messrs. Walter H. Bacon and *Robert H. McCarter* for appellees.

January 15, 1906. *Dismissed* for the want of jurisdiction. *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co.* v. *Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

EX PARTE: IN THE MATTER OF GEORGE W. WATT AND JAMES M. DOHAN, *Petitioners.* [No. —, Original.]

(See S. C. Reporter's ed. 614.)

Motion for leave to File Petition for a Writ of Mandamus.

Mr. W. C. Arnold for petitioners.

No opposition.

January 29, 1906. *Denied.*

GEORGE H. JONES, *Plaintiff in Error*, *v.* WILLIAM VANE *et al.* [No. 405.]

(See S. C. Reporter's ed. 614.)

In Error to the Supreme Court of the State of Idaho.

See same case below (Idaho) 82 Pac. 110.

Mr. Wm. T. Birdsall for plaintiff in error.

Messrs. S. M. Stockslager and *George C. Heard* for defendants in error.

January 22, 1906. *Dismissed* for the want of jurisdiction. *San Francisco* v. *Itsell*, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; *Hopkins* v. *McLure*, 133 U. S. 386, 33 L. ed. 662, 10 Sup. Ct. Rep. 407; *California* v. *Holladay*, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; *Eustis* v. *Bolles*, 150 U. S. 361, 367, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; *Kipley* v. *Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *Lynde* v. *Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; *Western U. Teleg. Co.* v. *Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

ANNA SIEGEL, *Plaintiff in Error*, *v.* NEW YORK & HARLEM RAILROAD COMPANY *et al.* [No. 407]; HEDEWIG KRIETE, *Plaintiff in Error*, *v.* NEW YORK & HARLEM RAILROAD COMPANY *et al.* [No. 453]; DAVID W. O'NEIL *et al.*, *Plaintiffs in Error*, *v.* NEW YORK & HARLEM RAILROAD COMPANY *et al.* [No. 454]; FRANZISKA SCHOLZ, *Plaintiff in Error*, *v.* NEW YORK & HARLEM RAILROAD COMPANY *et al.* [No. 493].

(See S. C. Reporter's ed. 615.)

In Error to the Supreme Court of the State of New York.

See same case below, in Appellate Division, 62 App. Div. 290, 70 N. Y. Supp. 1088; in Court of Appeals, 173 N. Y. 644, 66 N. E. 1116.

Messrs. Charles A. Hess and *L. M. Berkeley* for plaintiff in error in No. 407; *James C. Bushby* and *L. M. Berkeley* for plaintiffs in error in Nos. 453, 454, and 493.

Messrs. Edward Winslow Paige, Ira A. Place, and *Thomas Emery* for defendants in error.

January 29, 1906. Judgments *reversed* with costs, and cases remanded for further proceedings not inconsistent with the opinions of this court in *Muhlker* v. *New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; *Birrell* v. *New York & H. R. Co.* 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667.

EX PARTE: IN THE MATTER OF LEONARD IMBODEN AND JAMES A. HILL, *Petitioners*. [No. ——, Original.]

(See S. C. Reporter's ed. 614.)

Motion for Leave to File Petition for a Writ of Habeas Corpus.

Messrs. Henry J. Hersey, James J. Banks, and *James S. Davis* for petitioners.

No opposition.

January 29, 1906. *Denied.*

JOSHUA W. DARDEN, *Plaintiff in Error*, *v.* STATE OF ARKANSAS. [No. 222.]

(See S. C. Reporter's ed. 615.)

In Error to the Supreme Court of the State of Arkansas.

See same case below, 73 Ark. 315, 84 S. W. 507; on rehearing, 73 Ark. 321, 84 S. W. 509.

Mr. Joe T. Robinson for plaintiff in error.

Mr. Thomas B. Martin for defendant in error.

February 26, 1906. *Dismissed* for want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *California Nat. Bank* v. *Stateler*, 171 U. S. 447, 43 L. ed. 233, 19 Sup. Ct. Rep. 6; Kirby's Digest of Ark. Stat. § 1790.

COLUMBIAN CORRESPONDENCE COLLEGE, *Appellant*, *v.* GEORGE B. CORTELYOU, Postmaster General, *et al.* [No. 242.]

(See S. C. Reporter's ed. 615.)

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 25 App. D. C. 149.

Messrs. Arthur A. Birney and *Charles A. Ray* for appellant.

The Attorney General and the *Solicitor General* for appellees.

February 26, 1906. *Dismissed* for the want of jurisdiction. *South Carolina* v. *Seymour* (*United States ex rel. South Carolina* v. *Seymour*) 153 U. S. 353, 357, 38 L. ed. 742, 744, 14 Sup. Ct. Rep. 871; *United States* v. *Lynch*, 137 U. S. 280, 286, 34 L. ed. 700, 702, 11 Sup. Ct. Rep. 114; D. C. Code, § 233 (31 Stat. at L. 1227, chap. 854).

IROQUOIS TRANSPORTATION COMPANY, etc., *Petitioners*, *v.* A. HARVEY'S SONS MANUFACTURING COMPANY. [No. 512.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 141 Fed. 945.

Mr. Charles E. Kremer for petitioners.

Mr. Henry B. Graves for respondent.

December 18, 1905. *Denied.*

UNITED STATES, *Petitioner*, *v.* GEORGE RIGGS & Co. [No. 516.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General, the *Solicitor General*, and *Assistant Attorney General McReynolds* for petitioner.

Messrs. Charles Curie and *W. Wickham Smith* for respondents.

January 2, 1906. *Granted.*

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY, *Petitioner*, *v.* STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND. [No. 452.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 1 L.R.A.(N.S.) 1095, 67 C. C. A. 602, 133 Fed. 636.

Messrs. Francis J. Heney and *A. B. Browne* for petitioner.

Messrs. T. C. Van Ness and *Wm. Denman* for respondent.

January 2, 1906. *Denied.*

COPPER RIVER MINING COMPANY, *Petitioner*, *v.* R. F. MCCLELLAN *et al.* [No. 504.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 138 Fed. 333.

Messrs. Chas. H. Aldrich and *W. B. Heyburn* for petitioner.

Messrs. Frank D. Austin, John A. Carson, and *Frederick DeCourcy Faust* for respondent.

January 2, 1906. *Denied.*

LAST CHANCE MINING COMPANY *et al. Petitioners*, *v.* BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY. [No. 260.]

(See S. C. Reporter's ed. 617.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 66 C. C. A. 299, 131 Fed. 579.

Messrs. George Turner and *W. B. Heyburn* for petitioners.

Messrs. Curtis H. Lindley, Henry Eickhoff, and *M. A. Folsom* for respondent.

January 8, 1906. *Denied.*

EMPIRE STATE-IDAHO MINING & DEVELOPMENT COMPANY, *Petitioner*, *v.* BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY. [No. 437.]

(See S. C. Reporter's ed. 617.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 66 C. C. A. 99, 131 Fed. 591.

Messrs. George Turner and *F. T. Post* for petitioner.

Messrs. Curtis H. Lindley, Henry Eickhoff, and *M. A Folsom* for respondent.

January 8, 1906. *Denied.*

JOACQUIN F. DE VIGNIER *et al., Petitioners*, *v.* CITY OF NEW ORLEANS. [No. 523.]

(See S. C. Reporter's ed. 617.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Richard De Gray, J. D. Rouse, and *Wm. Grant* for petitioners.

No opposition.

January 8, 1906. *Denied.* Mr. Justice **White** took no part in the disposition of this application.

HARRY B. DAVIS *et al., Petitioners*, *v.* THOMAS R. JONES *et al.* [No. 435.]

(See S. C. Reporter's ed. 617.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 138 Fed. 62.

Mr. E. Hayward Fairbanks for petitioners.

Messrs. Melville Church and *Robert Watson* for respondents.

January 15, 1906. *Denied.*

JESSE THOMAS, *Petitioner*, *v.* PROVIDENT LIFE & TRUST COMPANY *et al.* [No. 528]; LUCY L. WICKHAM, *Petitioner*, v. PROVIDENT LIFE & TRUST COMPANY *et al.* [No. 529].

(See S. C. Reporter's ed. 618.)

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 138 Fed. 348.

Mr. Chas. S. Fogg for petitioner in 528; *Mr. David A. Gourick* for petitioner in 529.

Mr. John F. Shafroth for respondents.

January 15, 1906. *Denied.*

CHARLES C. BROWNE, *Petitioner*, *v.* UNITED STATES. [No. 531.]

(See S. C. Reporter's ed. 618.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 145 Fed. 1.

Messrs. Wm. Lindsay, *Louis Marshall*, and *Judson G. Wells* for petitioner.

The Attorney General, the *Solicitor General*, and *Mr. W. Wickham Smith* for respondent.

January 15, 1906. *Denied.*

C. R. CHIPMAN, etc. *et al. Petitioners*, *v.* JAMES B. MCDONALD, Administrator, etc. [No. 538.]

(See S. C. Reporter's ed. 618.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. T. Moultrie Mordecai, *P. H. Gadsden*, and *J. E. Hartridge* for petitioners.

Mr. A. W. Cockrell for respondent.

January 15, 1906. *Denied.*

COUNTY COMMISSIONERS OF WICOMICO COUNTY, *Petitioners*, *v.* SAMUEL BANCROFT, JR. [No. 424.]

(See S. C. Reporter's ed. 618.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. James E. Ellegood for petitioners.

Mr. Nicholas P. Bond for respondent.

January 22, 1906. *Granted.*

ALBERT M. RAYMOND, *Petitioner*, *v.* UNITED STATES. [No. 526.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below on first appeal, 25 App. D. C. 555; on second appeal, 26 App. D. C. 250.

Mr. Levi H. David for petitioner.

The Attorney General and the *Solicitor General* for respondent.

January 22, 1906. *Denied.*

EFFIE C. WILSON, *Petitioner*, *v.* SAMUEL D. HOFFMAN. [No. 544.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 65 C. C. A. 14, 130 Fed. 694; on rehearing, 134 Fed. 844.

Mr. George J. Bergen for petitioner.

Mr. C. L. Cole for respondent.

January 22, 1906. *Denied.*

NORTH PACIFIC COAST RAILROAD COMPANY, *Petitioner*, *v.* MRS. CATHERINE HALL *et al.* [No. 535]; NORTH SHORE RAILROAD COMPANY, *Petitioner*, *v.* J. S. MCCUE [No. 536]; NORTH PACIFIC COAST RAILROAD COMPANY, *Petitioner*, *v.* MRS. CATHERINE HALL [No. 537].

(See S. C. Reporter's ed. 619.)

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 141 Fed. 270.

Mr. George W. Towle, Jr., for petitioners.

Mr. H. V. Morehouse for respondents.

January 29, 1906. *Denied.*

R. PERCY WRIGHT, *Petitioner*, *v.* EAST RIVERSIDE IRRIGATION DISTRICT. [No. 550.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 138 Fed. 313.

Messrs. Wm. F. Humphrey and *G. W. McEnerney* for petitioner.

Mr. Byron Waters for respondent.

January 29, 1906. *Denied.*

I. H. MOORE *et al.*, *Petitioners*, *v.* JOHN DALTON *et al.* [No. 552.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 141 Fed. 311.

Mr. S. M. Stockslager for petitioners.

Mr. E. S. Pillsbury for respondents.

February 19, 1906. *Denied.*

FREDERICK S. GOSHORN *et al. Petitioners*, *v.* ROYAL TRUST COMPANY *et al.* [No. 556.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Henry W. Leman for petitioners.

Messrs. Frank H. Scott and *Edgar A. Bancroft* for respondents.

February 19, 1906. *Denied.*

CHARLES G. DUNN, Receiver, etc., *Petitioner*, *v.* MITCHELL L. ERLANGER, Sheriff, etc. [No. 561.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 66 C. C. A. 374, 135 Fed. 736.

Mr. Wm. Lesser for petitioner.

Mr. Henry J. Goldsmith for respondent.

February 19, 1906. *Denied.*

DELTA NATIONAL BANK *et al. Petitioners, v.* J. O. EASTERBROOK, Trustee. [No. 566.]
(See S. C. Reporter's ed. 620.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
See same case below, 67 C. C. A. 236, 133 Fed. 521.
Mr. Edwin C. Brandenburg for petitioners.
No opposition.
February 19, 1906. *Denied.*

GEORGE H. GILMAN *et al. Petitioners, v.* JAMES A. HINSON. [No. 567.]
(See S. C. Reporter's ed. 620.)
Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.
See same case below, 26 App. D. C. 409.
Mr. L. S. Bacon for petitioners.
Messrs. C. Clarence Pool and *Taylor E. Brown* for respondent.
February 19, 1906. *Denied.*

FERDINAND EIDMAN, Collector, etc., *Petitioner, v.* FREDERICK B. TILGHMAN *et al.*, Executors, etc. [No. 599.]
(See S. C. Reporter's ed. 620.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
The Attorney General, the *Solicitor General*, and *Assistant Attorney General Robb*, for petitioner.
Mr. Edward B. Whitney for respondents.
February 26, 1906. *Granted.*

GERMAN SAVINGS & LOAN SOCIETY, *Petitioner, v.* WILLIAM L. TULL *et al.* [No. 505.]
(See S. C. Reporter's ed. 621.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
See same case below, 136 Fed. 1.
Mr. Francis J. Heney for petitioner.
Messrs. Robert A. Howard, L. G. Nash, and *Samuel R. Stern* for respondents.
February 26, 1906. *Denied.*

KOKOMO STEEL & WIRE COMPANY, *Petitioner, v.* COLUMBIA WIRE COMPANY. [No. 545.]
(See S. C. Reporter's ed. 621.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
See same case below, 143 Fed. 116.
Messrs. Thomas A. and *Ephraim Banning* and *C. C. Shirley* for petitioner.
Mr. Thomas W. Bakewell for respondent.
February 26, 1906. *Denied.*

GREENWICH INSURANCE COMPANY OF NEW YORK CITY, *Petitioner, v.* N. & M. FREIDMAN CO. [No. 559.]
(See S. C. Reporter's ed. 621.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
See same case below, 142 Fed. 944.
Mr. Mark Norris for petitioner.
Mr. Loyal E. Knappen for respondent.
February 26, 1906. *Denied.*

MISSOURI RIVER POWER COMPANY, *Petitioner, v.* LOUIS STADLER *et al.* [No. 560.]
(See S. C. Reporter's ed. 621.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
See same case below, 139 Fed. 305.
Messrs. A. B. Browne, Alex. Britton, Thomas C. Bach, and *E. C. Day* for petitioner.
Mr. Thomas J. Walsh for respondents.
February 26, 1906. *Denied.*

EDWARD L. HARPER, Bankrupt, *Petitioner, v.* GEORGE C. RANKIN, Receiver, etc. [No. 563.]
(See S. C. Reporter's ed. 621.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
See same case below, 141 Fed. 626.
Mr. R. A. Ayers for petitioner.
Mr. W. C. Herron for respondent.
February 26, 1906. *Denied.*

DUNCAN ELECTRIC MANUFACTURING COMPANY *et al. Petitioners, v.* SIEMENS-HALSKE ELECTRIC COMPANY OF AMERICA. [No. 571.]
(See S. C. Reporter's ed. 622.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
See same case below, 142 Fed. 157.
Mr. Robert H. Parkinson for petitioners.
Messrs. Drury W. Cooper and *Thomas B. Kerr* for respondent.
February 26, 1906. *Denied.*

ROBERT B. ROOSEVELT, *Petitioner, v.* ELBERT A. BRINCKERHOFF *et al.* [No. 585.]
(See S. C. Reporter's ed. 622.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
See same case below, 143 Fed. 478.
Messrs. George H. Yeaman and *George C. Kobbe* for petitioner.
Mr. Frederick S. Duncan for respondents.
February 26, 1906. *Denied.*

GEORGE H. COPLAND *et al.*, *Appellants*, *v.* C. W. WALDRON *et al.* [No. 134.]

(See S. C. Reporter's ed. 622.)

Appeal from the District Court of the United States for the District of Washington.

Mr. G. Meade Emory for appellants.

No appearance for appellees.

December 12, 1905. *Dismissed* with costs, pursuant to the Tenth Rule, and cause remanded to the District Court of the United States for the Western District of Washington.

WILLIAM D. MARTIN, *Plaintiff in Error*, *v.* NEW TRINIDAD LAKE ASPHALT COMPANY, LIMITED. [No. 166.]

(See S. C. Reporter's ed. 622.)

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Henry B. Johnson for plaintiff in error.

Mr. Abram J. Rose for defendant in error.

December 14, 1905. *Dismissed*, per stipulation.

LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, *Plaintiff in Error*, *v.* PATRICK MARKEY. [No. 171.]

(See S. C. Reporter's ed. 622.)

In Error to the Supreme Court of the State of Missouri.

Mr. W. C. Scarritt for plaintiff in error.

Mr. George Robertson for defendant in error.

December 14, 1905. *Dismissed* with costs, per stipulation.

WABASH RAILROAD COMPANY, *Plaintiff in Error*, *v.* BERNARD LOEB. [No. 190.]

(See S. C. Reporter's ed. 623.)

In Error to the Kansas City Court of Appeals, State of Missouri.

Mr. W. H. Blodgett for plaintiff in error.

No appearance for defendant in error.

December 18, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

THOMAS S. ELLIS, *Appellant*, *v.* WILLIAM WILLIAMS, Commissioner of Immigration. [No. 130.]

(See S. C. Reporter's ed. 623.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

See same case below, 124 Fed. 637.

Mr. F. K. Pendleton for appellant.

The Attorney General for appellee.

January 2, 1906. *Dismissed*, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellee.

MUTUAL RESERVE LIFE INSURANCE COMPANY, *Plaintiff in Error*, *v.* GEORGE W. WOODWARD. [No. 122.]

(See S. C. Reporter's ed. 623.)

In Error to the Supreme Court of the State of New York.

See same case below, in Appellate Division, 84 App. Div. 324, 82 N. Y. Supp. 908; in Court of Appeals, 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10.

Mr. Gordon T. Hughes for plaintiff in error.

Mr. Rollin M. Morgan for defendant in error.

January 8, 1906. *Dismissed* per stipulation.

GIUSSEPPE MARMO, *Appellant*, *v.* FRANK H. SOMMER, Sheriff, etc. [No. 542.]

(See S. C. Reporter's ed. 623.)

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. Elvin W. Crane for appellant.

No appearance for appellee.

January 15, 1906. *Dismissed* with costs, on motion of counsel for the appellant.

JOSÉ S. ESQUIBEL, *Appellant*, *v.* FRANCISCO S. CHAVES. [No. 181.]

(See S. C. Reporter's ed. 624.)

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. Frank S. Bright for appellant.

No appearance for appellee.

January 19, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

DRAKE & STRATTON COMPANY, *Plaintiff in Error*, v. ALDEN ANDERSON, a Minor, etc. [No. 401.]

(See S. C. Reporter's ed. 624.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. Thomas J. Davis for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

January 26, 1906. *Dismissed* per stipulation.

DRAKE & STRATTON COMPANY, *Plaintiff in Error v.* MICHAEL SENESE. [No. 402.]

(See S. C. Reporter's ed. 624.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. Thomas J. Davis for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

January 26, 1906. *Dismissed* per stipulation.

MINERS & MERCHANTS BANK OF LONACONING, *P'aintiff in Error*, *v.* WALTER SNYDER. [No. 432.]

(See S. C. Reporter's ed. 624.)

In Error to the Court of Appeals of the State of Maryland.

Mr. Edgar H. Gans for plaintiff in error.

Mr. Wm. S. Bryan, Jr., for defendant in error.

January 29, 1906. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

EMILIO MONTILLA Y VALDESPINO, *Appellant*, *v.* PAUL VAN SYCKEL *et al.* [No. 417.]

(See S. C. Reporter's ed. 624.)

Appeal from the Supreme Court of Porto Rico.

Messrs. J. H. McGowan and *Charles Hartzell* for appellant.

Mr. N. B. K. Pettingill for appellees.

February 19, 1906. *Dismissed* with costs, per stipulation, on motion of *Mr. Barry Mohun* for the appellant.

DAVID KAWANANAKOA *et al.*, *Appellants*, *v.* ELLEN ALBERTINA POLYBLANK, etc. *et al.* [No. 597.]

(See S. C. Reporter's ed. 625.)

Appeal from the Supreme Court of the Territory of Hawaii.

Mr. A. B. Browne for appellees.

No opposition.

February 19, 1906. Docketed and *dismissed* with costs, on motion of *Mr. A. B. Browne* for the appellants.

LAKE ERIE PROVISION COMPANY, *Plaintiff in Error*, *v.* C. H. WESSELLS *et al.* [No. 263.]

(See S. C. Reporter's ed. 625.)

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Mr. Newton D. Baker for plaintiff in error.

No appearance for defendants in error.

February 19, 1906. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1905.

Vol. 201.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1905.

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[1] *COMMONWEALTH OF KENTUCKY
v.
CALEB POWERS. (No. 393.)

Ex Parte: IN THE MATTER OF THE COMMONWEALTH OF KENTUCKY, *Petitioner.* (No. 15.)

(See S. C. Reporter's ed. 1–40.)

1. Removal of causes—denial of civil rights.—The denial, in summoning or impaneling jurors, of any equal civil rights secured to an accused by the Federal Constitution or laws, does not, unless authorized by the state Constitution or laws, as interpreted by its highest court, give the right to remove a criminal prosecution from a state to a Federal circuit court, under U. S. Rev. Stat. § 641, U. S. Comp. Stat. 1901, pp. 520, 521, authorizing such removal whenever the accused is denied, or cannot enforce in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within its jurisdiction.

2. Error to state court—when writ may run to inferior tribunal.—A writ of error will lie from the Supreme Court of the United States to review the final judgment of a subordinate state court denying a Federal right specially set up or claimed, if, under the local law, that court is the highest court of the state entitled to pass upon such claim of Federal right.

3. Removal of causes—denial of civil rights.—The nonrecognition by the state courts of the validity of a pardon pleaded in bar of a criminal prosecution, even if involving a denial of a right secured to the accused by the Federal Constitution or laws, does not make a case for a removal of such cause from a state to a Federal circuit court, under U. S. Rev. Stat. § 641, authorizing such removals whenever the accused is denied or cannot enforce in the judicial tribunals of

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NOTE.—*When writ of error may run to inferior state court.*

In declaring that a writ of error may run from the Supreme Court of the United States to the highest court of the state "in which a decision of the Federal question could be had," although the final judgment of that court was subject to review in a higher state tribunal, KENTUCKY v. POWERS extends the rule heretofore announced by the Federal court. Previous decisions have stated the rule as requiring that the state court whose judgment is sought to be reviewed be the highest court in which a decision in the "suit" could be had. Mullen v. Western Union Beef Co. 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404; Fisher v. Perkins (Fisher v. Carrico) 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227. And the usual difficulty has been to determine whether the judgment was rendered by the court which, as to the particular case, was the state court of last resort. McComb v. Knox County, 91 U. S. 1, 23 L. ed. 185; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; The Moses Taylor (The Moses Taylor v. Hammons) 4 Wall. 411, 18 L. ed. 397; Lane v. Wallace, 131 U. S. ccxix. Appx., and 26 L. ed. 703; Callan v. Bransford, 139 U. S. 197, 35 L. ed. 144, 11 Sup. Ct. Rep. 519; Miller v. Joseph, 17 Wall. 655, 21 L. ed. 741; Gregory v. McVeigh, 23 Wall. 294, 23 L. ed. 156; Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; Kanouse v. Martin, 15 How. 198, 14 L. ed. 660; McGuire v. Massachusetts, 3 Wall. 382, 18 L. ed. 164; Bryan v. Bates, 12 Allen, 201; McKnight v. James, 155 U. S. 685, 39 L. ed. 310, 15 Sup. Ct. Rep. 248; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; and Olney v. Arnold, 3 Dall. 308, 1 L. ed. 614. And see division III. b, in note to Apex Transp. Co. v. Garbade, 62 L.R.A. 518, on *What adjudications of state courts can be brought up*

the state any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within its jurisdiction.

[Nos. 393, 15, Original.]

No. 393 submitted January 22, 1906. Decided March 12, 1906.
No. 15, Original, argued January 22, 1906. Decided March 12, 1906.

APPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review an order granting a writ of habeas corpus in aid of an order removing to that court a criminal prosecution pending in the Circuit Court of Scott County, in that state. *Reversed* with directions to set aside both orders. Also, a

PETITION by the Commonwealth of Kentucky for a writ of mandamus to compel the Circuit Court of the United States for the Eastern District of Kentucky to remand a criminal prosecution which had been removed to that court from the Circuit Court of Scott County, in that state, and to restore the custody of the accused to the state authorities. *Rule for mandamus made absolute.*

See same case below, 139 Fed. 452.

Statement by Mr. Justice **Harlan:**

These cases arise out of a criminal prosecution begun in one of the courts of Kentucky, and, after several trials, removed on the petition of the accused, Caleb Powers, into the circuit court of the United States for the eastern district of Kentucky.

The principal question to be determined is whether the prosecution was removable from the state court.

After referring to the indictment and to the transfer of the prosecution into the circuit court of the United States, the petition for removal alleged that the accused was within the jurisdiction of the United States and of the commonwealth of Kentucky; that he was, and all of his life had been, a citizen of the United States, and of that commonwealth, and as such citizen was entitled to enforce in the judicial tribunals of Kentucky, *on the trial and final disposition of said [3] prosecution, all equal civil rights and equal protection of laws secured to him by that part of the Amendment providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Art. 14, § 1.] He also claimed the rights secured by § 1977 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1259), providing, "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other;" as well as those secured by the act of Congress of March 1st, 1875. (18 Stat. at L. 335, chap. 114, U. S. Comp. Stat. 1901, p. 1260), the preamble of which

for review in the Supreme Court of the United States by writ of error to those courts. But unless a writ of error lies when the inferior state court is the highest tribunal which can pass upon the Federal question, it is clear, as stated by Mr. Justice Harlan in KENTUCKY v. POWERS, that it will be in the power of a state so to regulate the jurisdiction of its courts as to prevent the Supreme Court of the United States from protecting rights secured by the Federal Constitution and improperly denied in a subordinate state court, although specially set up and claimed.

Even where there is no uncertainty as to whether the judgment sought to be reviewed is that of the highest court of the state, it is sometimes difficult to determine whether the writ of error has been directed to the proper court.

The writ is ordinarily directed to the court which rendered the judgment. Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265.

But where the record remains in, or is returned to, the inferior state court, the writ of error may be directed to that court. McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; Wurts v. Hoagland, 105 U. S. 701, 26 L. ed. 1109; Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381; Green v. Van Buskerk, 3 Wall. 448, 18 L. ed. 245; McGuire v. Massachusetts, 3 Wall. 382, 18 L. ed. 164; Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; and Polleys v. Black River Improv. Co. 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369.

At any time before the remittitur, the writ may be directed to the higher court. Wurts v. Hoagland, *supra.*

The word "may," as used in this connection, probable means "must." Atherton v. Fowler, *supra.*

And the mere fact that the highest state court orders its judgment of affirmance to be certified to the lower state court, where it is received and entered, does not make it proper to direct the writ of error to the lower court. Underwood v. McVeigh, 131 U. S. cxix., Appx., and 21 L. ed. 952.

And see division II. b, of note to wedding v. Meyler, 66 L.R.A. 833, on the *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal.*

declares that: "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law."

The petition then refers to the arrest of the accused on the 9th of March, 1900, upon the charge of being an accessory before the fact to the wilful murder of William Goebel, and alleges that on the 10th of March, 1900, and prior to the finding and reporting of the indictment against the accused, "William S. Taylor, who was then the duly and legally elected, qualified, actual, and acting governor of the state of Kentucky, and had in his actual possession and under his actual control the office and executive mansion prepared by said state for its governor, and all the books, papers, records, and archives belonging thereto, in due form of law duly and legally granted and de-
[4] livered *to your petitioner, and your petitioner accepted from him, a full, complete, absolute, and unconditional pardon, release, and acquittance of the identical charge against him in said indictment, and the charge now pending in said prosecution against your petitioner in said Scott circuit court, and under which your petitioner is now in custody; that said Taylor, at the time he granted said pardon, had the right and authority, under the Constitution and the laws of Kentucky, to grant same; that your petitioner accepted said pardon, and from the time same was granted he claimed, and he now claims, the full benefit and effect thereof and his liberty thereunder. That on the day said pardon was granted him it was, by said Taylor, as governor aforesaid, duly entered on the exevecutive journal kept in his office, and a certificate thereof was duly and in due form of law, and as required by law, issued and delivered to him, duly executed by said governor and the secretary of said state, and placed in your petitioner's possession, and same was by your petitioner accepted. Your petitioner further states that at the time the said pardon was granted to him by his Excellency, the said William S. Taylor, and subsequent thereto, the said William S. Taylor was, and prior thereto he had been recognized, regarded, and treated as the duly elected, actual, and acting governor of the state of Kentucky by the executive power and executive departments, of the United States government, including the President, the Attorney General, and the Postmaster General, and by the postmaster at Frankfort, Kentucky;" that "for said state to hold him in custody, or to try or to require him to be tried in any one of its courts for the offense alleged against him in and by said indictment, since the granting and acceptance of said pardon and the issuance and acceptance of the certificate thereof, is a denial to him of the equal protection of the laws and the equal civil rights to which he is entitled under and as provided for in and by the portions of said amendment to the Constitution of the United States above copied, and by said section of said Revised Statutes, and by said act of Congress;" and, that "notwithstanding the granting and acceptance *of said pardon, the issuance and ac-[5] ceptance of said certificate, the fact that the said William S. Taylor was the governor of Kentucky when said pardon was granted and when said certificate was issued, and was then recognized as such governor by said executive officers of the United States, that he cannot enforce in the said Scott circuit court in which said prosecution is pending, or in that part of the state in which said Scott county is located, or in any court, judicial tribunal, or place of the said state, the equal civil rights and the equal protection of the laws secured to him by each and all of the three portions of said amendment copied above, and by said section of the Revised Statutes of the United States, and by said act of Congress for the reasons now set forth."

The accused here refers to the three trials to which he was subjected, and after stating that he was confined in the county jail, without bail, and awaiting trial, proceeds in his petition: "That at each of said trials your petitioner presented to said Scott circuit court said certificate of pardon, and pleaded and offered in evidence said pardon and said certificate as a bar and complete defense to said prosecution and the trial and conviction of your petitioner under said indictment, but at each of said trials the said trial court overruled said pleas and refused to admit said pardon and certificate as evidence, and held and adjudged that said pardon and certificate were null and void and of no effect whatever, and in each of said trials the said holding of the trial court in reference to said pardon and certificate was duly excepted to and made one of the grounds which was presented and on which a reversal was asked by said court of appeals on the trial of each one of said appeals heretofore mentioned, and on each one of said appeals your petitioner contended that said pardon and certificate entitled him to an acquittal of the charge contained in said indictment, but the said court of appeals, on the trial and final disposition of each one of said appeals, failed and refused

to hold that said pardon and certificate authorized your petitioner's acquittance of said charge; instead, that court, as the [6]said trial court had *done, held that said pardon and certificate were and are null and void and of no effect whatever. The holding of said court of appeals on the trial of each of said appeals was reduced to writing, and each holding, as prepared and ordered by said court of appeals, has been, by the official reporter of that court, under the court's direction, caused to be printed in, and is now a part of, the official printed reports of said court, and all of said holdings are now in full force and effect as, and they in fact are, the laws of said state in this case, and are binding upon and will have to control this honorable court. That the instances named are the only instances in which said court of appeals or any trial court of said state ever held any pardon and certificate thereof, granted, entered, and issued by any governor of Kentucky, to be void and of no effect. That in consequence of the action and holdings of said trial court and said court of appeals, above stated, this honorable court, cannot, and should this case be retried in this honorable court, could not, allow your petitioner to plead or introduce said pardon and certificate as evidence as a defense to the said charges contained in said indictment against him, and could not allow your petitioner his liberty and acquittal under and by virtue of said pardon and certificate, or allow said pardon and certificate to have any effect whatever in your petitioner's behalf, but instead is and will be bound in consequence of said laws to hold said pardon and certificate null and void and of no effect whatever."

In the second paragraph of his petition for removal the accused states that he is a citizen of the United States and of Kentucky, and as such is entitled to enforce in the judicial tribunals of the state the equal civil rights and the equal protection of the law secured to him by the above constitutional provisions and statutes.

His petition then alleges: "But your petitioner states that he is denied and cannot enforce in the judicial tribunals of this state and in the part of the state where this action is pending, the rights secured to him [7]by said laws and each of said laws, *because the said state of Kentucky has enacted a law which has not been repealed nor abrogated, and which is now in full force and effect, to wit, § 281 of the Criminal Code of Practice of said state, which section reads as follows: 'The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception;' and because of the decisions of the court of appeals of Kentucky, the highest judicial tribunal in this state, rendered in this action. . . . upholding the validity of said law, notwithstanding its plain contravention of the said provisions of the Constitution of the United States.

. . . . . .

"Your petitioner states that the death of said Goebel occurred during the existence of intense political excitement following the election of a governor and other state officers in November, 1899; that said Goebel had been the Democratic candidate for the office of governor, and was, at the time of his death, contesting the right of said William S. Taylor to the office of governor, said Taylor, who was a Republican candidate for that office, having been actually elected governor and declared elected governor by the duly and legally constituted authorities, and inducted into said office; that this petitioner was, at said election, the Republican candidate for the office of secretary of state, and had been actually elected and declared elected to said office, and had been inducted into said office; and there was pending at the time of said Goebel's death a contest for the said office of secretary of state, against this defendant, inaugurated by one C. B. Hill, who had been a Democratic candidate for said office; that the public mind was, by said election and said contest for the office of governor, lieutenant governor, secretary of state, and the other state offices greatly inflamed, and bitter and intense political animosities were excited and fostered by reason thereof, and that such feelings existed at all of the trials of this petitioner hereinafter referred to, and such feelings still exist against him on the part of said *ad-[8] herents of said Goebel throughout the state of Kentucky, and particularly in Scott county.

"Your petitioner further states that he was first put on trial under said charge on the 9th day of July, 1900, at a special term of the Scott circuit court begun and holden on said date; that said trial resulted in a verdict of conviction, and he was sentenced to confinement in the state penitentiary during his natural life; that the jury in said trial was selected from a large number of the citizens of said county, and that, with three or four exceptions, all of the venire men were purposely summoned because of their known party affiliations, which were different from the known party affiliations of your petitioner; that by the laws of Kentucky in such cases made and provided the prosecution has a right to five, and the defense to fifteen, peremptory challenges, and that with the exception

of three or four Republicans and Independent Democrats, all of those summoned were known to be partisan Goebel Democrats, while your petitioner was and is a Republican, and was known to belong to the Republican party; that from venire men so summoned a trial jury was selected that was composed almost if not entirely, of Goebel Democrats, and no Republicans, although there were then residing in said county many hundreds of citizens qualified for jury service who were Republicans and Independent Democrats, and not supporters of said Goebel in his candidacy or contest for the office of governor of Kentucky, nor in sympathy with him; but your petitioner avers and charges that all of such citizens, with the exceptions named, were intentionally passed by in summoning said venire men, in order that your petitioner should not have a fair trial by a jury of his peers, impartially selected, but to the end that such jury might be selected to convict him.

"Your petitioner further respectfully represents that the sheriff of Scott county, to whom is assigned the duty of selecting all jurors whose names are not drawn from the jury wheel, is a Goebel Democrat, as are also the deputy sheriffs of said county.

[9] *"Your petitioner further states that at said first trial hereinbefore mentioned the judge of the Scott circuit court, when the original list of names drawn from the jury wheel for jury service had been exhausted, although requested by counsel for this petitioner, and while there remained in said jury wheel about one hundred names, to draw the names remaining in said jury wheel therefrom, refused to do so, but directed the sheriff to summon one hundred men for jury service, and explicitly directed him to summon no men for jury service from the city of Georgetown, but to go out into the county for that purpose. Your petitioner states that the said one hundred names that remained at said time in said jury wheel had been placed there by impartial and unbiased jury commissioners prior to the election in November, 1899, and prior to the killing of said Goebel. Your petitioner states that on the morning following the order of the court to the sheriff to summon the one hundred men for jury service from the county, and when said one hundred men so summoned had appeared in court, they were seated on one side of the court room, separate and apart from the spectators and other persons; that the judge of said court, without notice to your petitioner or any of his counsel, and without making any request of any of his counsel or of this petitioner to accompany him, left the bench and went to the side of the court room wherein said parties summoned for jury service were assembled, and without swearing said parties, so far as this petitioner saw, heard, or has information, as to their excuses for not serving as jurors, if any they had, called them up to him one at a time, not in the hearing of this petitioner, or his counsel, and excused such of them from jury service as he saw fit, without any knowledge on the part of this petitioner or his counsel as to why such parties were thus excused, and on the following day the same proceeding was had as to forty additional men that had been summoned for jury service in this case.

"Your petitioner further states that an appeal was taken from the judgment of said court to the Kentucky court of appeals, and that at the January term, 1901, of said court, the *judgment of the trial court was [10] reversed; that your petitioner was again tried in the Scott circuit court at its October, 1901, term, and a verdict of guilty returned again, fixing the punishment of your petitioner at confinement in the state penitentiary for life; that in summoning the venire men from whom the jury was selected at the second trial, the same unjust and unlawful discrimination was practised, and that of one hundred and twenty-five venire men summoned in Scott county, all were partisan Goebel Democrats except three, and of one hundred and sixty-eight venire men summoned in the adjoining county of Bourbon, all were partisan Democrats except three, so that of the aggregate of two hundred and ninety summoned, two hundred and eighty-four were Goebel Democrats and six were Republicans, notwithstanding the fact that there were many hundreds of citizens in each of said counties qualified for jury service who were Republicans, or Independent Democrats, and not Goebel partisans.

"Your petitioner states that at said second trial he objected to the formation of a jury from the venire men summoned as hereinbefore stated, and moved to discharge the entire venire on the ground that he could not obtain a fair trial before a jury selected therefrom, and filed in support of said objection an affidavit."

The affidavit referred to is given in full in the margin.†

†The affiant states that he ought not to be required to go to trial before a jury drawn as a panel for service at the present term of this court or already summoned from the county of Bourbon, for the following reasons, namely: that the political canvass in this state in 1899, in which the late William Goebel was candidate for the office of governor, was a heated and angry one, and tended to create great antagonism in the minds of his political adherents against those who opposed; that

[11] *The petition then proceeds: "Your petitioner states that although the statements in said affidavit were true and known to be true by the court, he was forced to submit to trial before a jury composed entirely [12]of Goebel Democrats, your petitioner *always having been a Republican in politics, as hereinabove stated; and, as hereinabove stated, your petitioner was at said trial found guilty and sentenced to imprisonment for life by the judgment of said Scott circuit court; that your petitioner took an appeal from the judgment so rendered, [13]which judgment was *reversed by the court of appeals of Kentucky at the September, 1902, term; that your petitioner was again and for the third time tried at a special term of the Scott circuit court under the charge hereinabove mentioned, which trial was begun and holden on the 3d day of August, 1903, and that of the number of one hundred and seventy-six venire men summoned from Bourbon county, from which the jury was selected, three only, or possibly four, were Republicans, and the remaining one hundred and seventy-three (two) were Goebel Democrats and were summoned for that reason, and because they differed politically from your petitioner, whereas there were many hundreds of Republicans and Independent Democrats in said county qualified for jury service, but your petitioner states they were purposely avoided and passed by in summoning said venire men, and that said trial jury was not selected impartially, as required by law; that in the year 1896 there were over twenty-six hundred votes in said county for William McKinley, Republican candidate for President of the United States, and about twenty-two hundred votes cast for William J. Bryan, his Democratic opponent; that in the year 1899 William S. Taylor, Republican candidate for governor of Kentucky, received twenty-seven more votes in said county than were cast for said William Goebel, his Democratic opponent, and that a jury impartially selected could not have been and would not have been, as it was, composed entirely of Goebel Democrats,—on his said third trial one juror, a Goebel supporter, but of doubtful politics, excepted.

"Your petitioner further represents that at the third and last trial of this petitioner in said Scott circuit court, the judge thereof entered an order directing the sheriff of said Scott county to summon two hundred men from Bourbon county for jury service; that this petitioner's attorneys asked the court to admonish the sheriff to summon an equal number of men of each political party; that this request was refused, and thereupon counsel for this petitioner asked the court to instruct the sheriff to summon the talesmen as he came to them, *regardless [14]

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this canvass was followed by a contest before the state legislature for said office, in which the deepest and fiercest passions were stirred in the minds of his followers in this county, as well as in other counties of the state, including the county of Bourbon; that during that contest the said Goebel was killed, which killing tended still further to deepen and intensify the political passions of his friends and admirers in this county and in the county of Bourbon and throughout the state, against this affiant, who was a candidate for a state office on the Republican ticket in the said year of 1900. The passions thus created have since that time been stimulated and fed by the political contests which have since followed, and are still in existence, in this county and Bourbon county. Affiant says that, at a special term of this court in July, 1900, he was put on trial in this county, charged with being an accessory before the fact to the killing of said William Goebel, and was by the jury found guilty. From the judgment of the court at that term, the affiant appealed to the appellate court, the appeal being taken in the early part of September in said year; that at the subsequent October term of said court, jury commissioners for this county were selected whose duty it was to select a large number of names and place them in the jury wheel for service during the year 1901.

The three commissioners appointed were John Bradford, Ben Mallory, and H. H. Haggard, all three of whom were partisan supporters and allies, in the contest referred to, of the said William Goebel, deceased. The said jury commissioners discharged the work assigned to them by placing in said jury wheel the names of two hundred citizens of Scott county, for purposes of said jury service; that at the February term, 1901 of the circuit court of this county, and at the May term of the said year, seventy-five or more names were drawn from the jury wheel for said service; that at the present term there were drawn from the said jury wheel for the purpose of securing a jury in this case about one hundred and twenty-five names, that being the entire number of names placed in the wheel. Affiant further states that at the regular state election of 1900, in the county of Scott, there were cast for the Democratic candidate, in round numbers, 2,500 votes, and for the Republican candidate 2,100 votes; that of these 2,100 votes not less than 1,300 were white voters of equal character, standing, and intelligence with the white voters who cast their votes for the Democratic party at said election.

Affiant says that, despite these conditions, which were shown to exist in this county, that of the 200 names placed in the jury wheel by the aforesaid commissioners and drawn out as herein described, only five were supporters of the Republican party, and the other 195 being active partisan friends and supporters of the party with which William Goebel was identified as its leader, and whose minds and passions had been inflamed against this affiant by continued political agitation.

The affiant further says that of the five Republicans whose names were placed in the jury wheel for jury service by said commis-

of political affiliation. This the court also refused to do.

"Your petitioner further states that said trial resulted in a verdict of guilty, affixing the death sentence, and a judgment was thereupon entered, from which judgment an appeal was taken to the court of appeals of Kentucky, and on December 6th, 1904, the judgment of conviction was for the third time reversed by said court, and that it is the purpose and intention of the Commonwealth of Kentucky to subject this petitioner to a fourth trial under said charge, within a short time, in said Scott circuit court.

"Your petitioner further respectfully states that at each of said three trials the facts in relation to the jurors given or hereinbefore recited were embraced in affidavits filed in support of challenges to the panel and the venire and objections to the formation of the jury from the men summoned as hereinabove mentioned, and were also embraced in the motions and grounds for new trial prepared and filed on behalf of this petitioner at each of said trials, but that they were disregarded by the court and your petitioner's challenge to the panels, to the venire, and the motions for new trials in each instance overruled; that by reason of § 281 of the Criminal Code of the state, hereinbefore quoted, this petitioner was and is denied the right of any exception on said grounds, and the court of appeals of Kentucky, on each of the three appeals hereinbefore set forth, have decided that no irregularity in the summoning or impaneling of the jury is a reversible error, and they are powerless to reverse any judgment of said court by reason of such facts, and have held said law to be valid, and such law is now the law of this case, and said court of appeals of Kentucky are powerless upon any future appeal to reverse any judgment of said court by reason of a repetition of the acts hereinbefore set forth, or for any other irregularity or improper conduct in the formation of a jury, no matter how prejudicial to the substantial rights of your petitioner they may be, and must be followed and cannot be disregarded by this honorable court.

*"Your petitioner therefore prays this hon- [15]
orable court that the said indictment and the prosecution pending thereunder in this honorable court against your petitioner be removed into the circuit court of the United States for the eastern district for trial at the next ensuing term of said circuit court, and your petitioner will ever pray."

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sioners, as before stated, one man drawn for service at the February term of this court, 1901, and another at the May term; of the remaining three, two of them at the present term disqualified themselves herein by previously formed opinions, and the fifth and last, after qualification and acceptance on the *voir dire*, was peremptorily challenged by the commonwealth. The affiant says that it will be impossible under these circumstances for him to avoid being tried at this term of this court except by a jury composed entirely of his political opponents, and exclusively made up of those who were the adherents and admirers of said Goebel, and it will be impossible for him to obtain a fair and impartial trial before any jury so constituted and formed.

The affiant further states that the officers of this county who went to Bourbon county to summon the men for jury service sent directly to the sheriff of Bourbon county, who, together with his deputies, were earnest and ardent adherents, supporters, and friends of the said William Goebel, and opposed politically to this affiant; that the officers of this county consulted and advised with the said officers of Bourbon county as to the selection of the men summoned, and that Wallace Mitchell, deputy sheriff of said county, James Burke, another deputy sheriff of said county, Joseph Williams, a constable of Bourbon county, and James A. Gibson, a guard for county prisoners in Bourbon county, all of whom are the political adherents of said Goebel and politically opposed to this affiant, acted with them in making the selection and summoning said men. He says that the political complexion of Bourbon is almost equally Democratic and Republican, there being a slight majority in favor of the Democratic party; that of the Republicans, about three fifths are colored, but there are many conscientious, fairminded and respectable citizens of Bourbon county, qualified for jury service, of the same political faith of this affiant, a great many of whom could have been as readily and conveniently summoned, and who would give to both sides herein a fair and impartial trial; but that none of such persons were summoned with the exception of two men, and with these exceptions ninety-one of the ninety-three names appearing upon the list furnished this affiant as a correct list of the men summoned from Bourbon county are the names of the supporters and adherents of said Goebel, and opposed politically to this affiant, and were summoned for jury service herein by reason of such fact, as this affiant believes.

Affiant further states that said Wallace Mitchell the deputy sheriff of Bourbon county, is now a candidate for sheriff of said county, seeking an election at the hands of the supporters and adherents of said William Goebel, and is their nominee for said office. Said Mitchell, in the fall of 1900, acted in summoning for jury service in this court in the case of the Com. v. Youtsey, indicter for the same offense as this affiant, and in making the selection of men to serve as jurors therein, made the statement that he would not summons a single Brown Democrat or Republican for such service, and he did not summons any such.

Messrs. **N. B. Hays** and **Lawrence Maxwell, Jr.**, argued the cause, and, with *Messrs. Robert B. Franklin* and *C. J. Bronston*, filed a brief for petitioner in No. 15, original:

The decision of the court of appeals of Kentucky that W. S. Taylor was not governor of the state when he assumed to grant a pardon to Powers, and that the pardon is therefore invalid, presents no Federal question.

Taylor v. *Beckham*, 178 U. S. 548, 578, 44 L. ed. 1187, 1200, 20 Sup. Ct. Rep. 890, 1009.

The state cannot be deemed guilty of a violation of its obligations, under the Constitution of the United States, because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Re Converse, 137 U. S. 624, 631, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191.

With the disposition of state questions by the appropriate state authorities it is not the province of this court to interfere.

Lambert v. *Barrett*, 157 U. S. 697, 699, 39 L. ed. 865, 866, 15 Sup. Ct. Rep. 722.

The possibility that officers of the state court will disregard the statutes of the state, and practise unlawful discrimination in summoning jurors at the next trial, is not ground for removal to the Federal courts.

Ex parte Wells, 3 Woods, 128, Fed. Cas. No. 17,386; *Virginia* v. *Rives* (*Ex parte Virginia*) 100 U. S. 313, 322, 25 L. ed. 667, 670; *Neal* v. *Delaware*, 103 U. S. 370, 386, 26 L. ed. 567, 570; *Gibson* v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Murray* v. *Louisiana*, 163 U. S. 101, 105, 41 L. ed. 87, 89, 16 Sup. Ct. Rep. 990; *Re Wood* (*Wood* v. *Brush*) 140 U. S. 278, 285, 35 L. ed. 505, 508, 11 Sup. Ct. Rep. 738; *Andrews* v. *Swartz*, 156 U. S. 272, 276, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389.

The possibility that the judge who presides at the next trial in the state court will commit error of law in overruling challenges to the panel is not ground for removing the prosecution into a Federal court. It is ground for a writ of error.

Carter v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Rogers* v. *Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257.

The removal statute will not be enlarged by construction.

Virginia v. *Paul*, 148 U. S. 107, 114, 37 L. ed. 386, 389, 13 Sup. Ct. Rep. 536.

The right to trial by an impartial jury in a state court is not guaranteed by the Constitution or laws of the United States.

Brooks v. *Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; *Marrow* v. *Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Howard* v. *Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The right of appeal in a criminal case is left entirely to the discretion of the state, and is not guaranteed by the Federal Constitution.

Kohl v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Missouri* v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 22, 25 L. ed. 989; *Andrews* v. *Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389.

If any right of a defendant in a criminal case, under the Constitution or laws of the United States, in connection with a challenge to a panel, or upon motion to set aside an indictment, or upon motion for a new trial, is denied by a state court, the remedy is by writ of error from this court, as in *Carter* v. *Texas* and *Rogers* v. *Alabama*, *supra*. or by writ of habeas corpus from a Federal court after conviction.

Due process of law and the equal protection of the laws do not require that there shall be right of appeal from a criminal prosecution in the state court.

Andrews v. *Swartz*, *supra*.

The commonwealth is entitled to a writ of mandamus.

Virginia v. *Rives* (*Ex parte Virginia*), 100 U. S. 313, 25 L. ed. 667; *Virginia* v. *Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

Messrs. N. B. Hays and *Lawrence Maxwell, Jr.*, also filed a separate brief for petitioner:

The 14th Amendment prohibits action by states, and not by individuals, and authorizes only legislation to correct or redress state action.

Civil Rights Cases, 109 U. S. 3, 11, 27 L. ed. 835, 839, 3 Sup. Ct. Rep. 18; *James* v. *Bowman*, 190 U. S. 127, 136, 47 L. ed. 979, 981, 23 Sup. Ct. Rep. 678; *Virginia* v. *Rives* (*Ex parte Virginia*), 100 U. S. 313, 318, 25 L. ed. 667, 669.

Where a state, acting through its judicial department, has violated the 14th Amendment, the final judgment of the state court is to be deemed the act of the state, within the meaning of that Amendment.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581; *Virginia* v. *Rives* (*Ex parte Virginia*), 100 U. S. 313, 320, 25 L. ed. 667, 670; *Lent* v. *Tillson*, 140 U. S. 316, 331, 35 L. ed. 419, 426, 11 Sup. Ct. Rep. 825.

The clause of U. S. Rev. Stat. § 641, U. S. Comp. Stat. 1901, p. 520, which is relied upon, does not provide for removal by white persons.

Strauder v. *West Virginia*, 100 U. S. 303, 311, 25 L. ed. 664, 666; *Virginia* v. *Rives* (*Ex parte Virginia*) *supra*.

Mr. **E. L. Worthington** argued the cause, and, with *Messrs. Richard Yates, R. D. Hill, James C. Sims*, and *H. Clay Howard*, filed a brief for respondent:

It is true that this court has decided in *Strauder* v. *West Virginia*, 100 U. S. 303, 25 L. ed. 664, and other cases, that a legislative denial of his equal civil rights entitles a party to a removal under U. S. Rev. Stat. § 641, U. S. Comp. Stat. 1901, p. 520. But it puts this, not upon the ground that a legislative denial is within the terms of that section, but upon the ground that it is fair to presume that this legislative denial will be followed by a denial in the judicial tribunals.

But it would be an anomalous construction of a statute which speaks not of a legislative denial, nor of an executive denial, but solely of a judicial denial,—a denial in the judicial tribunals of the state,—to say that it refers not to a judicial denial, but solely to a legislative denial.

Nor has this court ever decided that a denial in the judicial tribunals of the state, which is made before the last and final trial has begun, does not come within the spirit as well as the letter of this section.

Virginia v. *Rives* (*Ex parte Virginia*) 100 U. S. 313, 25 L. ed. 667; *Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567; *Gibson* v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Smith* v. *Mississippi*, 162 U. S. 592, 40 L. ed. 1082, 16 Sup. Ct. Rep. 900; *Murray* v. *Louisiana*, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; *Williams* v. *Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

The judgment of a trial court of a state cannot be re-examined and reversed or affirmed by this court unless that trial court is the highest court of the state in which a decision in the suit can be had. The court of appeals is the highest court in Kentucky in which a decision in the prosecution against Caleb Powers can be had. It is the judgment of that court only in the case, therefore, that may be re-examined by this court. The judgment of the Scott circuit court cannot be so re-examined.

Great Western Teleg. Co. v. *Burnham*, 162 U. S. 342, 40 L. ed. 992, 16 Sup. Ct. Rep. 850.

It results, therefore, that the error of the Scott circuit court in denying to Powers the right to be tried by a jury selected without class discrimination,—a right which is given him by the Constitution and laws of the United States,—cannot be corrected, on appeal or writ of error, by any court; not by the court of appeals of Kentucky, because of § 281 of the Criminal Code; and not by this court, because it can re-examine the judgment of the court of appeals only, which is the highest court in the state in which a decision in the suit can be had.

This court cannot reverse a judgment of the court of appeals because it correctly decided that it had no jurisdiction to pass on certain alleged errors committed by the trial court.

Fashnacht v. *Frank*, 23 Wall. 416, 23 L. ed. 81.

Mr. **Frank S. Black** also argued the cause, and, with *Messrs. Richard Yates, E. L. Worthington, R. D. Hill, James C. Sims*, and *H. Clay Howard*, filed a brief for respondent:

Unless there is a record contradiction, the sworn allegations of a petition for removal which are not traversed must be taken as true.

Dishon v. *Cincinnati, N. O. & T. P. R. Co.* 66 C. C. A. 345, 133 Fed. 471; *Toledo Traction Co.* v. *Cameron*, 137 Fed. 48; 18 Enc. Pl. & Pr. p. 372.

U. S. Rev. Stat. § 641, U. S. Comp. Stat. 1901, p. 520, is constitutional.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; *Strauder* v. *West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567; *Bush* v. *Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625; *Gibson* v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Smith* v. *Mississippi*, 162 U. S. 592, 40 L. ed. 1082, 16 Sup. Ct. Rep. 900; *Murray* v. *Louisiana*, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; *Williams* v. *Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Virginia* v. *Rives* (*Ex parte Virginia*) 100 U. S. 313, 25 L. ed. 667; *Tennessee* v. *Davis*, 100 U. S. 257, 25 L. ed. 648.

Civil rights are not limited to any class of citizens.

Holden v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

As to what is meant by equal civil rights see:—

Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Holden* v. *Hardy*, *supra*; *Yick Wo* v. *Hop-*

kins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Ho Ah Kow* v. *Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Gandolfo* v. *Hartman*, 16 L.R.A. 277, 49 Fed. 181.

A state, by its judicial tribunals, cannot deny to a citizen of the United States a right secured to him by any law providing for the equal civil rights of citizens of the United States.

Missouri v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 22, 25 L. ed. 989; *Pace* v. *Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637; *Moore* v. *Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; Guthrie's 14th Amendment, pp. 107, 108.

The Kentucky courts have held the pardon to be invalid.

Powers v. *Com.* 110 Ky. 399, 53 L.R.A. 245, 61 S. W. 735, 114 Ky. 273, 70 S. W. 644, 1050, 114 Ky. 287, 71 S. W. 494, 26 Ky. L. Rep. 1112, 83 S. W. 146.

These decisions of the Kentucky court of appeals are binding upon all of the courts of Kentucky, and must, by those courts, be regarded as the inexorable law of this case.

Rowland v. *Craig*, Sneed (Ky.) 330; *Morgan* v. *Dickerson*, 1 T. B. Mon. 20; *Legrand* v. *Baker*, 6 T. B. Mon. 235; *Sims* v. *Reed*, 12 B. Mon. 51; *Gray* v. *Dickinson*, 11 Ky. L. Rep. 890, 13 S. W. 209; *Louisville & N. R. Co.* v. *Survant*, 19 Ky. L. Rep. 1576, 44 S. W. 88; *Schmetzer* v. *Louisville & N. R. Co.* 19 Ky. L. Rep. 1713, 44 S. W. 395; *Com.* v. *Louisville & N. R. Co.* 20 Ky. L. Rep. 351, 46 S. W. 206; *Louisville & N. R. Co.* v. *Ricketts*, 21 Ky. L. Rep. 662, 52 S. W. 939; *Lancashire Ins. Co.* v. *Monroe*, 21 Ky. L. Rep. 782, 52 S. W. 1058; *Brashears* v. *Letcher County Court*, 21 Ky. L. Rep. 1250, 54 S. W. 840; *Freeman* v. *Mills*, 22 Ky. L. Rep. 859, 59 S. W. 3; *Butler* v. *Prewitt*, 22 Ky. L. Rep. 1911, 62 S. W. 20; *Louisville & N. R. Co.* v. *Penrod*, 24 Ky. L. Rep. 50, 66 S. W. 1013; *Gray Tie & Lumber Co.* v. *Farmers Bank*, 24 Ky. L. Rep. 2319, 74 S. W. 174; *Wilson* v. *Louisville Nat. Bkg. Co.* 25 Ky. L. Rep. 1065, 76 S. W. 1095; *Booth* v. *Bethel*, 25 Ky. L. Rep. 1747, 78 S. W. 868; *Brown* v. *Crow*, Hardin (Ky.) 443; *Bryan* v. *Beckley*, Litt. Sel. Cas. 91, 12 Am. Dec. 276; *Lewis* v. *Lewis*, 11 Ky. L. Rep. 413.

Equal civil rights are denied by state decisions no less than by state enactments.

Neal v. *Delaware*, 103 U. S. 370, 26 L. ed. 567; *Bush* v. *Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625.

Federal courts must enforce a valid state pardon when denied by the highest state court.

United States v. *Wilson*, 7 Pet. 150, 8 L. ed. 640; *Davis* v. *Braden*, 10 Pet. 288, 9 L. ed. 428; *United States* v. *Rosenburgh*, 7 Wall. 582, 19 L. ed. 263; *United States* v. *Harris*, 1 Abb. (U. S.) 114, Fed. Cas. No. 15,312; *Re De Puy*, 3 Ben. 316, Fed. Cas. No. 3,814; *Re Callicot*, 8 Blatchf. 96, Fed. Cas. No. 2,323; *People* v. *Bowen*, 43 Cal. 439, 13 Am. Rep. 148; Church, Habeas Corpus, § 458; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Ex parte Wells*, 18 How. 310, 15 L. ed. 423; *Greathouse's Case*, 2 Abb. (U. S.) 385, Fed. Cas. No. 5,741; *Ex parte Slauson*, 73 Fed. 666; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Iasigi* v. *Van de Carr*, 166 U. S. 391, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; *United States* v. *Fowkes*, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; *Ornelas* v. *Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Re Dana*, 68 Fed. 886; *Re Ludwig*, 32 Fed. 774; *Cook* v. *Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40.

When an officer has been lawfully inducted into office and holds actual possession thereof, claiming title by virtue of a certificate of election, his authorized official acts until legally and actually ousted are binding upon the state and third persons, regardless of the alleged determination of a contest. His powers continue as originally invested, pending any litigation that may properly ensue, and it is his duty to hold such office until title thereto is finally adjusted.

Braidy v. *Theritt*, 17 Kan. 471; *State* v. *Durkee*, 12 Kan. 308; *Ex parte Powers*, 129 Fed. 985; *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; *State ex rel. Fairbanks* v. *Superior Court*, 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741; *Petersilea* v. *Stone*, 119 Mass. 465, 20 Am. Rep. 337; *State ex rel. Leal* v. *Jones*, 19 Ind. 358, 81 Am. Dec. 403; *Hamlin* v. *Kassafer*, 15 Or. 456, 3 Am. St. Rep. 181, 15 Pac. 778; *Leach* v. *Cassidy*, 23 Ind. 449; *State ex rel. Van Amringe* v. *Taylor*, 108 N. C. 196, 12 L.R.A. 202, 23 Am. St. Rep. 51, 12 S. E. 1005; *State* v. *Carroll*, 38 Conn. 449, 9 Am. Rep 412; *Weatherford* v. *State*, 31 Tex. Crim. Rep. 530, 37 Am. St. Rep. 829, 21 S. W. 251; *State ex rel. Hartford* v. *Craig*, 132 Ind. 54, 16 L.R.A. 688, 32 Am. St. Rep. 239, 31 N. E. 352; *Marbury* v. *Madison*, 1 Cranch, 154, 2 L. ed. 66; *United States* v. *Mitchell*, 136 Fed. 896.

Title to an office cannot be determined in a suit between A and B. The judgment in such a suit binds the parties thereto, but them only. To be conclusive upon all the world, it must be by quo warranto.

People ex rel. Smith v. *Olds*, 3 Cal. 167, 58 Am. Dec. 398; *Markle* v. *Wright*, 13 Ind. 548; *Cochran* v. *McCleary*, 22 Iowa, 75; *Updegraff* v. *Crans*, 47 Pa. 103.

State decisions involving general principles are not followed in Federal courts.

Olcott v. *Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Venice* v. *Murdock*, 92 U. S. 494, 23 L. ed. 583; *Mohr* v. *Manierre*, 7 Biss. 419, Fed. Cas. No. 9,695.

State decisions are not followed if they deny equal civil rights.

Rowan v. *Runnels*, 5 How. 134, 12 L. ed. 85; *Piqua Branch of State Bank* v. *Knoop*, 16 How. 369, 14 L. ed. 977; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 17 L. ed. 173.

Federal recognition of the Taylor administration as the state government of Kentucky binds all courts.

Jones v. *United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Wolsey* v. *Chapman*, 101 U. S. 755, 25 L. ed. 915; *Runkle* v. *United States*, 122 U. S. 557, 30 L. ed. 1171, 7 Sup. Ct. Rep. 1141; *Wilcox* v. *Jackson*, 13 Pet. 498, 10 L. ed. 264; *United States* v. *Eliason*, 16 Pet. 291, 10 L. ed. 968; *The Confiscation Cases* (*United States* v. *Clarke*) 20 Wall. 92, 22 L. ed. 320; *United States* v. *Farden*, 99 U. S. 10, 25 L. ed. 267; *Marbury* v. *Madison*, 1 Cranch, 137, 2 L. ed. 60; *Re American Guano Co.* 11 Ops. Atty. Gen. p. 397; *Luther* v. *Borden*, 7 How. 1, 12 L. ed. 581.

Messrs. **N. B. Hays** and **Lawrence Maxwell, Jr.**, submitted the cause for appellant in No. 393.

Messrs. **Richard Yates, H. C. Howard, J. C. Sims,** and **E. L. Worthington** submitted the cause for appellee. *Mr. R. D. Hill* was on the brief:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action is a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.

Holden v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the 14th Amendment.

Ho Ah Kow v. *Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546.

In the administration of criminal justice, no rule can be applied to one class which is not applicable to all other classes.

Gibson v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

A discrimination by the state, between persons within its jurisdiction, is just and reasonable in the selection of jurors.

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. ed. 664.

Beyond such discrimination, a class discrimination in the selection of jurors is unjust and unreasonable.

Ibid; Virginia v. *Rives* (*Ex parte Virginia*) 100 U. S. 313, 25 L. ed. 667.

The commonwealth of Kentucky has not filed a reply to the petition for removal, or in any way taken issue with the defendant as to any of the allegations thereof. Such allegations must, therefore, be accepted as true save in so far as they may be contradicted by the transcript on file herein.

Dishon v. *Cincinnati, N. O. & T. P. R. Co.* 66 C. C. A. 345, 133 Fed. 471; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

Messrs. **Frank S. Black** and **R. C. Kinkead** also submitted the cause for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

Powers, the accused, was indicted in the circuit court of Franklin county, Kentucky, for the crime of having been an accessory before the fact to the murder of William Goebel, who was assassinated in that county on the 30th day of January, 1900. The prosecution was removed by change of venue to the circuit court of Scott county. In the latter court the accused was found guilty and his punishment fixed by the jury at confinement in the state penitentiary for life. Upon appeal *to the court of appeals [23] of Kentucky the judgment was reversed and a new trial ordered. 110 Ky. 386, 53 L. R. A. 245, 61 S. W. 735. At the second trial the verdict was guilty, and the punishment was again fixed at confinement in the penitentiary for life. Upon appeal, that judgment was reversed and a new trial ordered. 114 Ky. 239, 70 S. W. 644, 1050, 71 S. W. 494. A third trial occurred, which resulted in a verdict of guilty, with the punishment fixed at death. This judgment was also reversed and the case sent back for a new trial. 26 Ky. L. Rep. 1111, 83 S. W. 146.

When the case came on for trial the fourth time the accused tendered and offered to file in the state court his petition praying, upon grounds therein stated (and which appear in the above statement), that the prosecution be removed for trial into

the circuit court of the United States for the eastern district of Kentucky. But the state court would not allow the petition to be filed. Subsequently, a partial transcript of the record was filed in the Federal court, and the case was docketed in that court. The commonwealth objected to the filing of the transcript from the state court and to the docketing of the case in the Federal court, and moved to vacate the order of filing and docketing. That motion was overruled.

Thereupon the accused, by his counsel, presented to the Federal court an application for a writ of habeas corpus, in order that he might be discharged from the custody of the state authorities. For the reasons set forth in the opinion of that court the application was granted and a writ ordered to issue, commanding the jailer of Scott county, who held the accused in custody for the state, to deliver him into the custody of the marshal of the Federal court, which was done, that officer being directed to keep the accused confined in the county jail of Campbell county, Kentucky, until the further order of the Federal court. 139 Fed. 452. From that order the commonwealth of Kentucky has prosecuted the above appeal (No. 393), the sole ground of such appeal being that the Federal court
[24] was without jurisdiction to make the *order allowing the writ of habeas corpus and taking the accused from the custody of the state authorities. The accused has moved to dismiss the appeal because the remedy of the commonwealth was by a writ of mandamus.

The commonwealth also asked leave to file a petition for mandamus to compel the Federal court to remand the case to the state court and to restore the custody of the accused to the state authorities. Leave to file was granted and the Federal judge, having made his return, submitted the rule upon the record of the case, including the opinion filed by the court below when the writ of habeas corpus was awarded to take the accused from the custody of the state authorities. This is case No. 15, Original.

The fundamental question to be determined is whether the removal of this criminal prosecution from the state court into the Federal court was authorized by any statute of the United States. We say, by any statute, because the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress. Chief Justice Marshall, speaking for this court, has said that "courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex Parte Bollman*, 4 Cranch, 75, 93, 2 L. ed. 554, 560; *United States* v. *Hudson*, 7 Cranch, 32, 33, 3 L. ed. 259, 260; *Cary* v. *Curtis*, 3 How. 236, 245, 11 L. ed. 576, 581; *M'Intire* v. *Wood*, 7 Cranch, 504, 506, 3 L. ed. 420, 421; *United States* v. *Eckford* (*United States* v. *Tillou*) 6 Wall. 484, 488, 18 L. ed. 920, 921; *Sheldon* v. *Sill*, 8 How. 441, 449, 12 L. ed. 1147, 1151; *Jones* v. *United States*, 137 U. S. 202, 211, 34 L. ed. 691, 695, 11 Sup. Ct. Rep. 80.

The adjudged cases make it clear that whatever the nature of a civil suit or criminal procceding in a state court, it cannot be *removed* into a Federal court unless warrant therefor be found in some act of Congress.

*We are now to enquire whether the case [25] was removable from the state court, in virtue of any act of Congress.

The removal of this prosecution into the Federal court was rested on §§ 641 and 642 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 520, 521), which are as follows:

"§ 641. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person *who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States*, . . . such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. . . .

"§ 642. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas corpus *cum causa*, and of the marshal, by virtue of

said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ."

The contention of the commonwealth is that the decisions of this court wholly preclude the suggestion that § 641 authorized the removal of this case into the Federal court. In review of this contention we must see what has been heretofore decided.

[26] *Among the cases to which our attention has been called, the first one, in point of time, involving the construction of § 641, is *Ex parte Wells*, 3 Woods, 128, 132, Fed. Cas. No. 17,386, determined in the circuit court of the United States for the district of Louisiana, Mr. Justice Bradley presiding. The accused there sought to remove the prosecution from the state court, upon the ground, among others, that such vindictive prejudice existed against them on the part of the lawmaking and law-administering authorities of the state that they would be denied their rights as citizens in the state court, as well as before any jury that might be impaneled therein under the then-existing jury law of the state; consequently, they would not be able to enforce their rights in said court. It was also alleged that the state court and its officers had so manipulated the local law as to deprive the accused of an impartial jury, and that they would be deprived of the full and equal benefit of the laws and proceedings for the security of their persons. The court, having found that there was nothing in the Constitution or laws of the state that was hostile to the equal rights of the accused, in any particular, said: "The allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to the petitioners, and with regard to the existence of a general prejudice against them in the minds of the court, the jurors, the officials, and the people, are not within the purview of the statute authorizing a removal. The 14th Amendment to the Constitution, which guarantees the equal benefit of the laws, on which the present application is based, only prohibits state legislation violative of said right; it is not directed against individual infringements thereof. The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression; but, still, only when committed under color of some 'law, statute, ordinance, regulation, or custom.' [14 Stat. at L. 27, chap. 31, § 1.] And when that provision in this law, which is transferred to § 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court, against a person who is denied or cannot enforce any *of the rights secured by the act, it had [27] reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation, or custom. It is only when some such *hostile state legislation* can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the Federal court."

In *Strauder* v. *West Virginia*, 100 U. S. 303, 309, 312, 25 L. ed. 664, 666, 667, which was an indictment in a court of West Virginia against a person of the African race for the crime of murder, the accused, before the trial commenced, presented his petition for the removal of the case into the United States court upon the ground that the laws of the state, in relation to both grand and petit juries, discriminated against colored citizens, because of their race, in violation of the Constitution and the laws of the United States. The petition for removal was denied, and the accused was forced to a trial in the state court, found guilty, and sentenced. That judgment was affirmed by the supreme court of appeals of the state, and the case was brought here upon writ of error. This court held the state statute to be unconstitutional, as making an illegal discrimination against negroes, because of their race. After referring to what was said in *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563, to the effect that rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress, and that the form and manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, the court said: "There is express authority to protect the rights and immunities referred to in the 14th Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity is a law providing for the removal of his case from a state court, in which the right is denied *by the state law*, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Section 641 is *such a provision." Adverting [28] to the act from which §§ 1977 and 1978 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1259-1262) were taken, the court further said: "This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the con-

stitutional provisions. Section 641 was an advanced step, fully warranted, we think, by the 5th section of the 14th Amendment." Observe that this was the case of a state statute held to prevent the enforcement in the judicial tribunals of the state of rights secured to the accused by the Constitution of the United States. Upon that point this court said: "That the petition of the plaintiff in error, filed by him in the state court before the trial of his case, made a case for removal into the Federal circuit court, under § 641, is very plain, if, by the constitutional amendment and § 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and *a denial by the statute law of the state.* There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel."

In *Virginia* v. *Rives* (*Ex parte Virginia*), 100 U. S. 313, 321, 25 L. ed. 667, 670, which was an indictment in a court of Virginia against colored persons charged with the crime of murder, the accused moved that the venire, which was composed entirely of white men, should be modified so as to allow one third of the jury to be composed of colored men. That motion was overruled. Thereupon the defendants, before the trial, sought by petition to have the prosecution removed into the Federal court, upon the ground that the right secured to them by the act of Congress providing for the equal civil rights of all citizens of the United States was denied to them in *the judicial tribunals of the county in which the prosecution was pending;* also, upon the ground that the grand jury finding the indictment had been organized in discrimination [29]against the *colored race because of their race. The application to remove the case was denied, and the defendants were tried in the state court and convicted. The case at that stage of the trial was docketed, at the motion of the accused, in the Federal court, and, upon writ of habeas corpus sued out from that court. they were taken from the custody of the state, and placed in the custody of the United States marshal. The commonwealth of Virginia obtained from this court a rule against the judge of the Federal court to show cause why the accused should not be redelivered to the authorities of the state, to be dealt with according to the laws of that commonwealth. The judge made his return to the rule, averring that the indictments were removed into the Federal court by virtue of § 641 of the Revised Statutes. It is important to notice that there was no claim in that case that either the Constitution or laws of Virginia denied the civil rights of colored people, or stood in the way of their enforcing the equal protection of the laws. The law, this court said, made no discrimination against them because of their color, nor any discrimination at all. And further, referring to the officer charged with the duty of selecting jurors, this court said: "He made himself liable to punishment at the instance of the state and under the laws of the United States. In one sense, indeed, his act was the act of the state, and was prohibited by the constitutional amendment. But, *inasmuch as it was a criminal misuse of the state law,* it cannot be said to have been such a 'denial or disability to enforce in the judicial tribunals of the state,' the rights of colored men, *as is contemplated by the removal act.* § 641. It is to be observed that act gives the right of removal only to a person 'who is denied, or cannot enforce, in the judicial tribunals of the state, his equal civil rights.' And this is to appear before trial. *When a statute of the state* denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. *Such a case* is clearly within the provisions of § 641. But *when a subordinate officer of the state, [30]in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer, whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the state, and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash

the indictment or the panel, or, if not, the error will be corrected in a superior court. *We cannot think such cases are within the provisions of* § 641. *Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court.*"

The question as to the scope of § 641 of the Revised Statute again arose in the subsequent cases of *Neal* v. *Delaware*, 103 U. S. 370, 386, 26 L. ed. 567, 570; *Bush* v. *Kentucky*, 107 U. S. 110, 116, 27 L. ed. 354, 356, 1 Sup. Ct. Rep. 625; *Gibson* v. *Mississippi*, 162 U. S. 565, 581, 584, 40 L. ed. 1075, 1078, 1079, 16 Sup. Ct. Rep. 904, and *Smith* v. *Mississippi*, 162 U. S. 592, 600, 40 L. ed. 1082, 1085, 16 Sup. Ct. Rep. 900. In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in § 641—"who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States"—did not give the right
[31] of *removal*, unless *the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of *removal* under § 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the Constitution or laws of the state, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the state in which the decision, in respect of that right, could be had.

In *Gibson* v. *Mississippi*, *supra*, the words of this court as to the scope of § 641 were very emphatic. In that case there was a conviction in a state court of a negro for the crime of murder, and in which one of the questions, upon writ of error to the highest court of that state, was as to the action of the trial court in denying a petition for the removal of the prosecution to the Federal court. This court said: "When the Constitution and laws of a state, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the state court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for *removing* the prosecution into the circuit court of the United States in advance of a trial. We may repeat here what was said in *Neal* v. *Delaware*, namely, that in thus construing the statute 'we do not withhold from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the state, his constitutional equality of civil rights, all opportunity of appealing to the courts of the United States for redress *of his wrongs. For if not entitled, [32] under the statute, to the removal of the suit or prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment, any right, privilege, or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review.' . . . We therefore held in *Neal* v. *Delaware* that Congress had not authorized a removal of the prosecution from the state court, where jury commissioners or other subordinate officers had, *without authority derived from the Constitution and laws of the state*, excluded colored citizens from juries because of their race." Again: "The application was to remove the prosecution from the state court, and a removal, as we have seen, could not be ordered upon the ground simply that citizens of African descent had been improperly excluded, because of their race, and without the sanction of the Constitution and laws of the state, from service on previous grand juries, or from service on the particular grand jury that returned the indictment against the accused. We do not overlook in this connection the fact that the petition for the removal of the cause into the Federal court alleged that the accused, by reason of the great prejudice against him on account of his color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpœna witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the *removal* sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the Constitution and laws of the state. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice of race."

The cases to which we have adverted had reference, it is true, to alleged discriminations against negroes because of their race. But the rules announced in them equally

apply where the accused is of the white race. Section 641, as well as the 14th Amendment of the Constitution, is for the benefit [33]of all *of every race whose cases are embraced by its provisions, and not alone for the benefit of the African race.

We have not overlooked the suggestion, earnestly pressed upon our attention, that it is impossible for the accused to obtain a fair trial in the locality where the prosecution is pending. Indeed, the suggestion is, in effect, that there was a deliberate purpose on the part of those charged with the administration of justice in that locality to take his life, under the forms of law, even if the facts did not establish his guilt of the crime charged. It is true that, looking alone at the petition for removal, the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice and recognize the right of every human being, accused of crime, to be tried according to law. The case, as made by the record, it must be conceded, tends to show, if it does not justify the belief, that administrative officers having connection with the trial of the accused had it in mind, at each trial, to exclude from the jury, so far as it was possible to do so, every person, however competent, who belonged to the same political party as the accused. In his separate opinion, in 26 Ky. L. Rep. 1111, 1117, 83 S. W. 146, 149, Judge Barker, of the court of appeals of Kentucky, referring to the third trial of the accused, said: "It is clear that the trial judge was of opinion that it was not an offense against the 14th Amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans [the accused being a Republican in politics] from the jury, solely because they were Republicans, provided the selected Democrats [the deceased Goebel being a Democrat in politics] were possessed of the statutory qualifications required for jury service."

It is appropriate here to recall that the circuit court, referring to the petition for removal, said: "The commonwealth of Kentucky has not filed a reply to said petition for removal, or in any way taken issue with the defendant as to any of the allegations thereof. Said allegations must, therefore, be accepted as true, save in so far as they may be contradicted by the transcript [34]*on file herein. In the case of *Dishon* v. *Cincinnati, N. O. & T. P. R. Co.* 66 C. C. A. 345, 133 Fed. 471, Judge Richards, in discussing the affirmative allegations of a petition for removal in a civil suit under the jurisdictional acts of 1887, 1888 (24 Stat. at L. 552, chap. 373, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), said: 'If these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine. No answer was filed; no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out.' In the case of *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297, Justice Gray, in referring to a petition for a writ of habeas corpus, under §§ 751–755, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, pp. 592, 593), said: 'In a petition for a writ of habeas corpus, verified by oath of the petitioner, as required by U. S. Rev. Stat. § 754, U. S. Comp. Stat. 1901, p. 593, facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.' The allegations of the petition for removal are not borne out by the transcript in all their detail. They are, however, borne out to a substantial degree, and are not contradicted in any substantial particular. It establishes the discrimination complained of in the selection of the jurors by the subordinate officers having to do therewith on the second and third trials, and that on both trials the Scott circuit court held that such discrimination was not illegal and the defendant had no right to complain thereof, it not being claimed that the jurors selected did not possess the statutory qualifications. As to the first trial, all that the transcript shows is that it was one of the grounds of defendant's motion for new trial that the circuit judge, after the regular panel was exhausted, had refused to draw from the wheel the names of the jurors placed there in the fall of 1899, before any motive for discrimination had arisen, concerning which Judge Du Relle had this to say in the opinion delivered by him on behalf of the majority of the court of appeals *on the first appeal: [35]'In the grounds relied on in the motion for new trial it is stated that the court overruled the motion of appellant, after the regular panel was exhausted, to draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that, in a case concerning which so much feeling existed, the simple and easy mode was not adopted, which would have put beyond cavil the question of the accused having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial.'"

Taking, then, the facts to be as represented in the petition for removal, still the remedy of the accused was not to have prosecution removed into the Federal court, that court not being authorized to take cognizance of the case upon removal from the state court. It is not contended, as it could not be, that the Constitution and laws of Kentucky deny to the accused any rights secured to him by the Constitution of the United States or by any act of Congress. Such being the case, it is impossible, in view of prior adjudications, to hold that this prosecution was removable into the circuit court of the United States by virtue of § 641 of the Revised Statutes. Such a case as the one before us has not been provided for by any act of Congress; that is, a circuit court of the United States has not been authorized to take cognizance of a criminal prosecution commenced in a state court for an alleged crime against the state, where the Constitution and laws of such state do not permit discrimination against the accused in respect of such rights as are specified in the first clause of § 641. This court, while sustaining the subordinate courts of the United States in the exercise of such jurisdiction as has been lawfully conferred upon them, must see to it that they do not usurp authority not affirmatively given to them by acts of Congress. In *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510, 511, we said that "the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the ex-
[36] ercise of its appellate power, that of *all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction,—first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." This principle has been again and again reaffirmed. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453, 44 L. ed. 842, 843, 20 Sup. Ct. Rep. 690, and authorities there cited.

Now, it affirmatively appears of record that the circuit court has taken jurisdiction of this case on removal from the state court, when, as we hold, no act of Congress authorized it do so. We cannot, in fidelity to the law, as declared in former cases, overlook this defect of jurisdiction in the court below or fail to express our inability to concur in the views of the learned court below upon this point.

The circuit court said: "I, therefore, conclude that the prior action of the Scott circuit court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein,—just as real as an unconstitutional statute would be,—and that the defendant is denied the equal protection of the laws in said court, within the meaning of said section, and entitled to a removal on account thereof. He is denied in said court the equal protection of the laws because he has been denied, and such denial has never been set aside, but remains in full force and effect. . . . By an 'inability to enforce in the judicial tribunals of the state' is meant, as I construe the statute, any judicial tribunal of the state that may have jurisdiction of the prosecution." This view is met by what has been said in former cases, namely, that the words in § 641—"who is denied or cannot enforce in the judicial tribunals of the state"—have no application to any case where the rights secured to an accused "by any law providing for the equal civil rights of citizens of the United States, *or of all persons with- [37]
in the jurisdiction of the United States," are recognized or are not denied by the Constitution or laws of the state in which the prosecution is pending.

Under this holding, the accused is not deprived of opportunity to have his rights, of whatever nature, which are secured or guaranteed to him by the Constitution or laws of the United States, fully protected by a Federal court. But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindi-

cate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the Federal right, privilege, or immunity asserted. This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed. What we have said is clear from § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), which declares that "a final judgment or decree in any suit in the highest court of a state, in which a decision *in* the suit could be had, . . . where any title, right, privilege, or immunity is claimed under the Constitution, . . . and the decision is *against* the
[38] title, right, privilege, or immunity *specially set up or claimed, by either party, under such Constitution, . . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." Looking at the object of that section it must be held that this court has jurisdiction, upon writ of error, to re-examine the final judgment of a subordinate state court denying a Federal right, specially set up or claimed, if, under the local law, that court is the highest court of the state entitled to pass upon such claim of Federal right. The great case of *Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257, which was a criminal prosecution for a misdemeanor, was brought to this court, upon writ of error, from the quarterly session court for the borough of Norfolk, Virginia, and our jurisdiction was sustained upon the ground that such court was the highest court of the state in which, under the laws of Virginia, that case was cognizable. In *Downham* v. *Alexandria*, 9 Wall. 659, 19 L. ed. 807, which was a suit for taxes against a dealer in liquors, the court said: "The legislature, then, having thought fit to make the judgment of the district court in this case final and without appeal, that court is, for this case, the highest court in which the decision could be made; and the writ of error is, therefore, warranted by the act of Congress, and regular." In *Gregory* v. *McVeigh*, 23 Wall. 294, 306, 23 L. ed. 156, 157, which was a writ of error to the corporation court of Alexandria, Virginia, and in which there was a motion to dismiss for want of jurisdiction, this court, said: "The court of appeals is the highest court in the state of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under the laws of the state, could decide it. . . . We think, therefore, that the judgment of the corporation court of the city of Alexandria is the judgment of the highest court of the state in which a decision of the suit could be had, and that we may re-examine it upon error." In *Bergemann* v. *Backer*, 157 U. S. 655, 659, 39 L. ed. 845, 848, 15 Sup. Ct. Rep. 727, 728, a criminal prosecution for murder *in a subordinate [39]
court of New Jersey, this court said: "If the proceedings in the court of oyer and terminer could not, under the laws of New Jersey, be reviewed in a higher court of that state, except upon the allowance of a writ of error by such court or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the acts of Congress, the judgment of the highest court of the state in which a determination of the case could be had, and such judgment could have been, upon writ of error re-examined here, if it had denied any right, privilege, or immunity specially set up and claimed under the Constitution of the United States." So, in *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 530, 539, 46 L. ed. 673, 678, 22 Sup. Ct. Rep. 446, in which the defendant made a claim of immunity in virtue of an authority exercised under the United States, it was held that our writ of error ran, not to the supreme court of Missouri, but to the Kansas City court of appeals,—the highest court in which, under the law of that state, the question as to that immunity could be decided.

It is necessary to notice one other point made in behalf of the accused. At each of the trials he pleaded in bar of the prosecution a pardon granted to him on the 10th day of March, 1900, by William S. Taylor, who was alleged to have been, at the time, the duly elected, qualified, actual, and acting governor of Kentucky, having in his possession and under his control all the books, papers, records, and archives, as well as the executive mansion, belonging to the office of governor. That pardon, it is alleged, was accepted by the accused. It is further alleged that at the time said pardon was issued Taylor had been recognized, regarded, and treated as the lawful

governor of Kentucky by the executive power and executive department of the government of the United States, including the President, the Attorney General, and the Postmaster General, and by the postmaster at Frankfort, the capital of Kentucky. The petition for removal alleged that the court in which the accused was tried, as well as the court of appeals of Kentucky, had refused to recognize said pardon as having
[40] any legal effect, and had *thereby denied to him the equal civil rights and the equal protection of the laws secured to him by the above provisions of the Constitution and laws of the United States; consequently, it was contended, he was denied, and could not enforce, in any judicial tribunal of Kentucky, the rights which said pardon gave him.

Manifestly, in view of what has already been said, this question as to the pardon of the accused does not make a case of removal on the ground of the denial or inability to enforce in the judicial tribunals of Kentucky of a right secured to the accused "by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States." Whether the nonrecognition by the courts of the state of the validity of the alleged pardon involved a denial of any right secured to the accused by any other law or by the Constitution of the United States, we need not now consider. As the circuit court could not, in virtue of § 641, take cognizance of this prosecution or removal, we cannot properly pass upon the merits of any question of Federal right which might arise in the case. It is sufficient to say that if the accused, by reason of the Taylor pardon, acquired any right under the Constitution or laws of the United States, and if, at the next trial of his case, that right, having been specially set up and claimed, should be denied by the highest court of the state in which a decision of that question could be had, such action of that court, in respect of that pardon, can be reviewed here upon writ of error. We do not perceive that any question arising out of the pardon could make a case under § 641 for the removal of the prosecution from the state court.

We are all of opinion that *the order awarding the writ of habeas corpus cum causa must be reversed,* with directions to set aside that order as well as the order docketing the case in the circuit court of the United States; also, that *the rule in relation to mandamus must be made absolute,* the prosecution remanded to the state court, and the custody of the accused surrendered to the state authorities.

It is so ordered.

*TERRITORY OF NEW MEXICO, *Appt.*, [41]

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Rio Grande, Mexico, & Pacific Railroad Company, and Silver City, Deming, & Pacific Railroad Company.

(See S. C. Reporter's ed. 41–43.)

Appeal from territorial supreme court —jurisdictional amount.—That part of a judgment of a territorial district court, in favor of plaintiff in an action to recover taxes, which was disallowed by the judgment of the territorial supreme court, reversing the judgment below except as to an item which was not contested, is the "matter in dispute," within the meaning of the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), providing for appeals to the Supreme Court of the United States from the territorial supreme courts.

[No. 182.]

Argued January 26, 1906. Decided March 12, 1906.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment affirming in part a judgment of the District Court of Grant County, in that territory, in favor of the territory, in an action to recover taxes. *Dismissed* because the jurisdictional amount was not involved.

See same case below, 11 N. M. 669, 72 Pac. 14.

The facts are stated in the opinion.

Mr. **Frank W. Clancy** argued the cause, and, with *Mr. A. H. Harllee,* filed a brief for appellant.

Mr. **Robert Dunlap** argued the cause, and, with *Messrs. H. L. Waldo, R. E. Twitchell,* and *Gardiner Lathrop,* filed a brief for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The territory of New Mexico commenced three separate actions against appellees, respectively, in the district court of Grant county, New Mexico, to recover taxes alleged to be due on a levy to pay certain judgments against the county, including *a [42] particular item of $276.21, arising from the increase of the valuation of the property of the railroad companies. The aggregate amount claimed was $8,646.49, with interest at the rate of 25 per cent per annum. The cases were consolidated and submitted to the district court on an agreed statement of facts with exhibits attached, a jury being

NOTE.—*As to review by the United States Supreme Court of territorial decisions*—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

waived, and resulted in a judgment, October 9, 1902, for $5,156.71 with interest at 6 per cent per annum. This included the $276.21 with interest. Appellees sued out writs of error from the supreme court of the territory. No cross writ of error was brought and no cross errors were assigned. In the supreme court the item of $276.21 with interest was not contested. February 26, 1903, the supreme court announced its conclusion that the judgment be reversed, but as the item of $276.21 was not contested, rendered judgment for that amount, thereby rejecting the sum of $4,880.50 of the judgment below, that sum with interest at 6 per cent amounting to less than $5,000 on that date. 11 N. M. 669, 72 Pac. 14. From the judgment so rendered the territory prosecuted an appeal to this court, under the act of Congress in that behalf, January 17, 1905, and prayed in its assignment of errors that the judgment of the supreme court be reversed and set aside, and the cause be "remanded to said supreme court, with directions to affirm the judgment of the district court of Grant county." The appeal was heard in this court on January 26, 1906, and on that day appellant filed an additional assignment of errors to the effect that the supreme court of New Mexico erred in failing to hold that appellant was entitled to interest at the rate of 25 per cent per annum from October 9, 1902. But the judgment of the district court gave interest at 6 per cent, and, as before stated, the territory did not complain of that judgment as rendered.

By the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), no appeal or writ of error could be allowed from any judgment or decree of the territorial supreme courts, with certain exceptions not material here, "unless the
[43] matter in dispute, exclusive of costs, *shall exceed the sum of five thousand dollars." The matter in dispute here was that part of the judgment of the district court which was disallowed by the supreme court, and that was less than five thousand dollars.

Appeal dismissed.

EDWIN F. HALE, *Appt.*,
v.
WILLIAM HENKEL, United States Marshal.

(See S. C. Reporter's ed. 43–89.)

1. Grand jury — necessity of formal charge.—The examination of witnesses before a grand jury need not be preceded by a presentment, indictment, or other formal charge.

2. Grand jury—summoning witnesses.—In summoning witnesses before a grand jury it is sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against such persons.

3. Witnesses—self-incrimination—statutory immunity.—The examination of witnesses before a grand jury concerning an alleged violation of the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), is a "proceeding" within the meaning of the proviso to the act of February 25, 1903 (32 Stat. at L. 854–904, chap. 755, U. S. Comp. Stat. Supp. 1905, p. 602), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one.

4. Witnesses—self-incrimination—sufficiency of statutory immunity.—The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., 5th Amend., when examined concerning an alleged violation of the antitrust act of July 2, 1890, is taken away by the proviso to the act of February 25, 1903, that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed.

5. Witnesses—self-incrimination—sufficiency of statutory immunity.—The difficulty, if any, of procuring the testimony which a person has given on his examination before a grand jury concerning an alleged violation of the antitrust act of July 2, 1890, does not render the immunity from prosecution or forfeiture, given by the proviso to the act of February 25, 1903, insufficient to satisfy the guaranty of U. S. Const. 5th Amend., against self-incrimination.

6. Witnesses—self-incrimination—privilege is personal.—The privilege against self-incrimination afforded by U. S. Const. 5th Amend., is purely personal to the witness, and he cannot claim the privilege of another person, or of the corporation of which he is an officer or employee.

7. Constitutional law—searches and seizures.—The protection against unreasonable searches and seizures afforded by U. S

NOTE.—*On the privilege of witnesses*—see notes to Cooper v. State, 4 L.R.A. 766; Rice v. Rice, 11 L.R.A. 591; and *Re* Buskett, 14 L.R.A. 407.

On the sufficiency of statutory immunity to satisfy the constitutional guaranty against self-incrimination—see note to Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

On constitutional protection against unreasonable searches and seizures—see notes to Shuman v. Ft. Wayne, 11 L.R.A. 378; and Levy v. Superior Court, 29 L.R.A. 818.

Const., 4th Amend., cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the antitrust act of July 2, 1890, by such corporation.

8. **Constitutional law—searches and seizures.**—A corporation charged with a violation of the antitrust act of July 2, 1890, is entitled to immunity under U. S. Const., 4th Amend., from such an unreasonable search and seizure as the compulsory production before a grand jury, under a *subpœna duces tecum*, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different states.

[No. 340.]

Argued January 4, 5, 1906. Decided March 12, 1906.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order discharging a writ of habeas corpus to inquire into a commitment for a contempt in refusing to testify before the grand jury and produce the papers and documents called for in a *subpœna duces tecum*, and remanding the petitioner to the custody of the marshal. *Affirmed.*

See same case below, 139 Fed. 496.

Statement by Mr. Justice **Brown:**

This was an appeal from a final order of the circuit court, made June 18, 1905, dismissing a writ of habeas corpus, and remanding the petitioner, Hale, to the custody of the marshal.

The proceeding originated in a *subpœna duces tecum*, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify
[45] and give evidence *in a certain action now pending . . . in the circuit court of the United States for the southern district of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States, and that you bring with you and produce at the time and place aforesaid:"

1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts, or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States, and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpœna, and, before being sworn, asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information, or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the circuit court, as stated in the subpœna, and that the grand jury was investigating no specific charge against *any [46] one, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence, and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the assistant district attorney that this was a proceeding under the Sherman act to protect trade and commerce against unlawful restraint and monopolies; that, under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions.

He also declined to produce the papers and documents called for in the subpœna:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed.

Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpœna.

Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the circuit judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of habeas corpus was thereupon sued out, and a hearing had before another judge of the same court, who discharged the writ and remanded the petitioner.

Mr. **De Lancey Nicoll** argued the cause, and, with *Messrs. Junius Parker* and *John D. Lindsay*, filed a brief for appellant:

Unless the grand jury, in prosecuting the investigation referred to, in its two reports to the court was acting within the scope of its jurisdiction, the court was without authority to punish the witness for his supposed contumacy in refusing to answer questions, and all of its acts and proceedings in the premises were without authority, and void.

People v. *Cassels*, 5 Hill, 164; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Cooley, Const. Lim. 7th ed. p. 575; *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. ed. 377; *Re Lester*, 77 Ga. 143; *Hartranft's Appeal*, 85 Pa. 433, 27 Am. Rep. 667.

It is doubtless true that the grand jury will ordinarily be presumed to have followed the "usual" methods of procedure. But such presumption only arises in the absence of any averment or suggestions to the contrary.

United States v. *Terry*, 39 Fed. 355.

Notwithstanding the language of the subpœna, which commanded the petitioner to testify and produce papers and documents "in a certain action," the requirement that the petitioner appear before the grand jury necessarily shows that there was, in fact, no action pending, for there can be no action, or prosecution, or even a criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense, by indictment duly returned by the grand jury, or, at least, by information lodged before a magistrate.

Post v. *United States*, 161 U. S. 583, 40 L. ed. 816, 16 Sup. Ct. Rep. 611.

An *ex parte* inquisitorial investigation, based upon mere suspicion or speculation, without any complaint or charge, and that may, and presumably would be, without result, is not a "case" or "controversy" within the meaning of the Constitution; and no court has any power or right to lend its aid or assistance to such a matter.

Re Pacific R. Commission, 32 Fed. 241; *Kilbourn* v. *Thompson*, and *Interstate Commerce Commission* v. *Brimson*, *supra*.

By the common law the powers of grand juries were restricted to the presentment to the court of accusations of two sorts; *viz.*, indictments returned after the examination of witnesses, and presentments made upon the knowledge or observation of the grand jurors themselves.

4 Bl. Com. chap. 23; 1 Chitty, Pl. pp. 162, 316, 322; 2 Gude, Crown Practice, 583*; Archbold, Crim. Pr. & Pl. 2d ed. 89, 90; Davis, Precedents of Indictments, p. 219; *Reg.* v. *Hughes*, 1 Car. & K. 519; Wharton, Precedents of Indictments & Pleas, 1st ed. 328.

The powers and duties of grand juries, ingrafted into our system by the Constitution, are only such as were possessed by grand juries at the common law; namely, of considering and acting upon indictments previously framed and laid before them by a known prosecutor, and of presenting facts within their own knowledge.

United States v. *Mundel*, 6 Call (Va.) 245.

Except in the single state of Tennessee, where there is legislative authority for it in respect to certain classes of offenses, the theory of general inquisitorial power in a grand jury is absolutely repudiated.

Re Lester, *supra*; *Lewis* v. *Wake County*, 74 N. C. 194; *Ward* v. *State*, 2 Mo. 120, 22 Am. Dec. 449; *Harrison* v. *State*, 4 Coldw. 195; *State* v. *Adams*, 2 Lea, 647; *State* v. *Lee*, 87 Tenn. 114, 9 S. W. 425; *Blaney* v. *State*, 74 Md. 153, 21 Atl. 547; *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74; *People ex rel. Pickard* v. *Chautauqua County*, 11 N. Y. Civ. Proc. Rep. 172; *O'Hair* v. *People*, 32 Ill. App. 277; *Webster's Case*, 5 Me. 432; *Post* v. *United States*, 161 U. S. 585, 587, 40 L. ed. 816, 817, 16 Sup. Ct.

Rep. 611; *Beavers* v. *Henkel*, 194 U. S. 73, 84, 48 L. ed. 882, 886, 24 Sup. Ct. Rep. 605.

In no case that can be found in the books, where the point has been presented, directly or indirectly, has there been intimation that a grand jury could prosecute an investigation in the absence of a specific charge of crime, directed against a particular person or persons, except in certain Pennsylvania decisions, where the courts have held that, under the instructions of the court, attention of grand juries may be drawn to matters of general public import, such as "great riots that shake the social fabric, public pestilences," etc.

Re Lloyd, 3 Clark (Pa.) 188; *Re Memorial*, 8 Phila. 478; *Hartranft's Appeal, supra; Com.* v. *Green*, 126 Pa. 531, 12 Am. St. Rep. 894, 17 Atl. 878.

Even though a grand jury may send for witnesses before an indictment has been actually framed and laid before them, still, it is perfectly certain that there must at least be pending before them some specific charge directed against a particular person or persons.

Counselman v. *Hitchcock*, 142 U. S. 547, 561, 35 L. ed. 1110, 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *United States* v. *Kilpatrick*, 4 Crim. L. Mag. 692, 16 Fed. 765; *Re Morse*, 42 Misc. 664, 87 N. Y. Supp. 721.

Our system of law does not contemplate any inquiry into the commission of crime except where someone is charged with it upon allegations showing the existence of facts which, if established by competent proof, constitute a violation of law.

Re Lloyd, supra.

Judicial power is that which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.

Cooley, Const. Lim. 132.

In *Re Pacific R. Commission, supra*, it was held that the courts could not legitimately be made the instruments for furthering an unwarranted legislative investigation.

See also *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The theory of our criminal proceeding, like that of Great Britain, is accusatory, and not inquisitorial.

United States v. *James*, 26 L.R.A. 418, 5 Inters. Com. Rep. 578, 60 Fed. 257.

To suppose the powers of a grand jury, created, not by express statute, but by the necessity of their aiding the jurisdiction of a court, to transcend that jurisdiction, would be to consider grand juries, once convened, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined.

United States v. *Hill*, 1 Brock. 159, Fed. Cas. No. 15,364.

The constitutional guaranty against being forced to give incriminating testimony must have a broad construction in favor of the right which it was intended to secure.

Counselman v. *Hitchcock*, 142 U. S. 547, 562, 35 L. ed. 1110, 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

A grand jury inquiry for the purpose of discovering whether or not the Sherman act has been violated is not a "proceeding, suit, or prosecution," under that act.

Windt v. *Banniza*, 2 Wash. 147, 26 Pac. 189; *Post* v. *United States*, 161 U. S. 583, 40 L. ed. 816, 16 Sup. Ct. Rep. 611; *Virginia* v. *Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *State* v. *Wolcott*, 21 Conn. 279.

The order of May 5th, requiring the appellant to produce the papers called for by the *subpœna duces tecum*, was made in violation of his rights and the rights of the MacAndrews & Forbes Co. under the 4th Amendment.

Boyd v. *United States*, 116 U. S. 616, 630, 29 L. ed. 746, 751, 6 Sup. Ct. Rep. 524; *Re Lester*, 77 Ga. 143; *Hartranft's Appeal*, 85 Pa. 433, 27 Am. Rep. 667.

Whether a *subpœna duces tecum* for papers or a search warrant for chattels be issued, the spirit of the Amendment demands that, while in the latter case there must be probable cause, supported by oath or affirmation, with a description of the place to be searched, etc., in the former it must be shown to the court or authority issuing the process that there is some proper cause pending, in relation to which the papers or documents called for are material evidence.

Re Lester and *Hartranft's Appeal, supra; Re Moser* (Mich.) 11 Det. L. N. 593, 101 N. W. 588; *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426.

The process must, moreover, give a reasonably accurate description of the papers whose production is sought.

Ex parte Brown and *Re Moser, supra; Sandford* v. *Nichols*, 13 Mass. 286, 7 Am. Dec. 151.

So far from describing the papers whose production was sought with reasonable accuracy, the order in question lacked any specification whatever in that regard.

Ex parte Brown, supra.

A corporation cannot be compelled to furnish incriminating evidence against itself, and it is entitled to the same immunity in this regard which the common law and

our Constitution accord to private individuals.

3 Wigmore, Ev. § 2259, p. 3116; *Sicilies* v. *Wilcox*, 7 State Tr. N. S. 1049, 1062; *Logan* v. *Pennsylvania R. Co.* 132 Pa. 403, 19 Atl. 137; *Davies* v. *Lincoln Nat. Bank*, 16 N. Y. Civ. Proc. Rep. 68, 4 N. Y. Supp. 373.

This court has repeatedly held that a corporation is a "person," and protected by the 14th Amendment, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Santa Clara County v. *Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Are our constitutional safeguards against self-incrimination more infirm than those furnished by the common law? In former times it was thought a startling proposition that a corporation could be called upon to furnish evidence against one of its members. Here a corporation is sought to be compelled, by indirection, to furnish evidence against itself.

Rex v. *Purnell*, 1 Wils. 239.

Messrs. De Lancey Nicoll and *John D. Lindsay* also filed a separate brief for appellant:

No judicial body can act or proceed in any manner in the absence of an allegation showing the existence of facts justifying its intervention.

Re Peck, 167 N. Y. 391, 53 L.R.A. 888, 60 N. E. 775; *Re Davies*, 168 N. Y. 89, 56 L.R.A. 855, 61 N. E. 118; *People ex rel. Sandman* v. *Tuthill*, 79 App. Div. 24, 79 N. Y. Supp. 905.

Federal grand juries are not bound to keep a record of the evidence taken before them, and are prohibited from disclosing their proceedings, and so are all other persons who have access to, or are permitted to participate in, those proceedings.

United States v. *Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134.

Corporations enjoy the protection of the 4th and 5th Amendments.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

If corporations may suffer the judgment of death by dissolution (*People* v. *North River Sugar Ref. Co.* 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436), if they may be condemned to forfeit the corporate property, if they may be indicted, convicted, and sentenced to pay a fine as individuals may,—what excuse can be made for denying to them the beneficent protection of these Amendments?

A corporation is a citizen under the provision of the Constitution which gives courts of the United States jurisdiction over controversies between citizens of different states.

Louisville, C. & C. R. Co. v. *Letson*, 2 How. 497, 11 L. ed. 353; *Marshall* v. *Baltimore & O. R. Co.* 16 How. 314, 325, 14 L. ed. 953, 958.

A corporation is a person within the meaning of penal statutes.

United States v. *Amedy*, 11 Wheat. 392, 412, 6 L. ed. 502, 507; *Harrison's Case*, 2 East, P. C. 927.

A corporation is deemed to be a person within the usury statute.

Thornton v. *Bank of Washington*, 3 Pet. 36, 7 L. ed. 594.

A corporation was a person within the meaning of the Treaty of Peace (1783–1794), and entitled to the protection of its property from forfeiture.

Society for Propagation of the Gospel v. *New Haven*, 8 Wheat. 464, 5 L. ed. 662.

The personal privilege of the witness may be one entity, the corporation's privilege may be another; but, unless the corporation can assert its privilege through its representative, how can it ever assert it at all?

State ex rel Atty. Gen. v. *Simmons Hardware Co.* 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125.

Mr. Junius Parker also filed a separate brief for appellant.

Mr. **Henry W. Taft** argued the cause, and, with *Mr. Felix H. Levy* and *Attorney General Moody*, filed a brief for appellee:

At the date of the adoption of the 5th Amendment, and for fifty years thereafter, under the procedure sanctioned by usage and precedent, an American grand jury (1) could proceed in cases other than those in which a private prosecutor presented a duly engrossed indictment, and (2) on its own motion, or at the instance of the court or the prosecuting attorney, could (and, necessarily, by an inquisitorial method) investigate an alleged or suspected crime, and, after the investigation, direct an indictment to be drawn in accordance with the evidence.

2 Wilson's Works, ed. 1896, p. 213; *Re Grand Jury*, Addison (Pa.) 38 Appx.; *United States* v. *Mundel*, 6 Call (Va.) 245; *Ward* v. *State*, 2 Mo. 120, 22 Am. Dec. 449; Davis, Precedents of Indictments, pp. 2, 18, 28; *State* v. *Freeman*, 13 N. H. 488.

Up to this time there had not been in any court in this country a judicial expression which attempted to limit the in-

quisitorial powers of the grand jury, except in the case of *State* v. *Smith*, Meigs, 99, 33 Am. Dec. 132, decided in 1838, but the decision in that case is not significant or important, for the reason that certain early statutes of the state of Tennessee expressly limited the power of the grand jury. In 1845, however, in the case of *Re Lloyd*, 3 Clark (Pa.) 188, there appeared the first well-considered expression of any American court showing a tendency at variance with the view expressed by Judge Addison, in the same state, fifty-four years before.

The decisions of the Federal courts continue to recognize broad inquisitorial powers in a grand jury.

Wharton, Crim. Pl. & Pr. 8th ed. § 337; *Re Charge*, 2 Sawy. 667, Fed. Cas. No. 18,255; *United States* v. *Kimball*, 117 Fed. 156; *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *United States* v. *Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134; *United States* v. *Terry*, 39 Fed. 355. See also *United States* v. *McAvoy*, 18 How. Pr. 380.

State courts generally recognize this rule. *Webster's Case*, 5 Me. 432; *State* v. *Terry*, 30 Mo. 368; *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Com.* v. *Smyth*, 11 Cush. 473; *Price* v. *Com.* 21 Gratt. 846; *State* v. *Wolcott*, 21 Conn. 272; *State* v. *Magrath*, 44 N. J. L. 227; *Blaney* v. *State*, 74 Md. 153, 21 Atl. 547; *People* v. *Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; Thompson & M. Juries, § 615, subd. 2; Wharton, Crim. Pl. & Pr. 8th ed. § 388.

Even in Pennsylvania, where some restrictions not common in other jurisdictions have been imposed upon the powers of the grand jury acting on its own motion, their power to act at the instance of the district attorney is recognized.

McCullough v. *Com.* 67 Pa. 30; *Rowand* v. *Com.* 82 Pa. 405; *Com.* v. *Green*, 126 Pa. 531, 12 Am. St. Rep. 894, 17 Atl. 878.

Criminal prosecutions before a grand jury in England at the time of the establishment of the judicial system of the United States were almost always commenced by private prosecutors. But the courts of this country have never thought it wise policy to permit a private prosecutor to take any part, except as a witness, in setting the machinery of the criminal law in motion.

Re Charge, supra.

Even in Pennsylvania, where, as early as 1705, the English practice was retained by statute to the extent of requiring that the name of the prosecutor should be placed upon the indictment, it was held, in 1769, that this statute did not apply where there was no real prosecutor, *i. e.*, where the prosecution took its rise from the grand jury, or, we might add with equal reason, from the prosecuting attorney.

King v. *Lukens*, 1 Dall. 5, 1 L. ed. 13.

In its beginnings, the grand jury seems to have been devised as a convenient method to assist itinerant justices in England in detecting crime and punishing it. They seem clearly to have been expected to investigate, and originally they indicted frequently, on mere rumor.

2 Pollock & M. History of English Law, p. 639; 2 Bracton, De Corona, Twiss's ed. chap. 22, folio 143, p. 451, folio 116*b*; 1 Reeves, History of English Law, p. 457; 2 Reeves, History of English Law, p. 293; Stephen, History of Crim. Law of England, p. 253; 1 Huband, Grand Jury in Crim. Cases in Ireland, p. 8; Britton, P. C. 22–26; 1 Stubb, Constitutional History of England, 661 *et seq.*; Stubb, Select Charters, p. 259; Taylor, Origin & Growth of English Constitution, p. 329; *Macclesfield* v. *Starkey*, 10 How. St. Tr. 1330.

If the claim of the appellant be conceded, that a charge is necessary, it must also follow that he has the right to object to the admissibility of evidence, on the ground that it is not competent under the charge. But there are abundant authorities in the Federal courts to the effect (1) that the granting of such a right would necessarily result in a violation of the secrecy of the proceedings of the grand jury, and (2) that a witness has no right to question the regularity of the proceedings of a grand jury.

United States v. *Brown*, 1 Sawy. 533, Fed. Cas. 14,671; *McGregor* v. *United States*, 134 Fed. 187; *United States* v. *Cobban*, 127 Fed. 713; *United States* v. *Farrington*, 5 Fed. 343; *United States* v. *Terry* and *United States* v. *Reed, supra; United States* v. *Ambrose*, 3 Fed. 283.

If a charge more specific than that which may be fairly inferred from the statement of the district attorney be necessary, the court will presume that it was made. In other words, the court will presume that both the grand jury and the district attorney proceeded in accordance with their sworn duties and in accordance with law.

United States v. *Terry, supra; United States* v. *Hunter*, 15 Fed. 714; *United States* v. *Reed* and *United States* v. *McAvoy, supra.*

The attitude of the witness showed that he regarded the evidence called for as material, for he objected on the ground that it would incriminate him. He could not interpose that objection capriciously; to make it available, the possibility of crimination must have appeared from the circumstances.

United States v. *Burr*, Fed. Cas. No.

14,692e; *United States* v. *McCarthy*, 21 Blatchf. 469, 18 Fed. 87; *Ex parte Irvine*, 74 Fed. 954; Wigmore, Ev. § 2271.

It is doubtful whether, except in a most extreme case, a witness has any right at all to raise such objections as those raised here, and certainly not unless it clearly appears that his constitutional rights are in danger. A witness before a grand jury has no right to inquire whether that body is properly constituted and a lawful body.

Ex parte Haymond, 91 Cal. 545, 27 Pac. 859.

The scope of the powers of a grand jury is limited by the jurisdiction of the court of which it is an appendage.

United States v. *Hill*, 1 Brock. 156, Fed. Cas. No. 15,364.

It is also subject to the direction of the court, and cannot effectually exercise some of its most important functions without the interposition of the court. It must resort to the court to enforce, by subpœna, the attendance of witnesses, and it is only through the order of the court that witnesses may be punished for contumacy. *Com.* v. *Bannon*, 97 Mass. 214; *Heard* v. *Pierce*, 8 Cush. 338, 54 Am. Dec. 757.

The court may inquire whether the grand jury has exceeded its powers (*People* v. *Naughton*, 7 Abb. Pr. N. S. 421; *Denning* v. *State*, 22 Ark. 131), and may punish the entire jury or any of its members (*Turk* v. *State*, 7 Ohio, pt. 2, p. 240; *State* v. *Cowan*, 1 Head, 280; *Re Ellis*, Hempst. 10).

Whether a cause or action under the title mentioned in the subpœna was pending is unimportant. The proceeding might have proceeded without a title.

United States v. *Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134.

It is quite clear from the historical origin of the 4th Amendment that it was not intended to limit the power of the judiciary when it was proceeding in the ordinary way through the writ of *subpœna duces tecum* to compel the production, upon a trial in court, of documentary evidence. That writ had existed from time immemorial in England,—long before general executive warrants came into use. Without such a writ it would be utterly impossible to carry on the administration of justice (*Summers* v. *Moseley*, 2 Cromp. & M. 477; *Wertheim* v. *Continental R. & Trust Co.* 21 Blatchf. 246, 15 Fed. 718, and note; *Amey* v. *Long*, 9 East, 473); but its purpose and effect is totally different from a search warrant and other writs of that kind.

The 4th Amendment aimed at the seizure of papers or other tangible property by officers of the law in such manner that the owner was deprived not only of his possession and control of them, but also of his right, when they were produced as evidence, to assert his privilege in order to avoid their incriminating effect.

Adams v. *New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

It is difficult to see how, under any circumstances, a compulsory production of papers under a *subpœna duces tecum* can be held to be an unreasonable search and seizure, particularly where the papers cannot be used to incriminate the witness.

Interstate Commerce Commission v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; *Re Moser* (Mich.) 11 Det. L. N. 593, 101 N. W. 591; 1 Greenl. Ev. 16th ed. § 469a.

Unreasonableness, under the 4th Amendment, cannot be predicated upon either the indefiniteness of the description of the books and papers called for in the subpœna, or upon the volume of evidence and the inconvenience in producing it.

Reg. v. *Gurney*, 11 Cox, C. C. 414; *United States* v. *Babcock*, 3 Dill. 567, Fed. Cas. No. 14,484; *Re Storror*, 63 Fed. 564; Wigmore, Ev. § 2193; *United States* v. *Tilden*, 10 Ben. 566, Fed. Cas. No. 16,522; *Mitchell's Case*, 12 Abb. Pr. 249.

The petitioner was bound to produce the documents called for by the subpœna. Whatever his cause, his failure to do so constitutes contempt.

Doe ex dem. Butt v. *Kelly*, 4 Dowl. 273; *Reg.* v. *Russell*, 7 Dowl. 693; *Amey* v. *Long*, 9 East, 483; *Holtz* v. *Schmidt*, 2 Jones & S. 28; *Bull* v. *Loveland*, 10 Pick. 9; *Chaplain* v. *Briscoe*, 5 Smedes & M. 198; *Corsen* v. *Dubois*, 1 Holt, N. P. 239; *Field* v. *Beaumont*, 1 Swanst. 209; *Mitchell's Case*, *supra*; *Doe ex dem. Loscombe* v. *Clifford*, 2 Car. & K. 448; *O'Toole's Estate*, 1 Tucker, 39. See also Wigmore, Ev. § 2200, p. 2979.

Every person subject to the jurisdiction of a competent and lawful tribunal is bound to give testimony. This is a solemn and important duty that every citizen owes to his country (*Ward* v. *State*, 2 Mo. 120, 22 Am. Dec. 449). He is privileged to decline only in case his answers may tend to criminate him. Our system of jurisprudence does not permit a witness to refuse to answer because he prefers not to, or even because his answer will tend to degrade him, except, only, where degrading testimony is interposed solely to affect his credibility.

1 Greenl. Ev. §§ 454, 455.

Where the reason of the privilege ceases, the privilege also ceases.

Broom, Legal Maxims, p. 654; *Brown* v. *Walker*, 161 U. S. 597–599, 40 L. ed. 821, 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The proceeding before the grand jury was a "proceeding, suit, or prosecution" within the meaning of the immunity provision.

United States v. *Moore*, 11 Fed. 248; *United States* v. *Craft*, 43 Fed. 374; *Hogan* v. *State*, 30 Wis. 428, 11 Am. Rep. 575; *Bruner* v. *Superior Court*, 92 Cal. 248, 28 Pac. 341; *Re Tillery*, 43 Kan. 192, 23 Pac. 162; *Yates* v. *The Queen*, L. R. 14 Q. B. Div. 648; *Drumm* v. *Cessnum*, 61 Kan. 467, 59 Pac. 1078.

The grand jury was always regarded as an accusing body.

Re Charge, 2 Sawy. 668, Fed. Cas. No. 18,255; 17 Am. & Eng. Enc. Law, 2d ed. p. 1266; *State* v. *Branch*, 68 N. C. 186, 12 Am. Rep. 633.

Except as evidence in defense may be incident to or involved in accusing evidence, a grand jury generally has no right to seek for or receive evidence in defense.

Respublica v. *Shaffer*, 1 Dall. 236, 1 L. ed. 116; *United States* v. *Lawrence*, 4 Cranch, C. C. 514, Fed. Cas. No. 15,576; Wharton, Crim. Pl. & Pr. 8th ed. § 360.

Mr. Justice **Brown** delivered the opinion of the court:

Two issues are presented by the record in this case, which are so far distinct as to require separate consideration. They depend upon the applicability of different provisions of the Constitution, and, in determining the question of affirmance or reversal, should not be confounded. The first of these involves the immunity of the witness from oral examination; the second, the legality of his action in refusing to produce the documents called for by the *subpœna duces tecum*.

1. The appellant justifies his action in re-
[59] fusing to answer the *questions propounded to him, 1st, upon the ground that there was no specific "charge" pending before the grand jury against any particular person; 2d, that the answers would tend to criminate him.

The first objection requires a definition of the word "charge" as used in this connection, which it is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the district attorney, which is of no legal value in prosecutions for felony; or by a presentment, usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony. If another kind of charge be contemplated, when and by whom must it be preferred? Must it be in writing, and if so, in what form? Or may it be oral? The suggestion of the witness, that he should be furnished with a copy of such charge, if applicable to him, is applicable to other witnesses summoned before the grand jury. Indeed, it is a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room.

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill-will.

We are pointed to no case, however, holding that a grand jury *cannot proceed with- [60]
out the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Shaftesbury's Trial*, 8 How. St. Tr. 769, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given you in charge, *as of all other matters, and things as shall come to your own knowledge* touching this present service," etc. This oath has remained substantially unchanged to the present day. There was a difference, too, in the nomenclature of the two cases of accusations by private persons and upon their own knowledge. In the former case their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment. Says Blackstone in his Commentaries, bk. 4, p. 301:

"A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Substantially the same language is used in 1 Chitty, Crim. Law, 162.

In *United States* v. *Hill*, 1 Brock. 156, Fed. Cas. No. 15,364, it was indicated by Chief Justice Marshall that a presentment and indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.

In a case arising in Tennessee the grand jury without the agency of the district attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition. Mr. Justice Catron sustained the legality of the proceeding and compelled the [61] witnesses *to answer. His opinion is reported in Wharton's Criminal Pleading & Practice, 8th ed. § 337. He says: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime." His charge contains a thorough discussion of the whole subject.

While presentments have largely fallen into disuse in this country, the practice of grand juries acting upon notice, either of their own knowledge or upon information obtained by them, and incorporating their findings in an indictment, still largely obtains. Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of public prosecutions carried on by officers of the state appointed for that purpose, has been entirely settled since the adoption of the Constitution. In a lecture delivered by Mr. Justice Wilson of this court, who may be assumed to have known the current practice, before the students of the University of Pennsylvania, he says (Wilson's Works, vol. 2, p. 213):

"It has been alleged that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and *by accusers, marshaled in legal array, [62] should, on full investigation, be secure in that protection which the law engages that she shall enjoy inviolate.

"The oath of a grand juryman—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Similar language was used by Judge Addison, president of the court of common pleas, in charging the grand jury at the session of the common pleas court, in 1791:

"If the grand jury, of their own knowledge, or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty either to inform the officer who prosecutes for the state, of the nature of the offense, and desire that an indictment for it be laid before them, or, if they do not, or, if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The practice, then, prevailing, with regard to the duty of grand juries, shows that a presentment may be based, not only upon their own personal knowledge, but from the examination of witnesses.

While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them. An analysis of cases approving of this method of procedure would unduly burden this opinion, but the following are the leading ones upon the subject: *Ward* v. *State*, 2 Mo. 120, 22 Am. Dec. 449; *State* v. *Terry*, 30 Mo. 368; *Ex* *parte *Brown*, 72 Mo. 83, 37 [63] Am. Rep. 426; *Com.* v. *Smyth*, 11 Cush. 473; *State* v. *Wolcott*, 21 Conn. 272–280; *State* v. *Magrath*, 44 N. J. L. 227; Thompson & M. Juries, §§ 615–617. In *Blaney* v. *State*, 74 Md. 153, 21 Atl. 547, the court said:

"However restricted the functions of grand juries may be elsewhere, we hold in this state they have plenary inquisitorial

powers, and may lawfully themselves, and upon their own motion, originate charges against offenders, though no preliminary proceedings have been had before a magistrate, and though neither the court nor the state's attorney has laid the matter before them."

The rulings of the inferior Federal courts are to the same effect. Mr. Justice Field, in charging a grand jury in California (2 Sawy. 667, Fed. Cas. No. 18,255), said of the grand jury acting upon their own knowledge:

"Not by rumors and reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury."

Similar language was used in *United States* v. *Kimball*, 117 Fed. 156–161; *United States* v. *Reed*, 2 Blatchf. 449, Fed. Cas. No. 16,134; *United States* v. *Terry*, 39 Fed. 355. And in *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586, it is said by Mr. Justice Brewer:

"But in this country it . . . is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment."

There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view, and in a spirit of meddlesome inquiry. In the most pertinent of these cases (*Re Lester*, 77 Ga. 143), the mayor
[64] of Savannah, who was also *ex *officio* the presiding judge of a court of record, was called upon to bring into the superior court the "Information Docket" of his court, to be used as evidence by the state in certain cases pending before the grand jury. It was held "that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well-defined limits. . . . The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense."

This case is readily distinguishable from the one under consideration, in the fact that the subpœna in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company; and that the Georgia Penal Code prescribed a form of oath for the grand jury, "that the evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be, here state the case) shall be the truth," etc. This seems to confine the witness to a charge already laid before the jury.

In *Lewis* v. *Wake County*, 74 N. C. 194, the English practice, which requires a preliminary investigation where the accused can confront the accuser and witnesses with testimony, was adopted as more consonant to principles of justice and personal liberty. It was further said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal courts has been quite the contrary.

Other cases lay down the principle that it must be made to appear to the grand jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered. *Re Morse*, 18 N. Y. Crim. Rep. 312, 87 N. Y. Supp. 721; *State* v. *Adams*, 2 Lea, 647, an unimportant case, turning upon a local statute. In Pennsylvania, grand juries are somewhat more restricted in their powers than is usual in other states (*McCullough* v. *Com.* 67 Pa. 30; **Rowand* v. *Com.* 82 Pa. 405; *Com.* v.[65] *Green*, 126 Pa. 531, 12 Am. St. Rep. 894, 17 Atl. 878), and in Tennessee inquisitorial powers are granted in certain cases and withheld in others (*State* v. *Adams*, *supra*; *State* v. *Smith*, Meigs, 99, 33 Am. Dec. 132).

We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that, in summoning witnesses, it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in states where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impaneling grand juries for the investigation of riots, frauds, and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped

until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the state through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own ob-
[66] servations *or upon the evidence of witnesses, given before them.

2. Appellant also invokes the protection of the 5th Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself.

The answer to this is found in a proviso to the general appropriation act of February 25, 1903 (32 Stat. at L. 854–904, chap. 755, U. S. Comp. Stat. Supp. 1905, p. 602), that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the antitrust law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used by the courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. *Yates* v. *Queen*, L. R. 14 Q. B. Div. 648; *Hogan* v. *State*, 30 Wis. 428, 11 Am. Rep. 575.

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him; but the line is drawn at testimony that may expose *him to prosecution. If the [67] testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the 5th Amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality, which lingers only as a memory, and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal; but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply. The extent of this immunity was fully considered by this court in *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, in which the immunity offered by Rev. Stat. § 860 (U. S. Comp. Stat. 1901, p. 661), was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman* v. *Hitchcock* (586, L. ed. 1122, Inters. Com. Rep. 828, Sup. Ct. Rep. 206), that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incrimi-

nate him, and would justify him in refusing
[68] to answer almost *any question in a criminal case, unless it clearly appears that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown* v. *Walker*, both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown* v. *Walker*, and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas*, 199 U. S. 372, *ante*, 234, 26 Sup. Ct. Rep. 73,—namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute did not invalidate such statute under the 14th Amendment. It was held both by this court and by the
[69] supreme court of Kansas that *the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other states to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes*, 1 Best & S. 311; *King of Sicilies* v. *Willcox*, 7 St. Tr. N. S. 1049, 1068; *State* v. *March*, 46 N. C. (1 Jones, L.) 526; *State* v. *Thomas*, 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518. The entire question of immunity is also exhaustively treated in Wigmore on Evidence, §§ 2255–2259.

The case of *United States* v. *Saline Bank*, 1 Pet. 100, 7 L. ed. 69, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the district court of the Virginia district, who pleaded that the emission of certain unlawful bills took place within the state of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject them to those penalties. It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction.

But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even *though he
[70] were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman antitrust act can ordinarily be proved only by the testimony

of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the nonproduction by the witness of the books and papers called for by the *subpœna duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that, under the circumstances, he was under no obligation to produce them; and finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth
[71] with technical accuracy the real reason *for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpœna was an infringement upon the 4th Amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The construction of this amendment was exhaustively considered in the case of *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, which was an information *in rem* against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under § 5 of the act of June 22, 1874, [18 Stat. at L. 187, chap. 391, U. S. Comp. Stat. 1901, p. 2018], directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (page 622, L. ed. p. 748, Sup. Ct. Rep. p. 528) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the 4th Amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime of a forfeiture of his goods, is illegal (p. 634, L. ed. p. 752, Sup. Ct. Rep. p. 534), "is compelling a man to be a witness against himself, within the meaning of the 5th Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the 4th Amendment.

*Subsequent cases treat the 4th and 5th [72] Amendments as quite distinct, having different histories, and performing separate functions. Thus, in the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, the constitutionality of the interstate commerce act, so far as it authorized the circuit courts to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams* v. *New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, which was a writ of error to the supreme court of the state of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the 4th and 5th Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered was not a valid objection to their admissibility; that the admission as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment was not an infringement of the 5th Amendment, and that, by the introduction of such evidence, defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that: "If a search

warrant is issued for stolen property, and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and [73]property, and to *render invalid legislation or judicial procedure having such effect."

The *Boyd Case* must also be read in connection with the still later case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers, and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the 5th Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the circuit court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the *Boyd Case* was again considered in connection with the 4th and 5th Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that, by reason of the immunity act of 1903, the witness could not avail himself of the 5th Amendment it follows that he cannot set up that amendment as against the production of the books and papers, since, in respect to these, he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley*, 2 Cromp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey* v. *Long*, 9 East, [74]473; *Bull* v. *Loveland*, 10 *Pick. 9; *United States Exp. Co.* v. *Henderson*, 69 Iowa, 40, 28 N. W. 426; Greenl. Ev. 469*a*.

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to *act as a [75]corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that pur-

pose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

4. Although, for the reasons above stated, [76] we are of the *opinion that an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, *as well as all letters received by [77] that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Shaftsbury* v. *Arrowsmith*, 4 Ves. Jr. 66; *Lee* v. *Angas*, L. R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce, to which we have adverted, we do not wish to be under-

stood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the 4th Amendment.

But this objection to the subpœna does not go to the validity of the order remanding the petitioner, which is, therefore, affirmed.

Mr. Justice **Harlan**, concurring:

I concur entirely in what is said in the [78]opinion of the court *in reference to the powers and functions of the grand jury and as to the scope of the 5th Amendment of the Constitution: I concur also in the affirmance of the judgment; but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the 4th Amendment, which declares that "the right of the *people* to be secure in their *persons*, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized." It may be, I am inclined to think, as a matter of procedure and practice, that the *subpœna duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness — whose personal rights, let it be observed, were in nowise involved in the pending inquiry—to refuse compliance with the subpœna, upon the ground that it involved an unreasonable search and seizure of the books, papers, and records of the corporation whose conduct, so far as it related to the Sherman antitrust act, was the subject of the examination. It was not his privilege to stand between the corporation and the government in the investigation before the grand jury. In my opinion, a corporation—"an artificial being, invisible, intangible, and existing only in contemplation of law"—cannot claim the immunity given by the 4th Amendment; for it is not a part of the "people," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. If a contrary view obtains, the power of the government, by its representatives, to look into the books, records, and papers of a corporation, of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury *proceeding in its work under the orders[79] of the court, can plead the immunity given by the 4th Amendment against unreasonable searches and seizures, may it not equally rely upon that Amendment to protect it even against a statute authorizing or directing the examination by the agents of the government creating it, of its papers, documents, and records, unless they specify the particular papers, documents, and records to be examined? If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books, deemed valid if made under the express auand records of the corporation, could it be thority of an act of Congress? Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the 4th Amendment. In my judgment when a grand jury, seeking, in the discharge of its public duties, to ascertain whether a corporation has violated the law in any particular, requires the production of the books, papers, and records of such corporation, no officer of that corporation can rightfully refuse, when ordered to do so by the court, to produce such books, papers, and records in his official custody, upon the ground simply that the order was, as to the corporation, an unreasonable search and seizure within the meaning of the 4th Amendment.

Mr. Justice **McKenna**, concurring:

I concur in the judgment, but not in all the propositions declared by the court. I think the subpœna is sufficiently definite. The charge pending was a violation of the antitrust act of 1890. [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.] The documents and papers sought were the understandings and agreements of the accused companies. That the documents commanded were many or evidenced transactions occurring through a period of time are not circumstances fatal to the validity of the subpœna. If there was a violation of the antitrust act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced or its transactions alluded to in telegrams *and letters sent during the[80] time the combination operated. Each telegram, each letter, would contribute proof, and therefore material testimony. Why, then, should they not be produced? What answer is given? It is said the subpœna is tantamount to requiring all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, and an embarrassment is conjectured as a result to its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpœna. If

such consequences could be granted, they are not fatal to the subpœna. But they may be denied. There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require.

I cannot think that the consequences mentioned are important or necessary to the argument. A more serious matter is the application of the 4th Amendment of the Constitution of the United States.

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more direct and plain; nothing more expressive to distinguish a subpœna from a search warrant. Can a subpœna lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done,—not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves,—may be secret, intrusive, accompanied by force. The service of a subpœna is but the delivery of a paper to a party,—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of
[81] the *law; and it is all that can be allowed without serious embarrassment to the administration of justice. Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable, or are sacrifices which the law may not demand.

However, I may apprehend consequences that the opinion does not intend. It seems to be admitted that many, if not all, of the documents may ultimately be required, but it is said, "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production." This intimates a different objection to the order of the court than the generality of the subpœna, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it. The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of a grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised.

But what does the record show? It shows that Hale refused to give the testimony that, this court says, should have preceded the order under review. He refused to answer what the business of the MacAndrew & Forbes Company was, or where its office was, or whether there was an agreement with the company and the American Tobacco Company in regard to the products of their respective businesses, or whether the company he represented sold its products throughout the United States. The ground of refusal was that there was no legal warrant or authority for his examination,—not that the documents or testimony *was not material, or not shown to be material. Besides, after objection made to the laying of a foundation, complaint cannot be made that no foundation was laid. And it seems to be an afterthought in the proceedings on habeas corpus that the ground objection to examination did not exclusively refer to the want of power in the grand jury.

By virtue of its dominion over interstate commerce Congress has power, the opinion of the court asserts, over corporations engaged in that commerce. And the power is the same as if the corporations had been created by Congress. And yet it is said to be a power subject to the limitation of the 4th Amendment. To this I am not prepared to assent. I have already pointed out the essential distinction between a *subpœna duces tecum* and a search warrant, and, it may be, the case at bar demands from me no expression of opinion of the 4th Amendment. And I am mindful, too, of the reservation in the opinion of the court of the power of Congress to require by direct legislation the fullest disclosures of their affairs from corporations engaged in interstate commerce. While recognizing this may be true, and, that until such power is exercised, there may be reasons for holding that corporations are entitled to the protection of the 4th Amendment, there are reasons against the contention, and I wish to guard against any action which would preclude against their consideration in cases where the 4th Amendment may be a more determining factor than it is in the case at bar. There are certainly strong rea-

sons for the contention that, if corporations cannot plead the immunity of the 5th Amendment, they cannot plead the immunity of the 4th Amendment. The protection of both amendments, it can be contended, is against the compulsory production of evidence to be used in criminal trials. Such warrants are used in aid of public prosecutions (Cooley, Const. Lim., 6th ed. 364), and in *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, a relation between the 4th Amendment and the 5th Amendment was declared. It was said the amendments throw great light on each other, "for the 'unreasonable [83] searches and seizures' condemned *in the 4th Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the 5th Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the 5th Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the 4th Amendment. And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the 4th Amendment receives illumination from the 5th, or, to express the idea differently, if the amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable, conclusion, that, if corporations have not such immunity, they can no more claim the protection of the 4th Amendment than they can of the 5th.

Mr. Justice **Brewer**, dissenting:

With what is said in the opinion of the court of the necessity of a "charge," with the proposition that the immunity granted by the Federal statute is sufficient protection against both the nation and the several states, with the holding that the protection accorded by the 5th Amendment to the Constitution is personal to the individual, and does not extend to an agent of an individual, or justify such agent in refusing to give testimony incriminating his principal, and also that the *subpœna duces tecum* cannot be sustained, I fully agree.

Further, I desire to emphasize certain truths which in this and other cases decided to-day seem to be ignored or depreciated. The immunities and protection of articles 4, [84] 5, and 14 *of the Amendments of the Federal Constitution are available to a corporation so far as, in the nature of things, they are applicable. Its property may not be taken for public use without just compensation. It cannot be subjected to unreasonable searches and seizures. It cannot be deprived of life or property without due process of law.

It may be well to compare the words of description in articles 4 and 5 with those in article 14:

"Article 4. The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Article 5. No person . . . shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

"Article 14. Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132, Mr. Chief Justice Waite said:

"The court does not wish to hear argument on the question whether the provision in the 14th Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

See also *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255, *and cases [85] cited; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

These decisions were under the 14th Amendment; but if the word "person" in that amendment includes corporations, it also includes corporations when used in the 4th and 5th Amendments.

By the 4th Amendment the "people" are guaranteed protection against unreasonable

searches and seizures. "Citizens," is a descriptive word; no broader, to say the least, than "people."

As repeatedly held, a corporation is a citizen of a state for purposes of jurisdiction of Federal courts, and, as a citizen, it may locate mining claims under the laws of the United States (*McKinley* v. *Wheeler*, 130 U. S. 630, 32 L. ed. 1048, 9 Sup. Ct. Rep. 638) and is entitled to the benefit of the Indian depredation acts (*United States* v. *Northwestern Express Stage, & Transp. Co.* 164 U. S. 686, 41 L. ed. 599, 17 Sup. Ct. Rep. 206). Indeed, it is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, 562, 7 L. ed. 939, 956: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

United States v. *Amedy*, 11 Wheat. 392, 6 L. ed. 502, was the case of an indictment under an act of Congress for destroying a vessel with intent to prejudice the underwriters. The act of Congress declared that "if any person shall . . . wilfully and corruptly cast away . . . any ship or vessel . . . with intent or design to prejudice any person or persons that hath underwritten or shall underwrite any policy," etc. [2 Stat. at L. 290, chap. 40, § 2, U. S. Comp. Stat. 1901, p. 3641.] The indictment charged an intent to defraud an incorporated insurance company, and the court held that a corporation is a person within the meaning of the act, saying (p. 412, L. ed. p. 507):

"The mischief intended to be reached by
[86] the statute is the *same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. chap. 7, respecting the erection of cottages, where the word used is, 'no person shall,' etc., says: 'This extends as well to persons politic and incorporate, as to natural persons whatsoever.'"

Neither does the fact that a corporation is engaged in the interstate commerce in any manner abridge the protection and applicable immunities accorded by the amendments. The corporation of which the petitioner was an officer was chartered by a state, and over it the general government has no more control than over an individual citizen of that state. Its power to regulate commerce does not carry with it a right to dispense with the 4th and 5th Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either amendment.

It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a state has chartered it, the power is lodged in the state. If the nation, then in the nation; and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

In Angell & Ames on Corporations, 9th ed., chap. 19, §§ 684, 685, the authors say:

"To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the government itself, through the medium of the courts of justice; but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor. . . .

*"In this country, where there is no in-[87]
dividual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which, at common law, would cause a forfeiture of their charters."

The matter is discussed in Blackstone's Commentaries, in par. 3, chap. 18, bk. 1, and he says:

"I proceed, therefore, next to inquire, how these corporations may be visited. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate and whether ecclesiastical, civil, or eleemosynary."

And in respect to civil corporations he adds, same paragraph and chapter (*782):

"The law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in His Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority."

In 2 Kent, Com. *300, the author says: "The visitation of civil corporations is by

the government itself, through the medium of the courts of justice."

In *Amherst Academy* v. *Cowls*, 6 Pick. 427, 433, 17 Am. Dec. 387, it was held that:

"Without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters."

The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen states was subject to the [88] visitation of each of those states, and *compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the national government does not give to Congress any right of visitation or of any power to dispense with the immunities and protection of the 4th and 5th Amendments. The national government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the states. *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, arose under the revenue acts, and the applicability of the 4th and 5th Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the 4th and 5th Amendments is discussed, their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. I quote his words (p. 635, L. ed. p. 752, Sup. Ct. Rep. p. 535):

"It may be that it [the proceeding in question] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Finally, as the *subpœna duces tecum* was the initiatory step in the proceedings before the grand jury against this petitioner, *as [89] that is the major fact in those proceedings, and as it is agreed that it is not sustainable, it seems to me that the order adjudicating him in contempt should be set aside, and this notwithstanding that subsequently he improperly refused to answer certain questions.

The case is not parallel to that of an indictment in two counts upon which a general judgment is entered, and one of which counts is held good and the other bad, for a writ of habeas corpus is not a writ of error, and the order to be entered thereon is for a discharge or a remand to custody. If a discharge is ordered, no punishment can be inflicted under the judgment as rendered; and if a new prosecution is instituted containing the good count, a plea of former conviction will be a full defense. But in the case at bar an order for a discharge will have no such result. The habeas corpus statute (Rev. Stat. § 761, U. S. Comp. Stat. 1901, p. 594) provides that "the court or justice or judge shall proceed in a summary way . . . to dispose of the party as law and justice require." Justice requires that he should not be subjected to the costs of this habeas corpus proceeding, or be punished for contempt, when he was fully justified in disregarding the principal demand made upon him.

The order of the circuit court should be reversed and the case remanded with instructions to discharge the petitioner, leaving to the grand jury the right to initiate new proceedings not subject to the objections to this.

I am authorized to say that the CHIEF JUSTICE concurs in these views.

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*WILLIAM H. McALISTER, *Appt.*, [90]

v.

WILLIAM HENKEL, United States Marshal.

(See S. C. Reporter's ed. 90, 91.)

Witnesses — self-incrimination — privilege is personal.—The privilege against self-incrimination afforded by U. S. Const., 5th Amendment, is purely personal to the

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NOTE.—*On the privilege of witnesses*—see notes to Cooper v. State, 4 L.R.A. 766; Rice v. Rice, 11 L.R.A. 591; and *Re* Buskett, 14 L.R.A. 407.

witness, and he cannot claim the privilege of another person or of the corporation of which he is an officer or employee.

[No. 341.]

Argued January 4, 5, 1906. Decided March 12, 1906.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order discharging a writ of habeas corpus to inquire into a commitment for a contempt in refusing to testify before the grand jury and produce the papers and documents called for in a *subpœna duces tecum*, and remanding the petitioner to the custody of the marshal. *Affirmed.*

The facts are stated in the opinion.

Mr. **De Lancey Nicoll** argued the cause, and, with *Messrs. Junius Parker* and *John D. Lindsay*, filed a brief for appellant.

For their contentions see their brief as as reported in *Hale* v. *Henkel, ante*, 652.

Mr. **Henry W. Taft** argued the cause, and, with *Mr. Felix H. Levy* and *Attorney General Moody*, filed a brief for appellee:

Where the question of criminality is not involved, it is clearly settled that an officer of a corporation, having the books of the company in his custody, is bound to produce them in obedience to a *subpœna duces tecum.*

Wertheim v. *Continental R. & Trust Co.* 21 Blatchf. 246, 15 Fed. 718.

In determining whether the word "person" in a statute includes a corporation, Mr. Justice Story said that the mischief intended to be reached was to be considered (*United States* v. *Amedy*, 11 Wheat. 412, 6 L. ed. 507); and in *Beaston* v. *Farmers' Bank*, 12 Pet. 134, 9 L. ed. 1029, it is said that corporations are only to be considered as "persons" when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes.

All authorities agree that the privilege is personal, and is based upon the consideration of the law for the individual in his capacity as a witness.

Brown v. *Walker*, 161 U. S. 596, 40 L. ed. 820, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Best, Ev. 9th ed. p. 113; 3 Taylor, Ev. § 1453; 1 Greenl. Ev. 16th ed. § 469*d*; *Com.* v. *Shaw*, 4 Cush. 594, 50 Am. Dec. 813; Phillipps, Ev. 4th Am. ed. p. 935; Starkie, Ev. 10th Am. ed. 4; Wigmore, Ev. § 2263, p. 3123; *State* v. *Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Ex parte Reynolds*, 15 Cox, C. C. 108; *Bartlett* v. *Lewis*, 12 C. B. N. S. 249.

Every consideration that arises from conditions of modern civilization requires that the rule should not be extended further than is necessary to accomplish its original purpose of caring for the personal rights of individuals.

Wigmore, Ev. pp. 3101, 3107.

Courts have refused to permit the privilege to be asserted by an officer or employee in behalf of a corporation of which he is the representative.

New York L. Ins. Co. v. *People*, 195 Ill. 430, 63 N. E. 264; Wigmore, Ev. § 2259, p. 3115; *Re Moser* (Mich.) 11 Det. L. N. 593, 101 N. W. 591; *Re Peasley*, 3 Inters. Com. Rep. 333, 44 Fed. 271; *United States Exp. Co.* v. *Henderson*, 69 Iowa, 40, 28 N. W. 426; *Gibbons* v. *Waterloo Bridge*, 5 Price, 491.

An officer asserting the privilege against incrimination in behalf of a corporation in fact asserts it for the benefit of other persons; and this the law will not permit.

Wigmore, Ev. § 2259; Elliott, Ev. § 1007.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves many of the questions already passed upon in the opinion in *Hale* v. *Henkel*, 201 U. S. 43, *ante*, 652, 26 Sup. Ct. Rep. 370, differing from that case, however, in two important particulars: First, in the fact that there was a complaint and charge made on behalf of the United States against the American Tobacco Company and the Imperial Tobacco Company under the so-called Sherman act, and second, that the subpœna pointed out the particular writings sought for (three agreements), giving in each case the date, the names of *the parties, and, in one in- [91] stance, a suggestion of the contents.

The witness McAlister, who was secretary and a director of the American Tobacco Company, refused to answer or produce the documents for practically the same reasons assigned by the appellant Hale; demanding to be advised what the suit or proceeding was and to be furnished with a copy of the proposed indictment. A copy of one of the agreements with three English companies and certified by the Consul General of the United States is contained in the record.

For reasons already partly set forth, we think that the immunity provided by the 5th Amendment against self-incrimination is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer; in other words, the privilege is that of the witness himself, and not that of the party on trial. The authorities are practically uniform on

this point. *Com.* v. *Shaw*, 4 Cush. 594, 50 Am. Dec. 813; *State* v. *Wentworth*, 65 Me. 234, 241, 20 Am. Rep. 688; *Ex parte Reynolds*, 15 Cox, C. C. 108, 115. In *New York L. Ins. Co.* v. *People*, 195 Ill. 430, 63 N. E. 264, the privilege was claimed by a corporation, but the agent of an insurance company was permitted to testify in a suit for the recovery of a statutory penalty to facts showing the performance by the corporation of the act prohibited. Indeed, the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books.

The questions are the same as those involved in the *Hale Case*, without the objectionable feature of the subpœna, and *the order of the Circuit Court is, therefore, affirmed.*

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[92] *BENJAMIN F. NELSON, *Plff. in Err.*,
v.
UNITED STATES. (No. 490.)

ANSELM C. BOSSARD, *Plff. in Err.*,
v.
UNITED STATES. (No. 491.)

CLARENCE I. McNAIR, *Plff. in Err.*,
v.
UNITED STATES. (No. 492.)

(See S. C. Reporter's ed. 92–116.)

1. **Evidence — materiality.** — Evidence, whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition, in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by creating a general selling and distributing agent, is material, where it would tend to establish the manner in which such agent executed its functions.

2. **Contempt—refusal to testify before special examiner—immateriality of evidence no defense.**—The immateriality of the evidence sought to be elicited cannot justify the refusal of witnesses to obey the orders of the Federal circuit court, requiring them to answer the questions put to them, and to produce written evidence in their possession, on their examination before a special examiner.

3. **Appeal—in contempt proceedings—questions reviewable.**—Objections to the materiality of the testimony are not open to consideration on a writ of error sued out by witnesses to review a judgment for contempt, entered against them for disobeying an order to testify.

4. **Contempt—refusal to produce documentary evidence — possession and control.**—The refusal of corporate officers to obey orders of a Federal circuit court, requiring them to produce certain documentary evidence, on their examination before a special examiner, cannot be justified on the theory that such evidence was not in their possession or under their control, because their possession was not personal, but was that of the corporations.

5. **Witnesses—self-incrimination—sufficiency of statutory immunity.**—The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., 5th Amend., when examined concerning an alleged violation of the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), is taken away by the proviso to the act of February 25, 1903 (32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1905, p. 602), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed.

[Nos. 490, 491, 492.]

Argued January 5, 8, 1906. Decided March 12, 1906.

IN ERROR to the Circuit Court of the United States for the District of Minnesota to review judgments for contempt, entered against witnesses for their refusal to obey orders of that court requiring them to answer the questions put to them, and to produce written evidence in their possession, on their examination before a special examiner. *Affirmed.*

Statement by Mr. Justice **McKenna:**

These writs of error submit for review a judgment in contempt entered in the case of the *United States* v. *General Paper Co.* described in No. 381 *et seq.* [See 201 U. S. 117, *post*, 686, 26 Sup. Ct. Rep. 356.] The judgment was based upon the disobedience by the plaintiffs in error to orders of the court requiring them to answer certain *questions and to produce certain books, [93]

NOTE.—*On the privilege of witnesses*—see notes to Cooper v. State, 4 L.R.A. 766; Rice v. Rice, 11 L.R.A. 591; and *Re* Buskett, 14 L. R.A. 407.

On the sufficiency of statutory immunity to satisfy the constitutional guaranty against self-incrimination—see note to Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

On review of decree punishing for contempt—see note to New Orleans v. New York Mail S. S. Co. 22 L. ed. U. S. 354.

documents, and papers in their examination before the special examiner, in pursuance to a *subpœna duces tecum* duly issued and served. The orders requiring the plaintiffs in error to answer were made upon petition of the United States, which exhibited the issues in the suit of *United States* v. *General Paper Co.*, stated the questions asked plaintiffs in error, and the books, documents, and papers required of them.

Plaintiffs in error refused to obey the orders, and the examiner reported their disobedience to the court "for such action as the court might take for the further enforcement of its orders." In defense plaintiffs in error filed separate answers, which respectively alleged that Nelson was the president and manager of the Hennepin Paper Company; Bossard, manager and treasurer of the Itasca Company, and McNair, a director and general manager of the Northwest Paper Company. In other particulars the answers are identical except so far as the relations of plaintiffs in error to their respective corporations made a difference. Plaintiffs in error are also directors of the General Paper Company. We insert the answer of Nelson in the margin.†

[94] *The court required the questions to be answered and the books and documents to be produced, and, being of opinion that the order did not constitute a final decision, refused to allow an appeal on the part of either of the plaintiffs in error or either of *the defendants in the suit, or on the part [95] of all of them jointly.

Plaintiffs in error refused to obey the order of the court, and upon the report of the examiner the judgment under review was *entered fining plaintiffs in error sev- [96] erally $100 "for their said disobedience of the said order, said fines to be paid to the clerk of this court for the use of the United States, as punishment for such contempt," and sentencing them to be imprisoned until *the order of the court requiring them to [97] testify should be complied with.

The questions on the merits in these cases are the same as those on the merits in 381 *et seq.*, just *decided [*Alexander* v. *United States*, 201 U. S. 117, *post*, 686, 26 Sup. Ct. Rep. 356]. In those cases, however, [98] this court had no jurisdiction and the appeals were dismissed. In the present cases we have jurisdiction (*Bessette* v. *W. B. Conkey Co.* 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665), and directly from the circuit court, as questions under the Constitution of the United States are involved.

*In the pleadings in the original suit [99]

†Now comes Benjamin F. Nelson and, answering the order to show cause made in the above-entitled matter on the 15th day of September, A. D. 1905, and the petition heretofore filed in said matter by said complainant, upon which said order to show cause was made, alleges and shows unto the court as follows:

That this respondent is a director and the president of Hennepin Paper Company, one of the defendants in the above-entitled matter, and is also the owner and holder of stock in said company of the par value of forty-nine thousand ($49,000.00) dollars and that the books and papers referred to in said order to show cause and in the petition and schedules thereto attached, upon which said order to show cause was made, are the books and papers of said Hennepen Paper Company, and not of this respondent, and are subject to the control of said Hennepin Paper Company, and not of this respondent; that this respondent is also a director of General Paper Company, another of the defendants in the above-entitled matter, and the owner and holder of stock in said General Paper Company of the par value of $2,250; that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to the production of said books and papers for inspection by counsel for said complainant for the purpose of being offered in evidence in said cause. Said objections are based upon the following reasons:

1. That the materiality of said books and papers in the case mentioned in said order to show cause now pending in said court has not been established so as to authorize a court of equity to order their inspection, production, and introduction in evidence, and that the same are not material, relevant, or competent evidence in said cause; that said books and papers contain matters of importance relating to the business of said Hennepin Paper Company and said General Paper Company in no way bearing upon or touching the issues in said cause, which it would be highly injurious to the business interests of both of said companies to make public, and this respondent submits that he ought not to be required to disclose any portions of said books or papers except on a proper showing that the same are material to said cause to establish some issue therein, and a showing that the same are not privileged for the protection of the defendants above named.

2. That one of the purposes of said complainant in instituting said cause and in making the requests mentioned in said order to show cause for the inspection, production, and introduction as evidence of said books and papers, is to establish and to compel said Hennepin Paper Company and said General Paper Company, and this respondent as such director or officer of each of said defendants, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the act of Congress entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," approved July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and the acts amendatory thereof or supplemental thereto, and to subject said Hennepin Paper Company and said General Paper Company to the penalties for such violations imposed by said act, and that to compel the production by said Hennepin Paper Company or said General Paper Company, through their officers or otherwise, of said books and papers for inspection and introduction as evidence in said cause, would be contrary to the provisions of the 5th Amendment

brought in the circuit court of the United States for the district of Minnesota it is respectively alleged and denied that the defendant corporations, of which plaintiffs in error are officers, had entered into an agreement, combination, and conspiracy to control, regulate, and monopolize not only the manufacture of news prints and other papers, but the distribution and shipment thereof through the middle, southern, and western states, in violation of the antitrust act of July 2, 1890. [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901. p. 3200.] The United States sought to establish by plaintiffs in error the truth of the charge, and the subpœna served upon them was explicit as to what was required of them.

The subpœnas required plaintiffs in error to produce the account books, including the journals, ledgers, and other books kept by or under the control of the companies respectively, of which plaintiff in error were respectively officers, (*a*) showing the amounts, kinds, and grades of paper manufactured by the respective companies and sold by or through the General Paper Company, and which were shipped since the 5th of July, 1900; (*b*) the prices, amounts, or credits received for such paper from the paper company between the 5th of July and the present time, including entries showing the manner in which the prices and amounts received by the respective companies for any and all *of its products so sold have been [100] equalized with the prices and amounts received or realized of any and all of the other defendant companies for which the paper company is or has been the exclusive agent; (*c*) the amounts and proportions of earnings or profits of the paper company, received by the respective companies from and through the paper company, either in the form of rebates, credits, or otherwise.

Second. All contracts, agreements, writings, and account books, including journals, ledgers, and other books, kept by or under the control of the respective companies, showing the agreement, arrangement, or understanding under and pursuant to each, and the manner in which the prices and amounts realized by the respective companies upon the various kinds and grades of paper manufactured by it and sold by and through the paper company, are and have been, since July 5, 1900, equalized, or the profits arising from the sale of such paper distributed or apportioned, as between the respective companies and other defendants

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to the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself, and also contrary to the provisions of the 4th Amendment to the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said Henuepin Paper Company, be violations of the laws of the state of Minnesota, and would subject said Hennepin Paper Company to forfeiture of its charter and other penalties under said laws; that to compel said Hennepin Paper Company, through this respondent as one of its officers or otherwise, to produce said books and papers for inspection and introduction as evidence in said cause would be to compel it to furnish evidence tending to establish that it has been guilty of such acts, and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore mentioned of the 4th and 5th Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in making the requests mentioned in said order to show cause is to obtain from said court a decree enjoining said General Paper Company from carrying on the business for which it was incorporated, and to enjoin the carrying out of, and operation under, certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said act of Congress; that said contracts and agreements are of great value, not only to said General Paper Company, whose entire business practically rests upon them, but are also of great value to, and constitute valuable property rights in, each of the defendants respectively parties thereto, including the said Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements, and their virtual annulment thereby occasioned, would result in great injury, damage, or loss, not only to said General Paper Company, but also to said Hennepin Paper Company and to this respondent as a stockholder in each of said companies; and that to compel the production by said Hennepin Paper Company or said General Paper Company, or either of them, though this respondent as such director or officer or otherwise, of said books and papers for inspection and introduction as evidence in said cause for the purpose aforesaid, would be contrary not only to the provisions of said 4th and 5th Amendments to the Constitution of the United States, but also contrary to the well-established rule of the common law, as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or eventually, to prosecution for a crime, or to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty.

Further answering, this respondent alleges and shows unto this court that all the matters concerning which the questions referred to in said petition and schedules thereto annexed were asked, and which this respondent refused to answer, as stated in said petition,

manufacturing and selling through the paper company similar kinds or grades of paper or among all of the defendants manufacturing similar kinds or grades of paper, and then and there to testify and the truth to say, in a certain matter in controversy in said court, between the United States as complainant against the General Paper Company, et al., defendants, on the part of the complainant.

There is no uncertainty, therefore, either in the issue or the means of proof. In other words, the United States charges a conspiracy upon the part of the defendant corporations for the cessation of competition between the manufacturing defendants by creating a general selling and distributing agent, the General Paper Company, which restricts the output of the mills, fixes the prices of their products, determines to whom, and the terms and conditions upon which, such products shall be sold, into what states and places they shall be shipped, and what publishers and customers each mill shall supply. The means of proof of the charge are obviously the conditions of the companies before and after the formation of the paper company, *its organization and [101] the purpose of its organization, the means of its operation, how and by what means it equalizes the output and price of products, and the distribution of the proceeds of their sale, and the relations and accounts between it and the other defendant companies, and their books, accounts, and minutes of proceedings.

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came to this respondent's knowledge exclusively as president and a director of said Hennepin Paper Company, or as a director of said General Paper Company, in the conduct of matters intrusted to him as such director or president, and which said companies, from the nature of the case, were compelled to intrust to this respondent as such director or officer, and that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to said questions and to his being required to answer the same, for reasons similar to those already set forth in respect to the production, inspection, and introduction in evidence of the books and papers above mentioned, that is to say:

1. That the materiality of said questions in the cause above mentioned has not been established so as to authorize a court of equity to order them to be answered, and that the same are not material, relevant, or competent evidence in said cause.

2. That the purpose of said complainant in instituting said cause and in asking said questions is to establish and to compel said Hennepin Paper Company and said General Paper Company, through this respondent as such director or officer, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the acts of Congress above referred to, and to subject them to the penalties for such violations imposed by said acts, and that to compel said defendants hereinbefore named, or either of them, through this respondent, to answer said questions, would be contrary to the provisions hereinbefore referred to of said 4th and 5th Amendments to the Constitution of the United States.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainant in its original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by it, be violations of the laws of the state of Minnesota, and would subject it to forfeiture of its charter and other penalties under said laws; that to compel it through this respondent to answer the questions aforesaid would be to compel it to furnish evidence tending to establish that it has been guilty of such acts, and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore referred to of said 4th and 5th Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause, and in asking the questions mentioned in said order to show cause, is to obtain a decree enjoining said General Paper Company from carrying on the business for which it was incorporated, and to enjoin the carrying out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said acts of Congress: that said contracts and agreements are of great value, not only to said General Paper Company, whose entire business practically rests upon them, but are also of great value to, and constitute valuable property rights in, each of the defendants respectively parties thereto, including The Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements, and their virtual annulment thereby occasioned, would result in great injury, damage, and loss, not only to said Hennepin Paper Company or said General Paper Company, and that to compel said Hennepin Paper Company or said General Paper Company, through this respondent, to answer the questions aforesaid in aid of the purposes aforesaid would be contrary, not only to the provisions hereinbefore referred to of said 4th and 5th Amendments to the Constitution of the United States, but also contrary to the well-established rule of the common law as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or indirectly, to prosecution for a crime or to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty.

Further answering, this respondent alleges that he ought not to be required to answer the questions or comply with the requests, or produce for inspection by counsel for the complainant, or for the purpose of being offered in evidence in the cause above referred to, the books and papers referred to in said order to show cause and in the petition and schedules thereto annexed, upon which said

The questions were directed to these ends. They were directed to ascertain whether the prices received for the various paper materials were equalized, and whether, during the time the General Paper Company was the selling agent of the materials, there was in existence an arrangement whereby the prices received through the paper company were equalized between the other defendant companies. The questions were put in various ways to show such equalization and the arrangements to equalize, and to show the allowances to each mill, the fixing of definite prices, and the distribution of the balances received among the companies on the basis of their average daily output of the grade of paper inquired about. And there were also questions asked as to whether the board of directors or the executive committee of the paper company fixed the prices of paper to be paid to each of the mills by or through the paper company, and the compensation to be paid to the mills making butchers' fibre paper, because it was less profitable, and other questions as to conversations between gentlemen representing the different mills in regard to the organization of a corporation to act as general selling agent in order to eliminate competition. There were also questions as to whether the books showed the things expressed in the other questions. The objection made to each of the questions before the examiner was that the testimony sought was irrelevant, incompetent, and immaterial, and counsel advised the witnesses not to an-

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order to show cause was made, not only for the reasons hereinabove set forth, but also for the following reasons, that is to say:

1. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests and produce for inspection by counsel for the complainant, and for the purpose of being offered in evidence in said cause, the books and papers aforesaid, is to establish and to compel this respondent to furnish to said complainant evidence tending to establish that he has been guilty of certain violations of the acts of Congress hereinbefore mentioned and referred to, and to subject him to the penalties for such violations imposed by said acts, and that to compel him to answer said questions or comply with said requests, or to produce for inspection or for the purpose of being offered in evidence in said cause, the said books and papers, would be contrary to the provisions hereinbefore referred to of said 4th and 5th Amendments to the Constitution of the United States.

2. That the alleged acts of said Hennepin Paper Company and of said General Paper Company complained of by the complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said defendant companies, involve certain violations of the laws of the state of Minnesota by this respondent, and would subject him to penalties and forfeiture under said laws, and that to compel him to answer the questions or comply with the requirements aforesaid, or to produce for inspection, or for the purpose of being offered in evidence in said cause, the said books and papers, would be to compel him to furnish evidence tending to establish that he has been guilty of such violations of the laws of the state of Minnesota, and to subject him to the penalties and forfeitures aforesaid, contrary to the provisions hereinbefore referred to of said 4th and 5th Amendments to the Constitution of the United States.

3. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests, and produce for inspection by counsel for the complainant and for the purpose of being offered in evidence in said cause, the books and papers above referred to, is to establish and compel this respondent to furnish to said complainant evidence tending to establish the allegations of the original petition or bill of complaint in said cause, which, if established, will result in subjecting this respondent to loss or detriment in the nature of a penalty or forfeiture, in that the said Hennepin Paper Company, of which this respondent is a stockholder as aforesaid, will be subjected, under the laws of the state of Minnesota, to the forfeiture of its charter, resulting in the virtual forfeiture of the stock of this respondent in said defendant company, and in the loss and forfeiture to a large extent of the value of the interest of this respondent in said corporation. and in that the contracts made through said General Paper Company as its sales agent by said Hennepin Paper Company under and pursuant to the agency contracts herein referred to between said Hennepin Paper Company and said General Paper Company will be virtually annulled and the property rights of said Hennepin Paper Company in said contracts destroyed; that there are a large number of such contracts outstanding under which large sums of money are due to said Hennepin Paper Company, all of which, as this respondent is advised and believes, will be or may be forfeited and lost to said defendant and to this respondent as a stockholder therein in case the illegal combination alleged in said original petition or bill of complaint is established by the decree or judgment in said cause; and this respondent alleges that to compel him to answer the questions and comply with the requests and produce for inspection and for purpose of being offered in evidence the books and papers referred to in said order to show cause and the petition and schedules aforesaid, and which he has declined to answer and comply with or produce, if material to said cause, would be contrary to the provisions of said 4th and 5th Amendments to the Constitution of the United States. and also contrary to the well-established rule of the common law and of equity jurisprudence. that no person will be compelled to discover any fact or matter which may subject him to forfeiture or penalty or anything in the nature of a forfeiture or penalty.

swer. As to the books and papers, the following is a sample of the proceedings:

Q. Do the books, journals, or ledgers of the Hennepin Paper Company show any agreement or arrangement or understanding under and pursuant to which and the manner in which the prices and amounts realized by the Hennepin Paper Company
[102]*upon various grades of paper manufactured by it and sold by or through the defendant the General Paper Company are and have been, since the 5th day of July, 1900, equalized, or the profits arising from the sale of such paper distributed or apportioned, as between the defendants?

Mr. Flanders: All objections renewed, and I give the witness the same advice.

(No answer.)

Q. Do you refuse, Mr. Nelson, to produce the books?

Mr. Flanders: As I said before, you may assume for the purposes of these questions that the books and all the papers called for are present in court; but, on behalf of the Hennepin Paper Company and the witness and the General Paper Company, I decline to submit those to the inspection of the government counsel.

Mr. Kellogg: Or to allow them or any part of them to be put in evidence, Mr. Flanders?

Mr. Flanders: Yes.

Other facts will appear in the opinion.

Mr. **James G. Flanders** argued the cause, and, with *Mr. Charles F. Fawsett*, filed a brief for plaintiffs in error:

The plaintiff must show by clear averment the materiality of the documents sought to be disclosed,—a rule which applies not only to bills of discovery, but also to proceedings under the statute to compel the production of books or papers upon or in preparation for trial.

1 Dan. Ch. Pl. & Pr. 5th Am. ed. pp. *579, 580; Wigram, Discovery, 1st Am. ed. p. 15; Story, Eq. Pl. §§ 565, 568; 23 Am. & Eng. Enc. Law, pp. 176, 177; *Owyhee Land & Irrig. Co.* v. *Tautphaus*, 48 C. C. A. 535, 109 Fed. 547; *Condict* v. *Wood*, 25 N. J. L. 319; *First Nat. Bank* v. *Mansfield*, 48 Ill. 494; *Lester* v. *People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; *Bentley* v. *People*, 104 Ill. App. 353; *Wynn* v. *Taylor*, 109 Ill. App. 603; *Walsh* v. *Press Co.* 48 App. Div. 333, 62 N. Y. Supp. 833; *San Fernando Copper Min. & Reduction Co.* v. *Humphrey*, 111 Fed. 772; *Eschbach* v. *Lightner*, 31 Md. 528; *Jenkins* v. *Bennett*, 40 S. C. 393, 18 S. E. 929; *Berry* v. *Mathewes*, 7 Ga. 457; Hare, Discovery, 187; *Compton* v. *Gray*, 1 Younge & J. 154; *Bolton* v. *Liverpool*, 3 Sim. 489, 1 Myl. & K. 88; *Harris* v. *Harris*, 3 Hare, 450, *Van Kleeck* v. *Reformed Dutch Church*, 6 Paige, 600, 20 Wend. 458; Wigram, Discovery, § 293; *Storey* v. *Lennox*, 1 Myl. & C. 534; Langdell, Eq. Pl. § 164; *Bligh* v. *Benson*, 7 Price, 205; *Stroud* v. *Deacon*, 1 Ves. Sr. 37; *Barnett* v. *Noble*, 1 Jac. & W. 227.

Any party who is required to produce his books of account or other documents may seal such portions thereof as he swears contain nothing relating to the purposes of the discovery sought, and his affidavit that the parts so sealed do not relate to the matters in litigation is sufficient protection.

23 Am. & Eng. Enc. Law, p. 182; 2 Wait, Pr. 548; *Titus* v. *Cortelyou*, 1 Barb. 444; *Robbins* v. *Davis*, 1 Blatchf. 238, Fed. Cas. No. 11,880; *Campbell* v. *French*, 2 Cox, Ch. Cas. 286; *Gerard* v. *Penswick*, 1 Wils. Ch. 222; *Pynchon* v. *Day*, 118 Ill. 9, 7 N. E. 65.

The various acts of Congress under which the proceedings below were taken have been evidently drawn with careful intent to permit this interference with private rights only so far as is absolutely necessary for the administration of justice, and in strict accord with the chancery practice of England in regard to the production of documents.

Jacques v. *Collins*, 2 Blatchf. 23, Fed. Cas. No. 7,167; *Iasigi* v. *Brown*, 1 Curt. C. C. 401, Fed. Cas. No. 6,993; *Russell* v. *McLellan*, 3 Woodb. & M. 157, Fed. Cas. No. 12,158; *Story* v. *Livingston*, 13 Pet. 359, 10 L. ed. 200; *Thomson* v. *Wooster*, 114 U. S. 104, 112, 29 L. ed. 105, 107, 5 Sup. Ct. Rep. 788; 1 Bates, Fed. Eq. Proc. § 22; *Caspary* v. *Carter*, 84 Fed. 416; *Bischoffsheim* v. *Brown*, 29 Fed. 341; *Ryder* v. *Bateman*, 93 Fed. 31; *Owyhee Land & Irrig. Co.* v. *Tautphaus*, *supra*.

It is not sufficient for a party to state generally in his petition for the production of documents that they contain matters relevant to the issue, in order to entitle him to their inspection, or to base his allegations in regard to their materiality upon information and belief. Facts and circumstances must be stated from which the court may determine the question of the materiality and relevancy.

Walsh v. *Press Co. supra.*

The materiality of any question must be made to appear before a witness can be required to answer it, and before he can be adjudged guilty of a contempt of court for a refusal to answer.

Re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563; *Re Allis*, 44 Fed. 216; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The right of a party to decline to answer, in a suit in the Federal court, as to

matters which might subject him to penalties under the state law, was affirmed by this court at an early date.

United States v. *Saline Bank*, 1 Pet. 100, 7 L. ed. 69.

The jurisdiction of state authority over trade within the state is as exclusive and unqualified as the jurisdiction of Congress over trade between the states.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Allen* v. *Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379.

The Federal government cannot interfere with the regulation by the states of their domestic concerns, under whatever guise.

M'Culloch v. *Maryland*, 4 Wheat. 419, 4 L. ed. 604; *Craig* v. *Dimock*, 47 Ill. 308; 1 Kent, Com. pp. 312, 313, 316, 483; *The Collector* v. *Day* (*Buffington* v. *Day*) 11 Wall. 113, 20 L. ed. 122.

It is the settled law of this court that the 5th Amendment has no application to state courts and their proceedings under state laws.

Barron v. *Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Withers* v. *Buckley*, 20 How. 84, 15 L. ed. 816; *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Eilenbecker* v. *District Court*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424.

If it be granted that it was within the conceivable powers of Congress, in the circumstances under which the immunity clause was enacted, to make it generally applicable to state as well as to Federal courts, it cannot be said, under a fair construction of the clause, that Congress intended to exercise such extreme power. Being in the nature of an exception to a rule of liability, it should be strictly construed.

Sutherland, Stat. Constr. § 223; *United States* v. *Dickson*, 15 Pet. 141, 10 L. ed. 689; *Epps* v. *Epps*, 17 Ill. App. 196.

The view that the clause is confined, in its operation and effect to grant immunity, to the penalties provided for in the several acts to which it relates, finds support in—

United States v. *Price*, 96 Fed. 960.

The English Constitution and the protection which it gives to witnesses cover all the law which is administered in England.

1 Dan. Ch. Pl. & Pr. 5th Am. ed. p. *563.

The only exception given by the English rule in any degree analogous to that which would exclude the criminal laws of the states from the operation of the constitutional Amendment is that "a defendant cannot refuse to give testimony on the ground that it will expose him to penalties in a foreign country."

1 Dan. Ch. Pl. & Pr. 5th Am. ed. p. *567.

The law administered within a state, whether by state courts or by Federal courts, and whether enacted by state or national legislature, is the law of that state, binding upon all of its citizens and upon all of its governmental agencies.

Metcalf v. *Watertown*, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *Embry* v. *Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Ballin* v. *Loeb* (*Ballin* v. *J. & E. B. Friend Lace Importing Co.*) 78 Wis. 404, 10 L.R.A. 742, 47 N. W. 516; *Turrell* v. *Warren*, 25 Minn. 9; *Barney* v. *Patterson*, 6 Harr. & J. 182; *Thomson* v. *Lee County*, 22 Iowa, 206; *Wandling* v. *Straw*, 25 W. Va. 705; *St. Albans* v. *Bush*, 4 Vt. 58, 23 Am. Dec. 246; *McCauley* v. *Hargroves*, 48 Ga. 50, 15 Am. Rep. 660; *Williams* v. *Wilkes*, 14 Pa. 228.

It was firmly settled under the rules of common-law and equity procedure at the time the Constitution was adopted that no person could be compelled to discover any fact, either by producing documents or answering questions, which might subject him, either directly or eventually, to liability to a penalty or forfeiture, or anything in the nature of a penalty or forfeiture.

1 Dan. Ch. Pl. & Pr. 5th Am. ed. pp. *562, 563; 2 Story, Eq. Jur. § 1494; 1 Pom. Eq. Jur. 202; *Livingston* v. *Harris*, 3 Paige, 528, Affirmed in 11 Wend. 329; *Northrop* v. *Hatch*, 6 Conn. 361; *Livingston* v. *Tompkins*, 4 Johns. Ch. 432, 8 Am. Dec. 598; *Vanderveer* v. *Holcomb*, 17 N. J. Eq. 91; *Higdon* v. *Heard*, 14 Ga. 255; *State* v. *Talbott*, 73 Mo. 347; *Poindexter* v. *Davis*, 6 Gratt. 481; *Re Kip*, 1 Paige, 601; *United States* v. *National Lead Co.* 75 Fed. 94; *Newgold* v. *American Electrical Novelty & Mfg. Co.* 108 Fed. 341; *Boyd* v. *United States*, 116 U. S. 631, 29 L. ed. 751, 6 Sup. Ct. Rep. 524.

The grounds on which the franchises of corporations may be seized by the state and forfeited consist of a wilful nonfeasance or malfeasance, otherwise described as a wilful nonuser or misuser, of their franchises, in matters affecting the interests or right of the public generally.

5 Thomp. Corp. § 6609.

For a corporation to combine with other corporations and form a trust the object of which is to limit production, maintain prices, and stifle competition, is such a misuser of its franchises as will entitle the state to demand a judgment ousting it of them, where there is a statute prohibiting corporations from entering into such combinations.

5 Thomp. Corp. § 6627; *State* v. *Easton Social Literary & Musical Club*, 73 Md. 97, 10 L.R.A. 64, 20 Atl. 783; *State ex rel. Robinson* v. *Bacon Club*, 44 Mo. App. 86.

The fact that the defendant corporations are engaged in interstate commerce does not remove them from the authority which may be exercised by a state over corporations which it has created; and, apparently, there is no power on earth which can interfere between the state and a corporation deriving its charter from the state, in proceedings to take away its charter.

State v. *Cincinnati, W. & B. R. Co.* 47 Ohio St. 130, 7 L.R.A. 319, 23 N. E. 928; *State ex rel. Drake* v. *Doyle*, 40 Wis. 175, 22 Am. Rep. 692, 94 U. S. 535, 24 L. ed. 148.

The liability to injunction to which it is the purpose of the suit to subject the appellant is itself a penalty, to-wit: one of the penalties prescribed by the antitrust act.

Northern Securities Co. v. *United States*, 193 U. S. 401, 48 L. ed. 726, 24 Sup. Ct. Rep. 436; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *Merchants' Bank* v. *Bliss*, 35 N. Y. 412.

The consequences which must result to the appellants from the passing of the decree prayed for in the complaint are in the nature of a forfeiture. They should not be required to furnish the evidence to subject them to such forfeiture.

13 Am. & Eng. Enc. Law, p. 54.

The forfeiture of property by the annulment of contracts, and the deprivation of the fruits of existing contracts and business relations, is evident. The forfeiture of personal liberty is equally obvious.

Ritchie v. *People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *State* v. *Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

A corporation can speak and act only through its proper officers and agents, within the scope of their respective duties. If the officers of a corporation can be compelled to testify against the corporation in a matter involving the forfeiture of the charter, property, and business of the corporation, then corporations are entitled to no protection, either under the Constitution or the common law, against self-crimination or inquisitorial proceedings to forfeit their property.

Covington & L. Turnp. Road Co. v. *Sandford*, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198.

The equal protection of the laws, it would seem, must include the right to be protected from self-incrimination through inquisitorial proceedings against the officers and directors, through whom the corporation must act, and who are, to all legal intents and purposes, the *alter ego* of the corporation.

Louisville, N. A. & C. R. Co. v. *Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817.

An officer cannot be compelled to testify to matters tending to subject his company to a penalty or forfeiture.

State ex rel. Atty. Gen. v. *Simmons Hardware Co.* 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125; *Davies* v. *Lincoln Nat. Bank*, 16 N. Y. Civ. Proc. Rep. 68, 4 N. Y. Supp. 373; *Bank of Oldtown* v. *Houlton*, 21 Me. 502.

Mr. William Brace also filed a brief for plaintiffs in error:

The protection of the 14th Amendment extends over corporations.

Pembina Consol. Silver Min. & Mill. Co. v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

If corporations are within the protection of the 14th Amendment, there is no reason why they should not also be within the protection of the 4th and 5th Amendments.

Improperly forcing a person to produce his books and papers in court is a seizure of such books and papers.

Boyd v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Messrs. **Frank B. Kellogg** and **James M. Beck** argued the cause, and, with *Attorney General Moody*, filed a brief for defendant in error:

Whether finally admissible or not, the evidence should be given and received before the examiner, inasmuch as all questions of materiality, relevancy, and competency must be left primarily for determination upon final hearing by the United States circuit court for the district of Minnesota, where the cause is pending, and ultimately for decision by this court, when the suit shall be considered here on appeal.

Blease v. *Garlington*, 92 U. S. 1, 23 L. ed. 521; *Thomson-Houston Electric Co.* v. *Jeffrey Mfg. Co.* 83 Fed. 614; *Maxim-Nordenfelt Guns & Ammunition Co.* v. *Colt's Patent Firearms Mfg. Co.* 103 Fed. 39; *Parisian Comb Co.* v. *Eschwege*, 92 Fed. 721; *Fayerweather* v. *Ritch*, 89 Fed. 529; *Appleton* v. *Ecaubert*, 45 Fed. 281; *Edison Electric Light Co.* v. *United States Electric Lighting Co.* 45 Fed. 55; *Johnson Steel Street-Rail Co.* v. *North Branch Steel Co.* 48 Fed. 196; *Adec* v. *J. L. Mott Iron Works*, 46 Fed. 39; *Lloyd* v. *Pennic*, 50 Fed. 4; *Brown* v. *Wors-*

ter, 113 Fed. 20; *MacWilliam* v. *Connecticut Web Co.* 119 Fed. 509; *Whitehead & H. Co.* v. *O'Callahan*, 130 Fed. 243.

In *Edison Electric Light Co.* v. *United States Electric Lighting Co.* 44 Fed. 294, it was distinctly held that a party cannot excuse noncompliance with a *subpœna duces tecum* commanding him to produce documents unprivileged, in his own hands, by showing that he has delivered them into the hands of his counsel.

ities, clearly admissible. If the book had not attorney or partner is possession by the person himself.

Russell v. *McLellan*, 3 Woodb. & M. 157, Fed. Cas. No. 12,158.

The acts of the conspirators in furtherance of the combination and conspiracy, as evidenced by the minutes of the General Paper Company, are, under all of the authorities, clearly admissible. If the book had not been produced before the examiner at all, its production could have been compelled, and the use of its contents secured by an order to show cause, supported by a proper affidavit of counsel for the government that the book was material.

Coit v. *North Carolina Gold Amalgamating Co.* 9 Fed. 577.

All that can be expected is that the books and papers desired shall be accurately designated, and that there should be some showing that they prove to be material evidence.

United States v. *Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484.

In *Coit* v. *North Carolina Gold Amalgamating Co. supra*, it was held that the production of books and papers in possession of the opposite party might be required in equity causes on motion, supported by affidavit averring their materiality.

There is no doubt that, as a witness, a party can be compelled, by a *subpœnà duces tecum*, to produce books, documents, and papers in his possession in the same manner as any other witness.

Bischoffsheim v. *Brown*, 29 Fed. 341.

And the officers of a corporation may be required as witnesses to produce its books when the books are necessary evidence.

Wertheim v. *Continental R. & Trust Co.* 21 Blatchf. 246, 15 Fed. 716; *Johnson Steel Street-Rail Co.* v. *North Branch Steel Co.* 48 Fed. 196; *Edison Electric Light Co.* v. *United States Electric Lighting Co.* 44 Fed. 294, 45 Fed. 55.

In *Johnson Steel Street-Rail Co.* v. *North Branch Steel Co.* 48 Fed. 191, the circuit court for the western district of Pennsylvania required a witness, not a party to the suit, to produce certain drawings which seemed to be pertinent to the issue. This was done, although the papers related to a valuable secret method of producing a manufactured article.

The notice and motion in *Victor G. Bloede Co.* v. *Joseph Bancroft & Sons Co.* 98 Fed. 175, were far more sweeping and general in their terms than the request involved in this application.

Under issues of the character raised in this cause the entire manner of conducting the business of the General Paper Company is competent and material evidence.

Interstate Commerce Commission v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

The duty to give testimony is a duty to the state, and not to the parties.

Wigmore, Ev. §§ 2195, 2210.

The claim of privilege can be made solely by the witness himself; the privilege (as the common phrase runs) is purely personal to himself. Whether he chooses to fulfil his duty without objection, or whether he prefers to exercise the exemption which the law concedes to him, is a matter resting entirely between himself and the state (or the court, as its representative). The party against whom the testimony is brought has no right to claim or to urge the exemption on his own behalf.

Brown v. *Walker*, 161 U. S. 597, 40 L. ed. 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Wigmore, Ev. § 2196; *Morgan* v. *Halberstadt*, 9 C. C. A. 147, 20 U. S. App. 417, 60 Fed. 592; *Wertheim* v. *Continental R. & Trust Co. supra; New York L. Ins. Co.* v. *People*, 195 Ill. 430, 63 N. E. 264; *United States Exp. Co.* v. *Henderson*, 69 Iowa, 40, 28 N. W. 426; *Gibbons* v. *Waterloo Bridge*, 5 Price, 491.

There can be no distinction between his refusals to answer and his refusals to produce books and papers. The books and documents in a man's possession are as much subject to the calls of justice as are the faculties of speech and memory.

Bull v. *Loveland*, 10 Pick. 9.

Every act of the General Paper Company, as the form and entity which this combination and conspiracy assumed, is a fit subject for investigation under the issues that have been framed. All of its acts were done by the administrative officers of the selling company at the instance of the duly authorized representatives of the manufacturing corporations, sitting upon its board of directors. They are the acts of the conspirators in continuation of, and in furtherance of, the objects of the conspiracy itself. It is an elementary principle of evidence that, where two or more persons are associated together for some illegal purpose, the acts or declarations of any one or more of them in reference to the common object are admissible against them all.

1 Greenl. Ev. § 111; 2 Wigmore, Ev. § 1079; *American Fur Co.* v. *United States*, 2 Pet. 358, 7 L. ed. 450; *Clune* v. *United States*, 159 U. S. 593, 40 L. ed. 270, 16 Sup. Ct. Rep. 125; *Wiborg* v. *United States*, 163 U. S. 656, 41 L. ed. 298, 16 Sup. Ct. Rep. 1127, 1197; *Lincoln* v. *Claflin*, 7 Wall. 138, 19 L. ed. 109; *Connecticut Mut. L. Ins. Co.* v. *Hillmon*, 188 U. S. 219, 47 L. ed. 451, 23 Sup. Ct. Rep. 294; *United States* v. *Newton*, 48 Fed. 218; *United States* v. *Gooding*, 12 Wheat. 460, 6 L. ed. 693; *Nudd* v. *Burrows*, 91 U. S. 427, 23 L. ed. 288; *United States* v. *McKee*, 3 Dill. 546, Fed. Cas. No. 15,685; *State* v. *Winner*, 17 Kan. 305; *State* v. *Thompson*, 69 Conn. 720, 38 Atl. 869; *Hunter* v. *State*, 112 Ala. 77, 21 So. 65; *Lee* v. *Lamprey*, 43 N. H. 13; *Apthorp* v. *Comstock*, 2 Paige, 482; *Jackson* v. *Summerville*, 13 Pa. 359; *Burns* v. *McCabe*, 72 Pa. 309; *Confer* v. *McNeal*, 74 Pa. 112.

Evidence concerning meetings preliminary to the organization of the General Paper Company, and declarations made by witnesses during the formation of the combination and conspiracy, were material.

Lincoln v. *Claflin*, 7 Wall. 132, 19 L. ed. 106.

Where proof of the conspiracy depends upon a vast amount of circumstantial evidence, or a number of isolated and independent facts, it is in the sound discretion of the court to allow the declarations in advance of proof of the conspiracy.

1 Greenl. Ev. 111; *State* v. *Thompson*, 69 Conn. 720, 38 Atl. 870; *State* v. *Winner*, *supra*.

In cases of conspiracy, the admissions of the accused conspirators are always a fruitful source of evidence. Only in exceptional cases is the conspiracy shown by direct and positive evidence. The proof is usually indirect and circumstantial, and courts are bound to rely, in large measure, upon the admissions made by the conspirators either during or after the accomplishment of the common purpose.

State v. *Thompson*, *supra*; *Clune* v. *United States*, 159 U. S. 592, 40 L. ed. 270, 16 Sup. Ct. Rep. 125; *United States* v. *Hutchins*, Fed. Cas. No. 15,430; *United States* v. *Hamilton*, Fed. Cas. No. 15,288; *United States* v. *Doyle*, 6 Sawy. 612, 5 Fed. 680; *United States* v. *Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States* v. *Lancaster*, 4 Wash. C. C. 64, Fed. Cas. No. 15,557; *Davis* v. *United States*, 46 C. C. A. 619, 107 Fed. 753.

Under the ancient practice, in actions at common law a party might not compel his opponent to furnish evidence as a witness. His only remedy was by way of a bill of discovery in equity to compel his opponent to disclose facts and documentary evidence material to his case.

Wigmore, Ev. §§ 2217, 2218.

This limitation, however, never existed in equity, and parties could there be freely compelled, either before or after issue joined, to disclose evidence and documents material to the issues.

1 Greenl. Ev. 15th ed. § 361; 1 Dan. Ch. Pl. & Pr. 5th ed. p. 885, note 6; Adams, Eq. 7th ed. p. 36; Wigmore, Ev. §§ 2218, 2219, pp. 3012, 3014–3016.

A party will be compelled to make a disclosure of all facts within his knowledge, or books and documents in his possession, which tend either to establish his opponent's case or to refute the position which he himself takes.

Bustros v. *White*, L. R. 1 Q. B. Div. 423; *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90; *Moore* v. *Craven*, L. R. 7 Ch. Div. 95, note; *Atty. Gen.* v. *Gaskill*, L. R. 20 Ch. Div. 520; *Atty. Gen.* v. *Newcastle-Upon-Tyne* [1897] 2 Q. B. 384; *Atty. Gen.* v. *Emerson*, L. R. 10 Q. B. Div. 191; *Arnold* v. *Pawtuxet Valley Water Co.* 18 R. I. 189, 19 L.R.A. 602, 26 Atl. 55.

Modern legislation has made the bill of discovery an unnecessary adjunct even in actions at law. Material evidence may now be required of a party in such actions, without resorting to this cumbersome proceeding.

1 Pom. Eq. Jur. 2d ed. § 193; Wigmore, Ev. § 2219.

The order requiring the plaintiffs in error to testify and to produce documentary evidence, being made in a suit pending to restrain them from the continuance of a combination and conspiracy in restraint of trade, under the act of Congress, does not involve an unlawful search and seizure within the meaning of the 4th Amendment.

Boyd v. *United States*, 116 U. S. 625, 29 L. ed. 749, 6 Sup. Ct. Rep. 524; Cooley, Const. Lim. 6th ed. p. 364; *Adams* v. *New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

No principle is better established than that proceedings well known to the courts, and in general use at the time the Constitution was adopted, will not be considered to fall within the inhibitions therein contained.

Den ex dem. Murray v. *Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372.

The guaranty of the 5th Amendment, that no person shall be compelled, in a criminal case, to be a witness against himself, is per-

sonal to the witness, and does not protect corporations.

Railroad Tax Case, 8 Sawy. 238, 13 Fed. 746: *Brown* v. *Walker*, 161 U. S. 591, 597, 40 L. ed. 819, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Interstate Commerce Commission* v. *Baird, supra; Morgan* v. *Halberstadt*, 9 C. C. A. 147, 20 U. S. App. 417, 60 Fed. 592; *Wertheim* v. *Continental R. & Trust Co.* 21 Blatchf. 246, 15 Fed. 716; *New York L. Ins. Co.* v. *People*, 195 Ill. 430, 63 N. E. 264; *Re Peasley*, 3 Inters. Com. Rep. 333, 44 Fed. 271; *United States Exp. Co.* v. *Henderson*, 69 Iowa, 40, 28 N. W. 426; *Gibbons* v. *Waterloo Bridge*, 5 Price, 491; *State* v. *Jack*, 69 Kan. 387, 1 L.R.A.(N.S.) 167, 76 Pac. 911; 3 Wigmore, Ev. § 2270; *Com.* v. *Shaw*, 4 Cush. 594, 50 Am. Dec. 813; *Com.* v. *Howe*, 13 Gray, 26; *State* v. *Kent* (*State* v. *Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

Any privilege which may exist is covered by the immunity statute, 32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1903, p. 367, which is as broad as the constitutional protection. If the 5th Amendment is held to extend to corporations, the immunity statute must be likewise extended.

People ex rel. Akin v. *Butler Street Foundry & Iron Co.* 201 Ill. 255, 66 N. E. 349: *State* v. *Jack*, 69 Kan. 387, 1 L.R.A. (N.S.) 167, 76 Pac. 915; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 36, 37, 48 L. ed. 865, 866, 24 Sup. Ct. Rep. 563.

Pecuniary loss to the witness was not one of the penalties or forfeitures intended to be protected against by the Constitution.

Bull v. *Loveland*, 10 Pick. 9; 1 Greenl. Ev. 15th ed. § 452; *Baird* v. *Cochran*, 4 Serg. & R. 397; *Lowney* v. *Perham*, 20 Me. 240; *Ward* v. *Sharp*, 15 Vt. 115; *Harper* v. *Burrow*, 28 N. C. (6 Ired. L.) 30; *Robinson* v. *Neal*, 5 T. B. Mon. 213.

A penalty of forfeiture must be penal in its nature, as distinguished from pecuniary loss suffered as a consequence of civil liability.

Boyd v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *Huntington* v. *Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Brady* v. *Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; *Atlanta* v. *Chattanooga Foundry & Pipe Co.* 101 Fed. 900; *State* v. *Jack*, 69 Kan. 387, 1 L.R.A. (N.S.) 167, 76 Pac. 911; *State* v. *Standard Oil Co.* 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413: *Southern R. Co.* v. *Bush*, 122 Ala. 470, 26 So. 168; *Levy* v. *Superior Court*. 105 Cal. 600, 29 L.R.A. 811, 38 Pac. 965; *Ames* v. *Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; 3 Wigmore, Ev. § 256; 2 Beach, Priv. Corp. § 840.

The witness is not the sole judge of whether the testimony will tend to criminate him or not.

Counselman v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Burr's Trial*, 1 Burr's Tr. 244; *Reg.* v. *Boyes*, 1 Best & S. 311; *State* v. *Thaden*, 43 Minn. 253, 45 N. W. 447; 3 Wigmore, Ev. § 2271, p. 3140.

A recovery of treble damages as compensation to the person is not a penalty and forfeiture within the meaning of the 5th Amendment.

Huntington v. *Attrill*, *Brady* v. *Daly*, and *Atlanta* v. *Chattanooga Foundry & Pipe Co. supra.*

If the corporation is not protected by the 5th Amendment, then the possibility of a loss to the stockholder in any of the defendant corporations by reason of the corporation being subjected to any loss or damage in the nature of a forfeiture is too remote.

Brown v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *State* v. *Standard Oil Co.* and *State* v. *Jack, supra.*

No mere possibility of a liability or loss undefined is sufficient.

Brown v. *Walker*, 161 U. S. 608, 40 L. ed. 825, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The immunity statute of Congress is broad enough to protect the witness against any prosecution for or on account of anything which he may disclose in response to the command of the Federal court, whether under Federal or state jurisdiction.

Brown v. *Walker*, 161 U. S. 606, 40 L. ed. 824, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

The 5th Amendment is a limitation upon the Federal authority, and not upon that of the state.

Brown v. *Walker, supra; Barron* v. *Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox* v. *Ohio*, 5 How. 410, 12 L. ed. 213; *Withers* v. *Buckley*, 20 How. 84, 15 L. ed. 816; *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Presser* v. *Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580.

The boundaries of the Constitution and of the sovereignty which established it are the same.

3 Wigmore, Ev. § 2258.

It has been held that this principle, which has become a cardinal principle of the unwritten Constitution of England, does not protect the witness against prosecution by a foreign jurisdiction.

Sicilies v. *Wilcox*, 7 State Tr. N. S. 1049, 1068.

It has been held in the only states where the question has been decided, that this provision of the state Constitution does not protect a witness against giving testimony which may tend to convict him under Federal laws or the laws of other states.

People ex rel. Akin v. *Butler Street Foundry & Iron Co.* 201 Ill. 248, 66 N. E. 349; *State* v. *Jack, supra; State* v. *March*, 46 N. C. (1 Jones, L.) 526.

The power of Congress must necessarily be supreme, and if either party must yield to the other, clearly the power of the state is subordinate to that of Congress.

Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 1, 7 Sup. Ct. Rep. 4; *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *The Daniel Ball* (*The Daniel Ball* v. *United States*) 10 Wall. 557, 19 L. ed. 999; *Hall* v. *DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Jacobson* v. *Massachusetts*, 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 358; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 227, 44 L. ed. 142, 20 Sup. Ct. Rep. 96; *Ohio* v. *Thomas*, 173 U. S. 277, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; *Tennessee* v. *Davis*, 100 U. S. 263, 25 L. ed. 650; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Re Neagle* (*Cunningham* v. *Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Re Loney* (*Thomas* v. *Loney*) 134 U. S. 375, 33 L. ed. 950, 10 Sup. Ct. Rep. 584.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

Plaintiffs in error urge three main contentions, which we will consider in their order.

I. That the evidence, documentary and oral, which the witnesses were required to produce, was not shown to be material to plaintiff's case.

1. There are three answers to this contention. (1) The evidence is clearly material. The charge of the bill is that the defendant manufacturing corporations entered into a conspiracy and combination in violation of the act of July 2, 1890, to suppress competition between themselves, and that they accomplished this purpose by organizing the General Paper Company, and gave it certain controlling powers over the output of the mills and the prices and distribution of their products.

Before the application to the court for the orders under review there were certain facts established. It was established that in the fall of 1899 and the spring of 1900 there were preliminary meetings of the parties to ultimately form the paper company, and that it was subsequently formed by those representing the manufacturing companies, who subscribed for the stock. In July, 1900, the corporations, as represented in the paper company, fourteen in all, entered into contracts with it, making it their exclusive selling agent; that each constituent manufacturing company was represented by one of its principal officers upon the board of directors of the paper company, and the number of directors have been increased as other corporations have made the paper company their selling agent. A table of the constituent companies was given and the times the companies became members of the paper company. And it was established that there was an executive committee, comprised *substantial- [112] ly of the same persons who constituted the board of directors, and that the paper company had books and records containing the minutes of the meetings of stockholders, directors, and the executive committee, and that the treasurers and sales agents had presented reports to the stockholders, directors, and executive committee. It was stipulated that all the subscriptions to stock of the paper company were for the benefit of some paper manufacturing company, and in its name, that it was the beneficial owner thereof, and that the dividends declared thereon were its property; that said stock was from time to time allotted to such corporations as made contracts with the paper company, making it their exclusive selling agent, upon the basis of estimated relative productions of paper. A list of the individuals to whom stock was issued, the names of the corporations represented by them, and the days of the issuances of the stock, were given.

The questions were framed to prove the combination charged in the bill and the powers and operation of the General Paper Company and the relations of the other companies to it. What the answers will show we do not know, nor what the books and documents will disclose. The organization of the paper company had a purpose, and whether it was a legal or illegal instrument for competing companies to use we do not have now to determine. By the admissions of the answers the paper company entered into contracts with those companies, became their selling agent, and was entitled to a certain percentage of the sales. Presumably it exercised its powers, made sales and received profits. In all that it did, the manufacturing corporations were interested; they owned its stock, were en-

titled to its dividends. This we may admit, for argument sake, not prejudging in any way, may be consistent with continued competition between the companies, but it may be otherwise. At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.

It must not be overlooked that not only an [113] inspection of the *books was refused, but questions directed to ascertain the contents of the books were objected to, not answered. We have given one illustration; we will give another. Counsel for defendant corporations stated at the examination: "That for the purpose of any question the government counsel see fit to ask, it may be assumed that all the books, papers, and documents" described in the subpœna "are present here in court, and we decline to submit them to the inspection of the government counsel." The following then took place:

Q. State whether those books show the amounts, kinds, or grades of paper manufactured by the defendant Northwest Paper Company and sold by or through the defendant General Paper Company, as the exclusive sales agent of the defendant Northwest Paper Company since the 8th day of April, 1902, or since about the 1st of May, 1902 if that is the date the business commenced.

Same objections by defendants, and the witness given the same advice.

Q. You decline to answer?

A. I decline on advice of attorney.

Q. Do the books also show where the said paper so manufactured was sold and into what states and territories it was shipped since the 8th day of April, 1902, or the 1st day of May, 1902?

Mr. Flanders: I wish to make the same objections, and I give the witness the same advice.

A. Same answer.

And counsel for the United States, not only as to the matters expressed in the foregoing questions, but as to other matters which the bill charged against the companies and which had been inquired about, said that he desired to use the books and offer them in evidence to show such matters. An inspection of the books was refused, and all evidence of their contents withheld.

Necessarily the books contained the information. The paper company was the selling agent of the Northwest Paper Company [114] *and must have kept an account of its sales and into what states the paper of the company was shipped and sold. Such accounts are material and relevant to complainant's case. They may or may not, in connection with other evidence, sustain the charge of the United States, but they are elements in the proof, having tendency enough to sustain the charge to be considered material.

2. The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the circuit court. The procedure before an examiner and his powers are explained in *Blease* v. *Garlington*, 92 U. S. 1, 23 L. ed. 521. It is there said: "The examiner, before whom the witnesses are orally examined, is required to note exceptions, but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court, with the objections noted. So, too, when depositions are taken according to the acts of Congress, or otherwise, under the rules; exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus, both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there."

And an application to a court to compel the delivery of testimony in aid of the examination does not change the rule. The testimony is taken to be submitted to the court where the suit is pending, and all questions upon the evidence, its materiality and sufficiency, are to be determined by it, and after it by an appellate court. Even if the trial court permit the examination of witnesses orally in open court upon the hearing in cases in equity, as further said in *Blease* v. *Garlington*, the testimony must be taken "down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, *or the ruling will not be considered by us." [115] *Blease* v. *Garlington* has been applied at circuit in a number of cases.‡

‡Thomson-Houston Electric Co. v. Jeffrey Mfg. Co. 83 Fed. 614; Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co. 103 Fed. 39; Parisian Comb Co. v. Eschwege, 92 Fed. 721; Fayerweather v. Ritch, 89 Fed. 529; Appleton v. Ecaubert, 45 Fed. 281; Edison Electric Light Co. v. United States Electric Lighting Co. 45 Fed. 55, 59; Johnson Steel Strect-Rail Co. v. North Branch Steel Co. 48 Fed. 196; Adee v. J. L. Mott Iron Works, 46 Fed. 39; Lloyd v. Pennie, 50 Fed. 4; Brown v. Worster, 113 Fed. 20; MacWilliam v. Connecticut Web Co. 119 Fed. 509; Whitehead & H. Co. v. O'Callahan. 130 Fed. 243.

3. These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal, as we shall presently see.

II. That the documentary evidence called for was not shown to be in the possession or under the control of the witnesses. This contention is untenable. The ground of it is that the possession of the witnesses was not personal, but was that of the respective corporations of which they were officers. Granting this to be so, and that the witnesses could have set up whatever privileges the corporations had, nevertheless they had the custody (actual possession) of the books, and were summoned from necessity, as representing the corporations. It is hardly necessary to observe that the witnesses had all the possession human beings could have had or can have, and if the objection is to prevail, the books of a corporation can be withdrawn from the reach of compulsory process.

It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them—not the intangi-
[116] ble being they represent and act for—*that the law directs its process of subpœna and must procure its evidence.

III. That the evidence, documentary and oral, required to be produced, was in the nature of incriminating evidence, which the witnesses and the defendants are privileged from furnishing to the plaintiff under the provisions of the Federal Constitution and the well-recognized principles of equity procedure.

This contention asserts rights personal to the plaintiffs and rights of the corporation defendants in the suit. The basis of both rights is the protection of the 4th and 5th Amendments to the Constitution of the United States.

The argument submitted is substantially the same as that made by appellants in *Hale* v. *Henkel* and *McAlister* v. *Henkel* [201 U. S. 43, 90, *ante*, 652, 671, 26 Sup. Ct. Rep. 370, 385]. It is insisted that the immunity† given by the act of February 25, 1903, is not as broad as the penalties and forfeitures to which the plaintiffs in error or the corporations of which they are officers will be subjected. If the immunity, it is urged, protects from the penalties of the antitrust act of 1890, it does not protect, nor has Congress the power to protect, from the penalties of the Minnesota laws, which make criminal a combination and conspiracy in restraint of trade, and subject to forfeiture the charters of corporations who become parties to such combination and conspiracy. Minn. Stat. 1894, §§ 6955, 6956, 6962.

The extent of the immunity and its application to corporations was considered in *Hale* v. *Henkel* and *McAlister* v. *Henkel*, and decided adversely to the contention of plaintiffs in error.

Judgment affirmed.

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*LEWIS M. ALEXANDER, *Appt.*, [117]

v.

UNITED STATES. (No. 381.)

GEORGE A. WHITING, *Appt.*,

v.

UNITED STATES. (No. 382.)

WILLIAM Z. STUART, *Appt.*,

v.

UNITED STATES. (No. 383.)

GENERAL PAPER COMPANY, *Appt.*,

v.

UNITED STATES. (No. 384.)

E. T. HARMON and General Paper Company, *Appts.*,

v.

UNITED STATES. (No. 385.)

(See S. C. Reporter's ed. 117-122.)

Appeal—finality of decree below.—Orders of a Federal circuit court directing witnesses to answer the questions put to them, and produce written evidence in their pos-

NOTE.—*As to what judgments or decrees are final for purposes of review*—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

†"Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." Act February, 25, 1903, 32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1905, p. 602.

session, on their examination before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), lack the finality requisite to sustain an appeal to the Supreme Court.

[Nos. 381, 382, 383, 384, 385.]

Argued January 5, 8, 1906. Decided March 12, 1906.

APPEALS from the Circuit Court of the United States for the Eastern District of Wisconsin to review certain orders of that court. directing witnesses to answer questions put to them, and produce written evidence in their possession, on their examination before a special examiner. *Dismissed* for lack of any final judgment.

The facts are stated in the opinion.

Mr. **James G. Flanders** argued the cause, and, with *Mr. Charles Fawsett*, filed a brief for appellants.

Mr. William Brace also filed a brief for appellants.

Messrs. **Frank B. Kellogg** and **James M. Beek** argued the cause, and, with *Attorney General Moody*, filed a brief for appellee.

For contentions of these counsel, see their briefs as reported in *Nelson* v. *United States*, *ante*, 673.

[118] *Mr. Justice **McKenna** delivered the opinion of the court:

At the very beginning we encounter a question of jurisdiction. Are the orders of which the appellants complain appealable? The orders direct the appellants respectively to appear before Robert F. Taylor, special examiner in the case, at the time and place to be designated, and direct each of them to "answer each and every question put to them respectively by the counsel for the complainant, the United States of America," and to produce before such commissioner certain books, papers, records, documents, reports, and contracts, "for the purpose of their respective examination in said cause, and for use in evidence of the complaint of the United States of America in said examination." And it is ordered that the complainant's counsel shall have the right to inspect the said books, etc., and to introduce them or any of them in evidence; but, except as necessary for such purposes, the books, etc., to remain in the custody of the appellants.

A brief statement of the proceedings is all that is necessary. The United States, by its proper officers brought suit in the circuit court of the United States for the district of Minnesota against the General Paper Company and twenty-three other corporations, defendants, under and pursuant to the provisions of the act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.] It is alleged in the bill that the defendants, other than the General Paper Company and the Manufacturers' Paper Company, were engaged in the manufacture of manilla and fibre papers in active competition with one another, and that they entered into an agreement, combination, and conspiracy to control, regulate, and monopolize, not only the manufacture of news print, manilla, fibre, and other papers, but also the distribution and shipment thereof among and throughout the middle, southern, and western states. The General Paper Company was the means employed to execute the combination and conspiracy. That company is a corporation organized, the bill alleges, by *the other de- [119] fendants, under the laws of the state of Wisconsin, with a capital stock of $100,000, divided into one thousand shares, which were distributed among and owned and held by the other defendants in proportions based upon the average daily output of the mills of each defendant. It is authorized to become at its principal place of business the sales agent of the products of the defendants' mills in the state of Wisconsin and elsewhere. Absolute power is conferred upon it to control and restrict the output of the mills, fix the price of their products, and determine to whom and the terms and conditions upon which such products shall be sold, into what states and places they shall be shipped, and what publishers and customers each mill shall supply.

The Manufacturers' Paper Company, it is alleged, is a New York corporation, with its principal place of business in Chicago, and, from about the year 1897 to 1902, acted as the sales agent of various manufacturers of paper for the sale of news print and other papers; that in 1902 it became a party to the combination and conspiracy alleged in the bill, and agreed with the General Paper Company not to compete with it in certain territories.

It is admitted that, prior to the formation of the General Paper Company, the other defendants, except the Manufacturers' Paper Company, were in active competition. The formation of the General Paper Company is also admitted, and that it became, by contract with the defendants who manufacture paper, their selling agent. The defendants deny, however, a purpose to violate the act of July 2, 1890. The violation of that law is the issue in the case, and the bill prays an injunction against the defend-

ants and their officers from doing the acts or executing the purpose charged against them.

In trial of the issue thus made the circuit court appointed Robert S. Taylor special examiner, with authority to hear and take testimony within and without the district of Minnesota, and made an order fixing the time to take the testimony for the United States the 16th of May, 1905, at the
120] city of Milwaukee, *state of Wisconsin. The order was duly served on the counsel of the respective parties. Thereupon the United States petitioned the circuit court for an order directing the clerk of the circuit court to issue a *subpœna duces tecum*. The subpœna was duly issued and served on the appellants as individuals and as officers of certain of the defendant companies. They appeared before the examiner in obedience to the subpœna, but, under the advice of counsel, they refused to permit the use of books or certain parts of them, and refused to answer certain questions put to them, the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced. The United States then presented a petition to the United States circuit court for the district of Wisconsin, which recited the issues in the case, and the statement of the questions asked, and the parts of the books and documents sought to be used. To this petition the appellants filed separate answers.

The answers may be regarded for our present purpose as identical. They allege the immateriality of the evidence and that its materiality should be established as a condition precedent to its production; that they are officers of the companies, and as such officers, the custodians of the books, papers, and documents, and that the same are of interest and value to the company in its business, and the company forbids their production; that the United States seeks evidence to convict the company and the individual appellants of violations of the act of July 2, 1890, to annul the contracts and agreements of the company, and subject it and the other appellants to the penalties prescribed in that act, and to compel the company and the other appellants to furnish evidence against themselves, contrary to the provisions of the 5th Amendment to the Constitution of the United States, which provides that no person shall be a witness against himself; also contrary to the 4th Amendment of the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. It is also said that the alleged
121] acts of the *paper company complained of in the original petition of the United States, and which the United States is endeavoring to establish, would, if committed by the company, be violations of the laws of Wisconsin, and would subject the company to forfeiture of its charter and other penalties under said laws, and to compel it, through its officers, to produce the books and documents sought would be to compel it to furnish evidence tending to establish that it has violated the law of the state, and such purpose is contrary to the provisions of the 4th and 5th Amendments of the Constitution of the United States.

As we have said, the court entered orders requiring the appellants to answer the questions put to them and to produce the books, papers, and documents requested. Appeals were allowed to this court. To justify the appeals, appellants contend that the orders of the circuit court constitute practically independent proceedings and amount to final judgments. To sustain the contention, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, are cited.

Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences. In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go farther, and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court? Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to *issue process, is given
[122] the aid of the clerk of a court of the United States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process, or refusal to testify or to produce documents, such judge may "proceed to enforce obedience . . . or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued

by such court." Rev. Stat. §§ 868, 869, U. S. Comp. Stat. 1901, pp. 664, 665. This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit. This is clearly pointed out by Circuit Judge Van Devanter, disallowing an appeal from an order like those under review, in the case of *Nelson* v. *United States* [201 U. S. 92, *ante*, 673, 26 Sup. Ct. Rep. 358], error to the circuit court of the United States for the district of Minnesota. The learned judge said:

"I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance, that will give rise to another case or cases to which the witnesses will be parties on the one hand, and the government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision, and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

See also *Logan* v. *Pennsylvania R. Co.* 132 Pa. 403, 410, 19 Atl. 137.

This court having no jurisdiction, *the appeals must be dismissed*, and it is so ordered.

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[123] *GEORGE W. FELTS, *Appt.*,

v.

E. J. MURPHY, Warden of the Illinois State Penitentiary at Joliet.

(See S. C. Reporter's ed. 123–130.)

1. **Habeas corpus—as substitute for writ of error.**—A writ of habeas corpus cannot perform the function of a writ of error.

2. **Habeas corpus—Federal interference with state administration of criminal law.**—Federal courts have no power to interfere by habeas corpus with the imprisonment of a person under a judgment of conviction of a crime in a state court, if that court had jurisdiction to try the case, and jurisdiction over the person of the accused, and did not lose such jurisdiction during the trial.

3. **Habeas corpus—in Federal courts.**—A person convicted of murder in a state court will not be released on habeas corpus by the Federal courts, on the theory that jurisdiction over the subject-matter and the person of the accused was lost by the failure of the trial court to have the testimony in the case read or repeated to the accused, who was unable, because of his almost total deafness, to hear the evidence.

4. **Constitutional law—due process of law—criminal procedure.**—The failure of the trial court, in a criminal case, to see that the testimony is read or repeated to the accused, who, by reason of his almost total deafness, is unable to hear the evidence, does not infringe the prohibition of U. S. Const., 14th Amend., against the deprivation of liberty without due process of law.

[No. 533.]

Argued February 26, 27, 1906. Decided March 12, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review an order denying an application for a writ of habeas corpus on behalf of a person imprisoned under a judgment of conviction of murder, entered by the Circuit Court of Winnebago County, in that state. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The appellant was indicted in the circuit court of Winnebago county, in the state of Illinois, for the crime of murder. He was tried at the January term of that court, held in 1905, found guilty, and sentenced to the penitentiary for his natural life. He made an application to the circuit court of Cook county for a writ of habeas corpus, after judgment upon the verdict had been entered, and that court denied the writ. He then made a like application to the supreme court of the state of Illinois, which was denied. The appellant says that he was unable to obtain a writ of error in the state court, because, as he avers, it would cost between $700 and $800 to print the record, and

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NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; *Re* Carli, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164; and Glass v. The Betsey, 1 L. ed. U. S. 489.

As to what constitutes due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

that he was absolutely penniless, except that he had a pension of some $24 a month. Hence he was unable to obtain any relief in the state courts.

Subsequently the appellant applied by written petition to the United States circuit court for the northern district of Illinois, eastern division, for the same writ, to be directed to the warden of the Illinois state penitentiary, where the petitioner was con-
[124] fined *under the judgment entered upon the verdict of guilty upon the trial of the indictment. The appellant alleged in his petition the foregoing facts, and also, among other things, that he was not guilty of the crime of which he was indicted and had been convicted. He further stated and described the circumstances in which the killing was done, and said that he had been set upon on a dark night by some one unknown to him, who came upon him from behind and grasped him by the neck and almost broke it as he ran him about in the dark; that his neck was very badly hurt in the struggle and marks were left upon it visible for days thereafter. In the struggle the person was killed and the petitioner was subsequently convicted of his murder. The petitioner is a veteran of the Civil War, and lost his hearing in the line of his duty as a soldier, and is now between sixty and seventy years of age. He is so deaf that he can only hear when a person speaks into the mouthpiece of his ear trumpet, close to his ear.

He alleged in his petition that, upon the trial of the case, he did not hear one single word of the examination of the jurors, either by the state's attorney or by his own counsel; that he did not hear the names of the jurors nor their business, and could not confer intelligently with his counsel as to the advisability of acceptance or rejection of a juror, and, as a matter of fact, he was not consulted and did not know the facts elicited by the examination of the jurors before acceptance; that if he had known the facts as they occurred he would have counseled the rejection of certain jurors on account of their relationship to other people; that he did not hear or have communicated to him, in any way, the evidence of the witnesses on the trial of his case, and that he was unable to suggest to his counsel any questions for their examination or cross-examination during the trial, and that the substance of their evidence was not communicated to him, and he did not know what it was until he saw some partial reports of it in the newspapers, when it was too late to suggest to his counsel proper cross-questions; that the first thing communicated to him after the begin-
[125] ning of the *trial, which lasted about two weeks, was the verdict; he was in the court room, with his ear trumpet, but was unable to hear the verdict, and did not know what the verdict was until the clerk of the court wrote it upon a piece of paper and gave it to him.

He was present in the court room during the motion for a new trial, but did not hear a word that was said by either counsel, and the only thing communicated to him was when he was called to the bar to be sentenced.

The record shows that after the motion for a new trial had been made, the court said: "On reviewing the entire case I am disposed to say that the motion for a new trial be overruled." Continuing, the court said:

It is regretted in one sense that the defendant, on account of his infirmity, is unable to know clearly what has been done. He should be informed, I suppose, of the fact that his motion for a new trial has been overruled. Mr. Sheriff, will you bring Mr. Felts forward? I wish you would say to Mr. Felts that his motion for a new trial has been overruled.

The Sheriff: The court wishes me to tell you that motion for a new trial is overruled. Do you understand?

Felts: I understand; yes.

The Court: You may ask him if he has anything to say why sentence of the court should not now be pronounced.

The Sheriff: Have you anything to say why the sentence of the court should not be pronounced?

Felts: False swearing is all I got to say.

Court: Well, under the circumstances, of course, it is practically impossible for me to say anything to this defendant.

(Here follows the sentence of the court), which sentence was transmitted to the defendant by the sheriff through a tube.

The record shows that the appellant was himself examined as a witness on his trial and had the benefit of counsel, who appeared for and defended him upon such trial.

He contended before the Federal circuit court, on his application *for the writ of [126]
habeas corpus, that, on account of the manner in which he was tried, his constitutional rights had been denied him, and that his conviction was without due process of law within the meaning of the 14th Amendment to the Constitution of the United States, and that he was entitled, therefore, to be discharged from imprisonment under the judgment. He also urged that the same was void, as being rendered without jurisdiction, on account of the violation of his constitutional rights. The circuit court denied the application for the writ, and from the

order denying the same the appellant has appealed to this court.

Mr. **William E. Mason** argued the cause and filed a brief for appellant:

By the Constitution of the state as well as by the Federal Constitution, the common-law right to a trial by jury in criminal cases is guaranteed; and all trials for criminal offenses should be conducted according to the course of the common law.

Harris v. *People*, 128 Ill. 585, 15 Am. St. Rep. 153, 21 N. E. 563.

There can be no trial unless the defendant is permitted to know and understand the nature and purpose of the trial, and hear, or have communicated to him in some proper way, the evidence of witnesses, examination of jurors, and all of the details of that trial.

1 Hale, P. C. p. 34; *State* v. *Harris*, 53 N. C. (8 Jones, L.) 136, 78 Am. Dec. 272; *Dyson's Case*, 1 Lewin, C. C. 64; *Rex* v. *Pritchard*, 7 Car. & P. 303.

At no time or place was the relator permitted to defend himself in person, and the failure to communicate to him the details of the trial as it proceeded was a denial of that right under the Constitution.

Thompson's Case, 2 Lewin, C. C. 137; *Reg.* v. *Berry*, 13 Cox, C. C. 189.

The accused should not only be within the walls of the courthouse, but should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law has established.

Brown v. *State*, 38 Tex. 485.

It is a humane principle, applicable to criminal cases, and especially when life is in question, to consider that the prisoner is standing on all of his rights, waiving nothing on the score of irregularity.

People v. *M'Kay*, 18 Johns. 212.

In *Harris* v. *People*, *supra*, the defendant, charged with a felony, entered a plea of not guilty, and consented to a waiving of a jury and trial by the court. She was tried and convicted by the court. The supreme court held that the trial by the judge was nugatory and void, and that, in the absence of a jury, the court had no jurisdiction, and that the defendant could not confirm jurisdiction by consenting.

If any fundamental right is denied, the person has not been tried by due process of law, and the proceedings are null and void.

Ex parte Ulrich, 42 Fed. 587.

If the accused was absent during any of the proceedings, the judgment was void; and even though the prisoner's counsel was present and did not object, and did not call the attention of the court to the fact that the prisoner was absent, that was not a waiver of the rights of the prisoner to be present.

Maurer v. *People*, 43 N. Y. 1; *Andrews* v. *State*, 2 Sneed, 550; *Re Nielsen*, 131 U. S. 183, 33 L. ed. 120, 9 Sup. Ct. Rep. 672.

It is essential to the protection of one whose life or liberty is involved in the prosecution for felony, that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him.

Hopt v. *Utah*, 110 U. S. 579, 28 L. ed. 265, 4 Sup. Ct. Rep. 202.

Even though the court had, at the beginning of the trial, full and complete jurisdiction of the offense and the person, yet, when the court deprived the prisoner of any constitutional right, it lost jurisdiction, and the judgment was void.

Re Nielsen, *supra*.

Mr. **Harry B. North** argued the cause, and, with *Messrs. William H. Stead* and *Edgar Eldredge*, filed a brief for appellee:

It has been too frequently decided to be now open to question, that a writ of habeas corpus cannot be made use of to perform the functions of a writ of error or an appeal.

Re Lennon, 166 U. S. 552, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; *United States* v. *Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *Reid* v. *Jones*, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Re Belt*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; *Storti* v. *Massachusetts*, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; *Ex parte Kearney*, 7 Wheat. 38, 43, 5 L. ed. 391, 392; *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; *Re Schneider*, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; *Re Debs*, 158 U. S. 564, 600, 39 L. ed. 1092, 1108, 15 Sup. Ct. Rep. 900; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Re Swan*, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Dynes* v. *Hoover*, 20 How. 81, 88, 15 L. ed. 844, 845; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ornelas* v. *Ruez*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Markuson* v. *Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *New York* v. *Eno*, 155 U.

S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Baker* v. *Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Bishop, Crim. Proc. § 1410; Church, Habeas Corpus, 2d ed. §§ 356, 363.

There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, on writ of error, he could only have secured relief from that portion of the sentence which was void.

United States v. *Pridgeon, supra.*

Mere errors or irregularities, however gross, in the judgment, or the proceedings upon which the judgment was founded, will not be sufficient to obtain release on writ of habeas corpus.

15 Am. & Eng. Enc. Law, 2d ed. p. 172; Church, Habeas Corpus, 2d ed. § 363; *People ex rel. Henderson* v. *Allen*, 160 Ill. 400, 43 N. E. 332.

If the court has jurisdiction of the person and of the subject-matter, the judgment cannot be inquired into in a collateral proceeding.

People ex rel. Georgetown v. *Murphy*, 202 Ill. 493, 67 N. E. 226; *People ex rel. Henderson* v. *Allen, supra;* Church, Habeas Corpus, 2d ed. § 356.

Having acquired complete jurisdiction to hear, determine, and adjudicate in reference to the subject-matter before it, the court did not, nor could it, lose that jurisdiction by any error that may have been subsequently committed; for error intervening after the judgment attached, the judgment must be reversed in a direct proceeding, on appeal or writ or error; but that cannot be urged in a collateral suit.

Hernandez v. *Drake*, 81 Ill. 34; *Richards* v. *People*, 81 Ill. 551; *Allman* v. *Taylor*, 101 Ill. 185; *Spring* v. *Kane*, 86 Ill. 580; *People ex rel. Georgetown* v. *Murphy, supra.*

Mr. Harry B. North also filed a separate brief for appellee:

Habeas corpus is not a proper writ to correct errors or irregularities, even though a constitutional right is involved, if the court had jurisdiction to try the case.

Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Church, Habeas Corpus, 2d ed. § 364.

Law, in its regular course of administration through courts of justice, is due process of law; and, when secured by the law of the state, the constitutional requirement is satisfied. Due process is secured by laws operating on all alike.

Maxwell v. *Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Bergemann* v. *Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The uncontradicted facts are that this unfortunate man has been convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence that was given upon his trial, because of his almost total deafness, his inability to hear being such that it required a person to speak through his ear trumpet, close to his ear, in order that such person should be heard by him.

*Counsel for the appellant has cited in his [129] brief cases regarding the mode of procedure which has been sometimes adopted where, from the condition of mind of the individual to be tried, it was doubtful if he were able to understand or comprehend the proceedings of the trial, and it may well be that such a method might properly have been adopted in this case. But upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial, and if it continued all through, then the application for the writ was properly denied by the circuit court, and its order must be affirmed. The writ cannot perform the function of a writ of error. *Ex parte Bigelow*, 113 U. S. 328, 20 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Re Lennan*, 166 U. S. 548, 552, 41 L. ed. 1110, 1112, 17 Sup. Ct. Rep. 658; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638.

In this case the state court had jurisdiction both of the subject-matter and of the person upon the trial of the accused, and such jurisdiction was not lost during his trial, but continued to its end, and it had jurisdiction to direct the judgment which was entered, and to have the same executed. If there were any irregularities in the trial of the appellant, because of the failure of the court to see to it that the testimony in the case was repeated to him through the ear trumpet which he had with him, it was at most an error, which did not take away from the court its jurisdiction over the subject-matter and over the person of the accused. The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the 14th Amendment to the Federal Constitution. That amendment, it has been said by this court, "did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people." *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; *Brown* v. *New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77.

We are unable to see how jurisdiction was lost in this case by the manner of trial. The accused was *compos mentis*. No claim to the contrary is made. He knew he was being tried on account of the killing of the deceased. He had counsel, and understood the fact that he was on trial on the indict-
[130] ment mentioned, *but he did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court.

Upon the point that the failure to have repeated to the appellant the testimony given on the trial caused the court to lose jurisdiction, the case of *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672, is cited by appellant. We think it plain that the case does not substantiate the contention. The sentence imposed in this case was held by this court to have been beyond the jurisdiction of the trial court to pronounce, because it was against the express provisions of the Constitution, which bounds and limits all jurisdiction; but we are entirely clear that in this case the trial was so conducted that there was not at any time any lack of jurisdiction in the court, and that the most that can be urged is that there might have been an error committed by the trial court in omitting to have the evidence repeated to the appellant as it was given by the witnesses at the trial, even though no demand of the kind was made by petitioner or his counsel.

Although the conviction and punishment of the appellant under the facts appearing on this record may seem to be somewhat hard, yet this court has no jurisdiction to grant the relief asked for.

The order of the Circuit Court refusing the writ was right, and is affirmed.

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[131] *ANNA VALENTINA, *Appt.*,
v.
JAMES W. MERCER, Sheriff of Bergen County, New Jersey.

(See S. C. Reporter's ed. 131–140.)

1. Habeas corpus—as substitute for writ of error.—A writ of habeas corpus cannot perform the function of a writ of error.

2. Habeas corpus — Federal interference with state administration of criminal law.—Federal courts have no power to interfere by habeas corpus with the imprisonment of a person under a judgment of conviction of a crime in a state court, if that court had jurisdiction to try the case, and jurisdiction over the person of the accused, and did not lose such jurisdiction during the trial.

3. Habeas corpus—in Federal courts.—The Federal courts will not release, on habeas corpus, a person convicted of murder in the first degree in a state court, on the theory that that court lost its jurisdiction to proceed in the trial because it charged the jury, in accordance with the admission of counsel for the accused, that the only question for their consideration was the degree of murder of which the accused was guilty.

[No. 404.]

Argued February 27, 1906. Decided March 12, 1906.

APPEAL from the Circuit Court of the United States for the District of New Jersey to review an order refusing an application for a writ of habeas corpus on behalf of a person imprisoned under conviction of murder in the first degree, entered in the Bergen County Court of Oyer and Terminer, in that state. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The appellant has appealed from an order of the United States circuit court for the district of New Jersey, refusing her application for a writ of habeas corpus.

In her application for the writ, appellant stated that she had been indicted in the Bergen county court of oyer and terminer, in the state of New Jersey, in April, 1904, for the murder of one Rosa Salza, and that she had been convicted on the trial of such indictment by a jury, and sentenced to be hanged on the 19th day of May, 1904. She averred that she had been convicted without authority of law, and that her conviction was null and void, because the question of her guilt or innocence of murder was not entertained by the court or submitted to the jury, as the law of New Jersey expressly requires in all cases where parties are indicted for murder, but, on the contrary, she averred that evidence was taken in said court in said proceedings on her trial merely to determine the degree of her guilt; that her counsel, assigned by the court to represent

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NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; *Ex parte* Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164; and Glass v. The Betsey, 1 L. ed. U. S. 489.

[132]*her in said proceedings, had so stated in a petition in her behalf, made to the court of pardons of the state of New Jersey. She further said that it was stated by her counsel, in that same petition, that she had pleaded guilty when she was arraigned, but that, under the direction of the court, a plea of not guilty was entered so that evidence might be taken for the purpose of determining the degree of guilt. This averment she denied. The petitioner claimed that the proceedings were wholly unwarranted by the law of New Jersey; and that the court and her counsel proceeded under the impression that § 68 of the act for the punishment of crimes, approved March 27, 1874, which provided that "if a person indicted for murder should be convicted by confession in open court, the court should proceed by examining witnesses to determine the degree of the crime," was then in existence, whereas she said the act had been repealed in 1893, and the present law passed, which provides, "if, upon arraignment, such plea of guilty shall be offered, it shall be disregarded and a plea of not guilty entered, and a jury impaneled shall try the case in manner aforesaid." The petitioner urged in her petition that by the proceedings adopted upon her trial she was deprived of all benefit of the presumption of innocence and of reasonable doubt to which she was entitled by law, and that the questions of self-defense and manslaughter, fairly raised by her testimony, were excluded from the consideration of the jury, and the question submitted to them was limited by the court simply as to whether she was guilty of murder in the first degree or not, and the benefit of reasonable doubt was confined to that point.

A writ of error was sued out by the petitioner and her case was brought before the court of errors and appeals, the highest court of the state of New Jersey, for the purpose of review, and, after a hearing, that court refused a new trial. The case is reported in 71 N. J. L. 552, 60 Atl. 177.

It appears from the record herein that upon the trial proof was given that the petitioner stabbed the deceased with a knife a great many times in the neck and breast, [133]killing her instantly. *Counsel who had been assigned to defend the petitioner called her as a witness, and she admitted that she stabbed the deceased and killed her. She said that the deceased had a child in her arms at the time, and that the petitioner said to her that she did not want to raise any trouble, and told her to put the child away, but that the deceased had the knife in her hand, right behind her dress, and that when petitioner saw that she had the knife and that the deceased was going to stab her, petitioner took the knife and grabbed the deceased by the hair, and before deceased stabbed her she took the knife away from her and stabbed the deceased.

Upon opening for the defense her counsel said as follows:

"This defendant, when arraigned in open court, made confession of the commission of this crime, and you, gentlemen of the jury, from the evidence that has been produced on the part of the state, and that which shall be offered on the part of the defense, will simply have to determine what the degree of guilt shall be; your verdict will be either that she is guilty of the taking of the life of this woman, Mrs. Salza, with malice aforethought, premeditated, which would mean a verdict of murder in the first degree, or your verdict will be murder in the second degree; so that I find myself in a very peculiar position. It is one of those cases around which—the circumstances being such—that we stand, as it were, with only the defendant to testify. After you have heard her testimony, and possibly one or two witnesses in connection therewith, the case will then be given to you for you to determine whether this woman shall forfeit her life for the act which she committed on March 10th, last, or whether she shall suffer the penalty which the law will inflict by reason of a verdict of murder in the second degree."

After that the evidence was given on the part of the defense, and the defendant was called as a witness, and admitted the killing.

Mr. **James M. Trimble** argued the cause and filed a brief for appellant:

A mere inquiry to determine the degree of crime is not a trial.

People v. *Noll*, 20 Cal. 164.

The writ of habeas corpus cannot be used as a mere writ of error. But to deny a prisoner a constitutional right is not mere error in law, and, where the record presents such a case, the party is entitled to be discharged from imprisonment.

Re Nielsen, 131 U. S. 184, 33 L. ed. 120, 9 Sup. Ct. Rep. 672.

When the judge in this case limited the exercise of reasonable doubt to the first degree of murder, exclusively, he prevented the jury from considering, even in theory, the possibility of acquittal, and deprived, without sanction of law, the proceeding of its most important and characteristic feature as a criminal trial. This is not mere error. This is arbitrary authority; and it matters not how plain the evidence may be, the court is not thereby justified in assuming a disputed fact.

Wells, Questions of Law & Fact, chap. 10, § 466.

These proceedings do not constitute a trial in the constitutional sense; no verdict of a jury can condone it; here is a denial of fundamental right.

Caldwell v. *Texas*, 137 U. S. 697, 34 L. ed. 818, 11 Sup. Ct. Rep. 224.

Mr. **Robert H. McCarter** argued the cause and filed a brief for appellee:

The permission accorded by U. S. Rev. Stat. § 753 (U. S. Comp. Stat. 1901, p. 592), to Federal judges to issue writs of habeas corpus in all cases of this kind, does not justify the circuit court, or this court, on review of its action, to consider questions as on writ of error or appeal.

15 Am. & Eng. Enc. Law, pp. 174 *et seq*; *Storti* v. *Massachusetts*, 183 U. S. 138, 141, 46 L. ed. 120, 122, 22 Sup. Ct. Rep. 72; *Re Wood* (*Wood* v. *Brush*) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Anderson* v. *Treat*, 172 U. S. 24, 43 L. ed. 351, 19 Sup. Ct. Rep. 67; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; *Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Andrews* v. *Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; *Bergemann* v. *Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Re Shibuya Jugiro* (*Shibuya Jugiro* v. *Brush*) 140 U. S. 291, 297, 35 L. ed. 510, 513, 11 Sup. Ct. Rep. 770.

The record of the state court discloses no error reviewable in this court.

Clark v. *Pennsylvania*, 128 U. S. 397, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; *Caldwell* v. *Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *McNulty* v. *California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Clifford* v. *Heller*, 172 U. S. 641, 43 L. ed. 1181, 19 Sup. Ct. Rep. 874; *Bergemann* v. *Backer*, *supra*; *Lambert* v. *Barrett*, 157 U. S. 697, 699, 39 L. ed. 865, 866, 15 Sup. Ct. Rep. 722; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Re Shibuya Jugiro* (*Shibuya Jugiro* v. *Brush*), *supra*; *Lambert* v. *Barrett*, 159 U. S. 660, 40 L. ed. 296, 16 Sup. Ct. Rep. 135; *Hallinger* v. *Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

In this case, as in that of *Felts* v. *Murphy*, decided this day [201 U. S. 123, *ante*, 689, 26 Sup. Ct. Rep. 366], the question arises on an appeal from an order of the circuit court of the United States for the district of New Jersey, refusing appellant's petition for a writ of habeas corpus. Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the state court had jurisdiction to try the case, and had jurisdiction over the person of the accused, and never lost such jurisdiction, the Federal circuit court was right in denying the application of petitioner for a writ, and its order must be affirmed. A writ of this nature cannot perform the function of a writ of error. We again cite the authorities referred to in the *Felts Case*: *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Re Lennon*, 166 U. S. 548, 552, 41 L. ed. 1110, 1112, 17 Sup. Ct. Rep. 658; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638.

The contention of the counsel for the petitioner is that the proceedings upon the trial, which resulted in appellant's sentence to death, did not amount to a trial at common law, or a proceeding authorized by any statute. That it was a mere inquiry to determine the degree of murder of which defendant was guilty, and hence she has never had a trial by due process of law, and the action of the state court was without jurisdiction. A perusal of the charge of the court to the jury shows that the whole case was presented to the jury upon the evidence that was produced in court. Upon all the evidence given the court stated to the jury that there was no evidence to show that the defendant killed the deceased in her necessary self-defense, and the court instructed the jury that it would not be justified in acquitting the defendant on the ground of self-defense. The court further said that there was no question *of man- [139] slaughter in the case, and that, not only as a necessary conclusion from the evidence, but upon the admitted facts in the case, the defendant was guilty of the crime of murder, and the only question left for the consideration of the jury was whether it was murder in the first degree or second degree. The court gave an extended explanation as to what constituted murder in the first degree and what constituted murder in the second degree, and stated that the defendant was guilty of murder in the second degree, unless the evidence satisfied the jury beyond a reasonable doubt that the defendant intended to take the life of deceased, and that the intent was carried into execution deliberately, wilfully, and with premeditation. Finally, the court submitted to the jury the case, and instructed it to consider all the evidence according to the recollection of the jury, and giving to the evidence such weight as it possessed on the mind of the jury. The court stated it was the duty of the jury to determine whether the defendant intended to kill the deceased, and carried out that purpose wilfully, deliberately, and with premeditation. If she did, she was guilty of murder in the first degree, and it was the duty of the jury to say so. If not, then,

on the admitted facts, she was guilty of murder in the second degree, and it was the duty of the jury to say that by its verdict. The jury found the petitioner guilty of murder in the first degree.

The charge of the court was the subject of review by the court of last resort of the state of New Jersey, and it was held by that court to be without error. Upon the record in this case there can, in our judgment, be no possible doubt that the petitioner has had a valid trial by a court having jurisdiction of the subject-matter and of the person of the accused, and that there was no loss of jurisdiction over either at any time during the trial. What effect was to be given by the court to the admission of counsel (above set forth) was a question of law for the court to decide, and the charge of the court did not oust it of jurisdiction to pro-
[140] ceed in the trial of the case. *This is to us so plain a proposition that it is unnecessary to enlarge upon it.

Having no power to review on this writ any other question than that of the jurisdiction of the court in the trial and sentence pronounced upon the verdict of guilty, and concluding that there was the necessary jurisdiction *the order of the Circuit Court refusing the writ of habeas corpus is affirmed.*

OTIS COMPANY, *Plff. in Err.*,
v.
LUDLOW MANUFACTURING COMPANY and Ludlow Cordage Company.

(See S. C. Reporter's ed. 140–156.)

1. Constitutional law—due process of law—flowage of upper lands.—The due process of law guaranteed by U. S. Const., 14th Amend., is not denied an upper riparian owner by the provisions of Mass. Pub. Stat. chap. 190, giving mill owners the right to flowage to develop water power, where adequate compensation is secured to the upper owner for the resulting injury to his lands.

2. Constitutional law—due process of law—flowage of upper lands—compensation.—Compensation to an upper riparian proprietor for the damages sustained by reason of the erection of a dam by a lower mill owner, under the authority of Mass. Pub. Stat., chap. 190, must be deemed sufficiently secured to satisfy the due process of law clause of the 14th Amendment to the Federal Constitution by the provisions of that statute for the recovery of the damages sustained within three years by the person whose land is "overflowed or otherwise injured" by such dam, together with an annual compensation for future damages, or, in lieu therof, a gross sum, both to be computed by the jury, and for the bringing of a new complaint if dissatisfaction exists over the amount of such annual compensation,—especially since the state court has held that no easement or title is gained in or over the upper lands, and has recognized the right to injunctive relief if other remedies prove ineffectual.

[No. 73.]

Argued March 1, 2, 1906. Decided March 12, 1906.

IN ERROR to the Superior Court of the State of Massachusetts for the County of Suffolk, in that state, to review a judgment entered pursuant to an order of the Supreme Judicial Court of that state, directing the dismissal of a bill to restrain the flooding of the land of an upper riparian owner as the result of the erection of a dam under the authority of the Massachusetts mill act. Modified by directing that the bill be dismissed without prejudice, or retained until plaintiff's rights shall be determined in the proceedings for damages which have been instituted, and *as modified, affirmed.*

See same case below, 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009.

The facts are stated in the opinion.

Mr. **Boyd B. Jones** argued the cause, and, with *Messrs. Charles L. Gardner* and *John J. Winn,* filed a brief for plaintiff in error:

A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved therein.

Erie R. Co. v. *Purdy,* 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

If it appears from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell v. *Brunswick County,* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

In the case at bar, as in *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, the state court could not have reached a conclusion adverse to the plaintiff in error without holding either that the rights taken were not the property of the plaintiff,

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NOTE.—*On the validity of statutes authorizing the flowage of lands*—see note to Turner v. Nye, 14 L.R.A. 487.

On the liability arising out of damming back the water of a stream—see note to Avery v. Vermont Electric Co. 59 L.R.A. 817.

As to what constitutes due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; People v. O'Brien, 2 L.R.A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law.

In Massachusetts a river above the ebb and flow of the tide is a non-navigable river, and a riparian proprietor thereon owns to the thread of the stream, subject to the right of the public to pass in boats if the river be in fact boatable, and, like other property, subject to a constitutional exercise of the police powers of the state.

Ingraham v. *Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Com.* v. *Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Rowe* v. *Granite Bridge Corp.* 21 Pick. 344; *Hopkins Academy* v. *Dickinson*, 9 Cush. 544; *McFarlin* v. *Essex Co.* 10 Cush. 304; *Com.* v. *Vincent*, 108 Mass. 441.

A riparian proprietor on a non-navigable stream has the exclusive private right to the use of its waters as they flow through his land, and such right is parcel of the land, and as sacred as the right to the soil over which they flow.

Watuppa Reservoir Co. v. *Fall River*, 147 Mass. 548, 1 L.R.A. 466, 18 N. E. 465, 154 Mass. 305, 13 L.R.A. 255, 28 N. E. 257; *Fitch* v. *Stevens*, 4 Met. 426; *King* v. *King*, 7 Mass. 496; *Ingraham* v. *Wilkinson*, and *Com.* v. *Chapin*, *supra*; *Bardwell* v. *Ames*, 22 Pick. 333; *Williams* v. *Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Johnson* v. *Jordan*, 2 Met. 234, 37 Am. Dec. 85; *Pitts* v. *Lancaster Mills*, 13 Met. 156; *Knight* v. *Wilder*, 2 Cush. 199, 48 Am. Dec. 660; *Com.* v. *Alger*, 7 Cush. 53; *Bates* v. *Weymouth Iron Co.* 8 Cush. 548; *Elliot* v. *Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *McFarlin* v. *Essex Co.* *supra*; *Hill* v. *Sayles*, 12 Cush. 454; *Russell* v. *Russell*, 15 Gray, 159; *Tourtellot* v. *Phelps*, 4 Gray, 370; *Pratt* v. *Lamson*, 2 Allen, 275; *Merrifield* v. *Lombard*, 13 Allen, 16, 90 Am. Dec. 172; *Drake* v. *Hamilton Woolen Co.* 99 Mass. 574; *Com.* v. *Vincent*, *supra*; *Merrifield* v. *Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Lund* v. *New Bedford*, 121 Mass. 286; *Dwight Printing Co.* v. *Boston*, 122 Mass. 583; *Clapp* v. *Herrick*, 129 Mass. 292; *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396, 7 L.R.A. 613, 24 N. E. 774; *Washburn & M. Mfg. Co.* v. *Worcester*, 153 Mass. 494, 27 N. E. 664; *Maynard* v. *Northampton*, 157 Mass. 218, 31 N. E. 1062; *Fales* v. *Easthampton*, 162 Mass. 422, 38 N. E. 1129; *Sprague* v. *Dorr*, 185 Mass. 10, 69 N. E. 344.

The right to fish in a non-navigable stream is the exclusive right of the riparian proprietor, from the enjoyment of which the public are excluded, and for an infringement of which the owner can maintain a common-law action of trespass.

Ingraham v. *Wilkinson*, *Com.* v. *Chapin*, *Com.* v. *Alger*, *McFarlin* v. *Essex Co.* and *Russell* v. *Russell*, *supra*.

A riparian owner has a private right that the waters of a non-navigable stream shall not be polluted by others so as to interfere with his reasonable use of the same for proper purposes, and for an infringement of that right he has a remedy at law and equity.

Merrifield v. *Lombard*, *Merrifield* v. *Worcester*, *Dwight Printing Co.* v. *Boston*, *Washburn & M. Mfg. Co.* v. *Worcester*, and *Sprague* v. *Dorr*, *supra*.

A riparian proprietor has a right to have the waters of a stream flow to him without an unreasonable diversion, and can maintain an action of tort for damages occasioned by a violation of such right, or a bill in equity to restrain it.

Newhall v. *Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Lund* v. *New Bedford*, 121 Mass. 286; *Dwight Printing Co.* v. *Boston*, *supra*; *Wamesit Power Co.* v. *Allen*, 120 Mass. 352; *Warren* v. *Spencer Water Co.* 143 Mass. 9, 8 N. E. 606; *Watuppa Reservoir Co.* v. *Fall River*, 154 Mass. 305, 13 L.R.A. 255, 28 N. E. 257; *Hollingsworth & V. Co.* v. *Foxborough Water Supply District*, 165 Mass. 180, 42 N. E. 574; *Lexington Print Works* v. *Canton*, 171 Mass. 414, 50 N. E. 931.

A riparian proprietor has a private right to use the natural fall of the stream as it passes through his land for hydraulic purposes, and may maintain an action of tort for damages, or a bill in equity to enjoin the continuance of the obstruction to the flow, or may enter upon the premises of the wrongdoer and abate the nuisance.

Williams v. *Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Hill* v. *Sayles*, 12 Met. 142, 4 Cush. 549, 12 Cush. 454; *Tourtellot* v. *Phelps*, and *Pratt* v. *Lamson*, *supra*; *Smith* v. *Agawam Canal Co.* 2 Allen, 355; *Brighton* v. *Wheeler*, 12 Allen, 89; *Drake* v. *Hamilton Woolen Co.* and *Clapp* v. *Herrick*, *supra*; *Otis Co.* v. *Ludlow Mfg. Co.* 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009; *Ludlow Mfg. Co.* v. *Indian Orchard Co.* 177 Mass. 61, 58 N. E. 181; *Fales* v. *Easthampton*, *supra*; *M'Calmont* v. *Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102; *Lancey* v. *Clifford*, 54 Me. 487, 92 Am. Dec. 561; *Davis* v. *Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Parker* v. *Hotchkiss*, 25 Conn. 321; *Keeney & W. Mfg. Co.* v. *Union Mfg. Co.* 39 Conn. 576; *Heath* v. *Williams*, 25 Me. 209, 43 Am. Dec. 265.

The difference between the private property right of the riparian proprietor to use the natural fall of the stream for power, and his right as one of the public to use the stream for boating, is clearly shown in—

Blood v. *Nashua & L. R. Corp.* 2 Gray, 137, 61 Am. Dec. 444. See also *Blackwell* v. *Old Colony R. Co.* 122 Mass. 1.

A distinction exists between the common-law rights of a riparian proprietor and his rights under the mill act.

Gould v. *Boston Duck Co.* 13 Gray, 442; *Smith* v. *Agawam Canal Co.* 2 Allen, 355; *Fuller* v. *Chicopee Mfg. Co.* 16 Gray, 43.

While a riparian owner is not entitled to compensation for damages or annoyance caused by the exercise of the sovereign or police powers of a state in a manner which does not violate the owner's private rights (*Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Eldridge* v. *Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *Gibson* v. *United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Bedford* v. *United States*, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238), yet such owner cannot, even under such sovereign or police powers, be deprived of his rights without compensation. (*Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *United States* v. *Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349).

These are the same rules this court applies to lands.

Missouri P. R. Co. v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

The capacity of unimproved or unoccupied property for improvement for agricultural, commercial, or hydraulic purposes is property under both the Federal and state law.

Kaukauna Water Power Co. v. *Green Bay & M. Canal Co.* 142 U. S. 254, 276, 35 L. ed. 1004, 1012, 12 Sup. Ct. Rep. 173; *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 403, 407, 25 L. ed. 206, 208; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 260, 41 L. ed. 979, 993, 17 Sup. Ct. Rep. 581; *Eaton* v. *Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Wynehamer* v. *People*, 13 N. Y. 378; *Heard* v. *Middlesex Canal*, 5 Met. 81; *Boston & R. Mill Corp.* v. *Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Maynard* v. *Northampton*, 157 Mass. 218, 31 N. E. 1062; *Fales* v. *Easthampton*, 162 Mass. 422, 38 N. E. 1129; *Baxter* v. *Rutland*, 67 Vt. 607, 32 Atl. 488.

Whether an interference with property rights is a taking of property within the due process of law clause of the 14th Amendment is a Federal, and not a local, question.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; *Missouri P. R. Co.* v. *Nebraska, supra; Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Flowing the land of another under the authority of a mill act or other statute so as to deprive the owner of riparian rights, or so as to exclude him from the beneficial use of the land itself, or taking the right so to flow by such authority, is a taking of property within the due process of law clause of the 14th Amendment, entitling the owner to compensation.

Pumpelly v. *Green Bay & M. Canal Co. supra; Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; *United States* v. *Lynah* and *Boston & R. Mill Corp.* v. *Newman, supra; Sinnickson* v. *Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184; *Eaton* v. *Boston, C. & M. R. Co. supra; Arimond* v. *Green Bay & M. Canal Co.* 31 Wis. 316; *Lee* v. *Pembroke Iron Co.* 57 Me. 481, 2 Am. Rep. 59; *Ingram* v. *Maine Water Co.* 98 Me. 566, 57 Atl. 893; *Manigault* v. *Springs*, 199 U. S. 473, *ante*, 274, 26 Sup. Ct. Rep. 127.

An owner is deprived of his property when he is deprived of the right to use and enjoy it.

Edwards v. *Bruorton*, 184 Mass. 529, 69 N. E. 328; *Howe* v. *Weymouth*, 148 Mass. 605, 20 N. E. 316; *Re Wall Street*, 17 Barb. 617; *Portland* v. *Lee Sam*, 7 Or. 397; *Driver* v. *Western Union R. Co.* 32 Wis. 569, 14 Am. Rep. 726; *Forster* v. *Scott*, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; *Whyte* v. *Kansas City*, 22 Mo. App. 409; *Isele* v. *Schwamb*, 131 Mass. 337.

A right taken is to be paid for without regard to the time when or the extent to which the taker may see fit to exercise it.

Newton v. *Perry*, 163 Mass. 319, 39 N. E. 1032; *Imbescheid* v. *Old Colony R. Co.* 171 Mass. 209, 50 N. E. 609.

The Massachusetts rule that the right to erect and maintain a dam to raise water for working a mill does not give to the mill owner any right to the land flowed, or take away any right from the landowner, because the latter may embank his land, and thus stop any flowage of it, or, if he chooses, he may collect of the mill owner damages in gross or annually for the flowage (*Turner* v. *Nye*, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Williams* v. *Nelson*, 23 Pick. 141, 34 Am. Dec. 45), is opposed to the decisions of this court, violates the 14th Amendment, and is generally condemned.

Lewis, Em. Dom. §§ 182, 183.

It overlooks the fact that the embankment by the landowner to prevent the flooding by the mill owner produces, at the former's expense, the identical results to be avoided; and eminent judges of the su-

preme court of Massachusetts have refused to assent to it.

Kenison v. *Arlington*, 144 Mass. 456, 11 N. E. 705; *Turner* v. *Nye*, *supra*; *Isele* v. *Arlington Five Cents Sav. Bank*, 135 Mass. 142.

The mill act authorizes depriving a person of property without due process of law within the meaning of the 14th Amendment, because, as interpreted by the state court, it authorizes the taking of the property of another without notice to the owner thereof, by acts of occupation, like the making of the excavation in the present case, so unintelligible and ambiguous as utterly to fail to indicate how much of the property of the owner was or is to be taken, or even that any of his property is to be injuriously affected.

National Fibre Board Co. v. *Lewiston & A. Electric Light Co.* 95 Me. 318, 49 Atl. 1075; *Glover* v. *Boston*, 14 Gray, 282; *Wilson* v. *Lynn*, 119 Mass. 174; *Wamesit Power Co.* v. *Allen*, 120 Mass. 352; *Kenison* v. *Arlington*, *supra*; *Woodbury* v. *Marblehead Water Co.* 145 Mass. 509, 15 N. E. 282; *Hollingsworth & V. Co.* v. *Foxborough Water Supply District*, 165 Mass. 186, 42 N. E. 574; *Hamor* v. *Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40; *Warren* v. *Spencer Water Co.* 143 Mass. 9, 8 N. E. 606; *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 374, 60 N. E. 977.

Adequate provision for making just compensation to the owner of property taken is required by the due process of law clause of the 14th Amendment.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; *Williams* v. *Parker*, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; *Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695.

If adequate provision for payment of compensation be made, possession of property or enjoyment of right taken may be had before such payment.

Cherokee Nation v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Sweet* v. *Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Williams* v. *Parker*, *supra*.

But the owner is entitled to reasonable, certain, and adequate provisions for obtaining compensation before his occupancy is disturbed.

Cherokee Nation v. *Southern Kansas R. Co.* 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965.

In other words, the due process of law prescribed by the 14th Amendment requires compensation to be made or secured to the owner.

Norwood v. *Baker*, 172 U. S. 269, 277, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187.

A provision that compensation shall be paid by an individual or business corporation, but affording merely a right of action to obtain it, does not satisfy the constitutional requirement.

Atty. Gen. v. *Old Colony R. Co.* 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; *Ash* v. *Cummings*, 50 N. H. 591; *Steinhart* v. *Superior Court*, 137 Cal. 575, 59 L.R.A. 404, 92 Am. St. Rep. 183, 70 Pac. 629; *Howe* v. *Norman*, 13 R. I. 488; *Powers* v. *Bears*, 12 Wis. 213, 78 Am. Dec. 733; Lewis, Em. Dom. §§ 457, 458.

A provision that compensation shall be paid by the state, county, or city of permanent solvency, supported, as it is, by public faith and credit, and not liable to go up and down like that of an individual, is security within the constitutional requirement.

Williams v. *Parker*, 188 U. S. 491, 504, 47 L. ed. 559, 563, 23 Sup. Ct. Rep. 440; *Smeaton* v. *Martin*, 57 Wis. 364, 15 N. W. 403; *Great Falls Mfg. Co.* v. *Garland*, 25 Fed. 521; Cooley, Const. Lim. 7th ed. p. 816.

It is not sufficient that the provisions for compensation are such that it will probably be paid.

Connecticut River R. Co. v. *Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

The compensation must be either ascertained and paid to him (the owner) before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund.

Bloodgood v. *Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Powers* v. *Bears*, *supra*; Lewis, Em. Dom. § 459.

The intimations of this court are fully in accord with the decisions that the responsibility of a private person or corporation is not an adequate fund.

Williams v. *Parker*, 188 U. S. 491, 47 L. ed. 559, 22 Sup. Ct. Rep. 440; *Sweet* v. *Rechel*, 159 U. S. 380, 406, 40 L. ed. 188, 198, 16 Sup. Ct. Rep. 43.

The Massachusetts mill act violates the 14th Amendment because it denies the owner of vacant land any compensation whatever for the loss—caused by flowing, under the authority of said act—of that portion of its market value arising from its adaptability for mill purposes.

Fuller v. *Chicopee Mfg. Co.* 16 Gray, 43; *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 403, 25 L. ed. 206; *Fales* v. *Easthampton*, 162 Mass. 422, 38 N. E. 1129; *Watuppa Reservoir Co.* v. *Fall River*, 147

Mass. 548, 1 L.R.A. 466, 18 N. E. 465, 154 Mass. 305, 13 L.R.A. 255, 28 N. E. 257.

This mill act is also unconstitutional because, under its provision, one riparian owner is authorized, by an act of occupation of his land, thereby to acquire the right to flow the land of an upper proprietor, and, at a later date, to abandon such taking without flowing and without liability to the upper proprietor for damages resulting from such taking, and because it does not give the owner of property taken a right to compensation simultaneous with the taking, but makes such right dependent upon the future volition of the taker.

Thompson v. *Moore*, 2 Allen, 350; *Eames* v. *New England Worsted Co.* 11 Met. 570; *Storm* v. *Manchaug Co.* 13 Allen, 10; *Palmer Co.* v. *Ferrill*, 17 Pick. 58; *Fuller* v. *Chicopee Mfg. Co.* 16 Gray, 46; *Re Wall Street*, 17 Barb. 617; *Portland* v. *Lee Sam*, 7 Or. 397; *Forster* v. *Scott*, 136 N. Y. 577, 18 L. R.A. 543, 32 N. E. 976; *Driver* v. *Western Union R. Co.* 32 Wis. 569, 14 Am. Rep. 726; *Edwards* v. *Bruorton*, 184 Mass. 529, 69 N. E. 328; *Whyte* v. *Kansas City*, 22 Mo. App. 409; *Isele* v. *Schwamb*, 131 Mass. 337; *Imbescheid* v. *Old Colony R. Co.* 171 Mass. 209, 50 N. E. 609.

This mill act also violates the due process of law clause of the 14th Amendment because it authorizes the flowing of the land of another, and his consequent exclusion from the use thereof for the time between the flowing and the filing and recording f the verdict, usually a period of at least two years, without first requiring the payment of, or any security by attachment or otherwise for, the damages caused during that period.

Wight v. *Barnstable Sav. Bank*, 123 Mass. 183; *Hamilton* v. *Farrar*, 131 Mass. 572; *McNally* v. *Smith*, 12 Allen, 455; *Fuller* v. *Chicopee Mfg. Co. supra; Ash* v. *Cummings*, 50 N. H. 591.

The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done.

Stuart v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Montana Co.* v. *St. Louis Min. & Mill Co.* 152 U. S. 160, 170, 38 L. ed. 398, 400, 14 Sup. Ct. Rep. 506; *Dexter* v. *Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; *White* v. *Gove*, 183 Mass. 333, 67 N. E. 359.

The mill act also violates the due process of law clause of the 14th Amendment because it fails to require the payment in advance of damages accruing after the date of such verdict, or to provide any certain and definite fund out of which such damages shall be paid.

Hunt v. *Whitney*, 4 Met. 603; *Leland* v. *Woorbury*, 4 Cush. 245; *Dean* v. *Colt*, 99 Mass. 486.

Cases to the effect that an interference with the rights of a landowner which forces him either to have his lands flowed by a lower owner or to incur the expense of building an embankment, and thereby flow it to the same extent, is not a taking, are opposed to the decisions of this court. Eminent judges of the supreme court of Massachusetts have refused to subscribe to this doctrine, and it is generally condemned by courts of other jurisdictions as well as by learned authors.

Turner v. *Nye*, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; *Kenison* v. *Arlington*, 144 Mass. 456, 11 N. E. 705; *Isele* v. *Arlington Five Cents Sav. Bank*, 135 Mass. 142; *Isele* v. *Schwamb, supra; Chase* v. *Sutton Mfg. Co.* 4 Cush. 152; *Boston & R. Mill Corp.* v. *Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Talbot* v. *Hudson*, 16 Gray, 417; *Avery* v. *Vermont Electric Co.* 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; Lewis, Em. Dom. § 183.

The state, in the exercise of the police powers, may prohibit, without compensation to the owner, any use of property injurious to the health, morals, or safety of the community; but it cannot, even in such case, take such property without adequate provision for compensation, and much less can it, without compensation, deprive an owner of the right to the beneficial enjoyment of his property for general purposes, in order that another person may use such property for a single purpose.

Austin v. *Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Com.* v. *Alger*, 7 Cush. 53; *Sweet* v. *Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Miller* v. *Horton*, 152 Mass. 544, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *Bent* v. *Emery*, 173 Mass. 495, 53 N. E. 910; *Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224.

The Massachusetts mill act violates the 14th Amendment because it authorizes the taking of private property for private purposes.

Cole v. *LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Cary Library* v. *Bliss*, 151 Mass. 364, 7 L.R.A. 765, 25 N. E. 902.

The case at bar is readily distinguishable from the irrigation and drainage cases, in which one of many owners in severalty of a large tract of property is compelled to pay his just share of the expense of improving the entire tract, when such improvement would otherwise be impracticable. Such regulation of the rights of ownership is based upon considerations of public welfare.

Fallbrook Irrig. District v. *Bradley, supra; Wurts* v. *Hoagland,* 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086.

It is likewise distinguishable from those cases in which, where a general condition has made it almost essential to the growth of a state that landowners should have the right to cross the lands of other owners to obtain a supply of water necessary to the use of the land, a statute authorizing them to do so has been upheld.

Clark v. *Nash,* 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676.

In *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441, this court sustained a mill act which, as is most fully set forth in *Ash* v. *Cummings,* 50 N. H. 591, required an adjudication of public utility, prepayment of damages or security for such payment, and which prohibited the erection of a dam affecting any mill on the same stream. The language of this court in the opinion is significant: "The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay & M. Canal Co. supra.*"

A statute which deprives a mill owner of the right to develop a natural water power on his land does affect his mill.

Elting Woolen Co. v. *Williams,* 36 Conn. 310; *Occum Co.* v. *A. & W. Sprague Mfg. Co.* 35 Conn. 496.

In considering the constitutionality of the Massachusetts mill act, present conditions may well be held to render a statute unconstitutional which, many years before, under entirely different conditions, might have been held to be constitutional; just as the conditions in one state may support a statute which, in a different state, under different conditions, would clearly be invalid.

Stowell v. *Flagg,* 11 Mass. 364.

The following cases are opposed to the view that flowing, under such a mill act as the one in question, can be upheld as a taking for a public use or for the public welfare:

Ryerson v. *Brown,* 35 Mich. 333, 24 Am. Rep. 564; *Berrien Springs Water Power Co.* v. *Berrien Circuit Judge,* 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379; *Tyler* v. *Beacher,* 44 Vt. 648, 8 Am. Rep. 398; *Avery* v. *Vermont Electric Co.* 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; *Gaylord* v. *Sanitary District,* 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; *Sadler* v. *Langham,* 34 Ala. 311; *McCulley* v. *Cunningham,* 96 Ala. 583, 11 So. 694; *Loughbridge* v. *Harris,* 42 Ga. 501; *Crenshaw* v. *Slate River Co.* 6 Rand. (Va.) 245.

The following cases contain an intimation that, if it were a new question, mill acts would be held to be unconstitutional:

Jordan v. *Woodward,* 40 Me. 317; *Fleming* v. *Hull,* 73 Iowa, 598, 35 N. W. 673; *Harding* v. *Funk,* 8 Kan. 315; *Miller* v. *Troost,* 14 Minn. 365, Gil. 282; *Fisher* v. *Horicon Iron & Mfg. Co.* 10 Wis. 351; *Atty. Gen.* v. *Eau Claire,* 37 Wis. 400; *Murdock* v. *Stickney,* 8 Cush. 113.

By the 14th Amendment the validity of the constitutions and statutes of the states then or thereafter existing were made subject to the test of the due process of law clause of the 14th Amendment, as interpreted by the Supreme Court of the United States.

Neal v. *Delaware,* 103 U. S. 370, 26 L. ed. 567; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 239, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; *Wood* v. *Fitzgerald,* 3 Or. 568; *Portland* v. *Bangor,* 65 Me. 120, 20 Am. Rep. 681.

While peculiar local conditions may exist in one state which give a public character to a use by one person of the land of another, and justify a statute in that state which would be clearly unconstitutional if enacted under dissimilar conditions (*Clark* v. *Nash* and *Wurts* v. *Hoagland, supra*), yet the 14th Amendment protects the property rights of the citizens of the United States in every state by prohibiting the taking of the same for private purposes, and by requiring an adequate provision for the payment of full compensation to owners deprived of property rights either by the exercise of the right of eminent domain or of the police powers. This court, therefore, in dealing with the case at bar, is unaffected by considerations of contemporaneous construction and acquiescence which have led different state courts to diverse conclusions.

Chicago, B. & Q. R. Co. v. *Chicago, supra.*

A mill act authorizing an interference with private property rights by flowing without prepayment of compensation, or security for such payment, cannot, in the Federal sense, be a violation of the 14th Amendment if enacted in New Hampshire, and

cannot be in accord with that Amendment if enacted in Massachusetts.

Ash v. *Cummings*, 50 N. H. 591; *Otis Co.* v. *Ludlow Mfg. Co.* 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009.

Neither can a mill act enacted in Michigan be a violation of the 14th amendment because of recent enactment, and a compliance with it in Massachusetts because of ancient origin.

Ryerson v. *Brown, Berrien Springs Water Power Co.* v. *Berrien Circuit Judge, Otis Co.* v. *Ludlow Mfg. Co.* and *Murdock* v. *Stickney, supra.*

Nor can a Massachusetts statute be held constitutional in spite of the ambiguity in the act of taking, and a Maine act unconstitutional by reason of the same ambiguity.

Otis Co. v. *Ludlow Mfg. Co. supra; Hamor* v. *Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40.

Neither, under the 14th Amendment, can a given use under similar conditions be upheld as a public one, for the public welfare, in Massachusetts, and as a strictly private one in Vermont.

Otis Co. v. *Ludlow Mfg. Co.* and *Avery* v. *Vermont Electric Co. supra.*

A decision that the mill act in question is unconstitutional will not seriously affect vested interests.

Title to the water powers has been fixed by purchase, user, and acceptance of damages.

Lewis, Em. Dom. § 181.

Messrs. **James B. Carroll** and **William H. Brooks** argued the cause, and, with *Mr. Walter S. Robinson,* filed a brief for defendants in error:

When the parties have been heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States.

Walker v. *Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

The plaintiff below had the benefit of a full and fair trial in the several courts of its own state, whose jurisdiction was invoked by itself. In those courts its rights were measured, not by laws made to affect it individually, but by general provisions of law, applicable to all those in like condition.

Marchant v. *Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894.

If the statute under which the rights of the water owners are governed provides a tribunal for the hearing of all questions involved, and provides for the assessment of damages, then there is due process of law, as required by the 14th Amendment of the Constitution of the United States. And the regulation of the respective rights of the mill owners under that statute is a local question.

Castillo v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

The plaintiff elected to proceed under the statute, and, by so doing, waived its right to contest the constitutionality of the law whose aid it invoked. By proceeding under the particular statute, it acquiesced in its validity.

Hale v. *Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Electric Co.* v. *Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Pitkin* v. *Springfield*, 112 Mass. 509; *Baker* v. *Braman*, 6 Hill, 47, 40 Am. Dec. 387; *Dewhurst* v. *Allegheny*, 95 Pa. 437.

A party who seeks in the state court to litigate rights, and is given an opportunity to do so, cannot raise a Federal question simply because he is unsuccessful.

Remington Paper Co. v. *Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; Cooley, Const. Lim. 6th ed. p. 214; Bigelow, Estoppel, p. 689.

The plaintiff, by its pleadings, took two inconsistent positions before the courts of Massachusetts, —one, that the courts of that state should take jurisdiction over the action for the purpose of construing certain sections of the statute, and the other, that the state courts were without jurisdiction under the statute, unless they construed these sections in a certain way. And the plaintiff thereby is precluded from raising the question of the violation of the Federal Constitution.

Amy v. *Manning*, 144 Mass. 153, 10 N. E. 737; *Washburn* v. *Great Western Ins. Co* 114 Mass. 175.

A plaintiff in a bill in equity cannot rest his claim to relief on inconsistent titles. He cannot at the same time claim relief upon the assumption that a certain law is both valid and invalid. The position of the plaintiff in this case is analogous to the position of a plaintiff who, in the same bill in equity, asserts a will to be valid, in order to claim a benefit thereunder, or invalid, in order that he may be also benefited.

Wright v. *Wilkin*, 4 De G. & J. 141.

If, in the opinion of the Supreme Court, the state court could have rendered judgment upon grounds not involving a Federal question, then the Supreme Court will not take jurisdiction.

Klinger v. *Missouri*, 13 Wall. 257, 20 L. ed. 635; *Jenkins* v. *Loewenthal*, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Chouteau* v. *Gibson*, 111 U. S. 200, 28 L.

ed. 400, 4 Sup. Ct. Rep. 340; *DeSaussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Hammond* v. *Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141.

No Federal question was raised by the plaintiff's suggestion that a construction contrary to that claimed by it would be unconstitutional.

Giles v. *Teasley*, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; *Pierce* v. *Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *O'Neil* v. *Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *Rutland R. Co.* v. *Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Beaupre* v. *Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Hale* v. *Lewis, supra; Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Klinger* v. *Missouri* and *Eustis* v. *Bolles, supra; Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Sawyer* v. *Concordia*, 4 Woods, 273, 12 Fed. 754; *Pacific Gas Improv. Co.* v. *Ellert*, 64 Fed. 421; *Harrison* v. *Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742.

Jurisdiction is not conferred upon the Federal courts by a statement that plaintiff intends to rely upon a statute of the state, and that the statute, construed in a certain way, violates the Federal Constitution.

Boston & M. Consol. Copper & S. Min. Co. v. *Montana Ore Purchasing Co.* 188 U. S. 632, 639, 47 L. ed. 626, 632, 23 Sup. Ct. Rep. 434; *Tennessee* v. *Union & Planters' Bank, supra; Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Mutual L. Ins. Co.* v. *McGraw*, 188 U. S. 291, 310, 47 L. ed. 480, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

And if we assume that the supreme judicial court of Massachusetts passed upon the Federal question and decided it adversely to the plaintiff, this does not change the rule, if the Federal question was unnecessary for the decision.

Harrison v. *Morton, supra; Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Northern P. R. Co.* v. *Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 14 Wall. 23, 20 L. ed. 850; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Seneca Nation of Indians* v. *Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

The court did not pass upon any Federal question. The only question of this kind which the court even mentioned was the question of damages, and this question did not arise in the present case, and the court so stated in its opinion.

The court was considering the question of the supposed conflict of the statute with the Massachusetts Constitution, and made no reference to any conflict between the statute and the Constitution of the United States.

Miller v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Kipley* v. *Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550.

The plaintiff raised merely a moot question.

Castillo v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Kimball* v. *Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639.

The validity of the mill acts has been assumed by the highest court of the state for more than one hundred years without dispute.

Wolcott Woolen Mfg. Co. v. *Upham*, 5 Pick. 292; *Bigelow* v. *Newell*, 10 Pick. 348; *Palmer Co.* v. *Ferrill*, 17 Pick. 58; *Baird* v. *Wells*, 22 Pick. 312; *Storm* v. *Manchaug Co.* 13 Allen, 10; *Fiske* v. *Framingham Mfg. Co.* 12 Pick. 68; *Fitch* v. *Stevens*, 4 Met. 426; *Brigham* v. *Wheeler*, 12 Allen, 89; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; Washburn, Easements & Servitudes, 4th ed. 336; *Cary* v. *Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Gould* v. *Boston Duck Co.* 13 Gray, 442.

In cases where the question has been directly raised, the validity of the statutes known as the "mill acts" has been by the same court sustained and they have been declared constitutional.

Murdock v. *Stickney*, 8 Cush. 113; *Hazen* v. *Essex Co.* 12 Cush. 475; *Lowell* v. *Boston, supra; Turner* v. *Nye*, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; *Otis Co.* v. *Ludlow Mfg. Co.* 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009.

This being the construction of these statutes by the highest court of the state, such construction is conclusive on the Federal Supreme Court on a writ of error to the state court.

Fallbrook Irrig. District v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Noble* v. *Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Carstairs* v. *Cochran*, 193 U. S. 11, 48 L. ed. 596, 24 Sup. Ct. Rep. 318; *Walker* v. *Sauvinet*, 92

U. S. 90, 23 L. ed. 678; *Merchants' & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54.

The enactment by the legislature of Massachusetts of Public Statutes, chapter 190, was a legitimate exercise of its authority within the scope of its power to provide for the welfare and prosperity of the people of the state.

Head v. *Amoskeag Mfg. Co.* 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; *Fallbrook Irrig. District* v. *Bradley, supra; Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Manigault* v. *Springs*, 199 U. S. 473, *ante*, 274, 26 Sup. Ct. Rep. 127.

No title to the land flowed is acquired by a lower proprietor under this mill act, and no land is taken thereby.

Williams v. *Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Murdock* v. *Stickney*, *Storm* v. *Manchaug Co.*, *Manigault* v. *Springs*, *Wurts* v. *Hoagland*, and *Barbier* v. *Connolly, supra; Paine* v. *Woods*, 108 Mass. 160; *Lowell* v. *Boston, supra; Isele* v. *Arlington Five Cents Sav. Bank*, 135 Mass. 142; *Kenison* v. *Arlington*, 144 Mass. 456, 11 N. E. 705; *Turner* v. *Nye* and *Hazen* v. *Essex Co. supra; Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Otis Co.* v. *Ludlow Mfg. Co. supra.*

The plaintiff was entitled to no notice of the acts of the defendant which it did not receive.

Holt v. *Somerville*, 127 Mass. 408; *Gately* v. *Old Colony R. Co.* 171 Mass. 494, 51 N. E. 5; *Appleton* v. *Newton*, 178 Mass. 277, 59 N. E. 648; *Lancy* v. *Boston*, 185 Mass. 219, 70 N. E. 88; *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Bailey* v. *Miltenberger*, 31 Pa. 37; *Head* v. *Amoskeag Mfg. Co. supra; Tyler* v. *Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Reetz* v. *Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Detroit, Ft. W. & B. I. R. Co.* v. *Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; *Allen* v. *Charlestown*, 111 Mass. 123.

Notice is a local question.

Castillo v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

This "mill act" accords to this plaintiff in error constitutional compensation for damages sustained by it.

Otis Co. v. *Ludlow Mfg. Co.* 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009; *Head* v. *Amoskeag Mfg. Co. supra; Manigault* v. *Springs*, 199 U. S. 473, *ante*, 274, 26 Sup. Ct. Rep. 127; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54.

Plaintiff has had the process of law due according to the law of the land, and therefore "due process of law."

Marchant v. *Pennsylvania R. Co.* 153 U. S. 380, 385, 38 L. ed. 751, 755, 14 Sup. Ct. Rep. 894; *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112, 157, 158, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56; *Walker* v. *Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. ed. 478.

A decision that, as between riparian proprietors, priority of occupation gives the better right, is not contrary to the 14th Amendment of the Constitution of the United States.

Bigelow v. *Newell*, 10 Pick. 348; Washburn, Easements & Servitudes, 4th ed. chap. 3, § 5, ¶ 19; *Storm* v. *Manchaug Co.* 13 Allen, 10; *Dean* v. *Colt*, 99 Mass. 486; *Miller* v. *Troost*, 14 Minn. 365, Gil. 282; *Kelly* v. *Natoma Water Co.* 6 Cal. 105; *Kimball* v. *Gearhart*, 12 Cal. 27; *Parke* v. *Kilham*, 8 Cal. 77, 68 Am. Dec. 310; *Ortman* v. *Dixon*, 13 Cal. 33; *Ophir Silver Min. Co.* v. *Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Irwin* v. *Strait*, 18 Nev. 436, 4 Pac. 1215; *New England Hospital* v. *Boston*, 113 Mass. 518; *Trinity Church* v. *Boston*, 118 Mass. 164; *Otis Co.* v. *Ludlow Mfg. Co. supra.*

No real estate vests in the lower proprietor at any time, but, from the time of flowing, there is simply an interference with the upper proprietor's use thereof.

Manigault v. *Springs*, 199 U. S. 473, *ante*, 274, 26 Sup. Ct. Rep. 127.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity to restrain the defendants in error from flooding the plaintiff's land by means of a dam erected under the Massachusetts mill act. The injunction is asked on alternative grounds,—either that the mill act does not authorize the dam, or that, if it does, then it is contrary to the 14th Amendment of the Constitution of the United States. The case was tried in the superior court and reported to the supreme judicial court, which held that the statute authorized the dam and was valid, and ordered the bill be dismissed. 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009. A decree was entered in accordance with the

rescript, and the case then was brought here. The claim under the Constitution was dis-
[151] tinctly set up *in the bill, and was insisted on at every stage. The court could not have decided as it did without overruling that claim, so that the jurisdiction of this court is clear, although it was denied.

The dam in question is built across the Chicopee river, a non-navigable stream, at Red Bridge. It was begun, in pursuance of a long previous determination, on August 3, 1899, and was completed within a reasonable time. The plaintiff owned a mill and dam, more than two miles above, and land below its dam on the two sides of the water course, down to within about 2 miles from the principal defendant's dam. On April 4, 1900, the plaintiff determined to build a dam near its lower boundary, and began the work of construction on August 11 of the same year. This dam was completed before, although it was begun after, the defendants', and will be rendered nearly or wholly useless by the back flow from the defendants' structure. The plaintiff's original dam and mill will not be interfered with. The supreme judicial court decided that, under the statute then in force (Pub. Stat. chap. 190, § 2), the principal defendant, hereinafter called the defendant, acquired the prior right, and that the statute was constitutional. It postponed the consideration of the plaintiff's rights in reference to damages, but decided that the provision for compensation was adequate to satisfy whatever rights the plaintiff might have.

The only question which it is necessary for us to consider is whether the act as construed violates the 14th Amendment. General objections to mill acts as taking property for private use or on other grounds have been disposed of by *Head* v. *Amoskeag Mfg.* Co. 113 U. S. 9. 28 L. ed. 889, 5 Sup. Ct. Rep. 441. See further, *Clark* v. *Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676; *Strickley* v. *Highland Boy Gold Min. Co.* 200 U. S. 527, *ante*, 581, 26 Sup. Ct. Rep. 301. Such acts have been in force in Massachusetts ever since an act of 1714, chap. 15, 1 Prov. Laws, 729. The practice sanctioned by them would seem, from the recitals of that act, to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watchings
[152] *and wardings one miller to each grist mill (act of 1693, chap. 3, § 13, 1 Prov. Laws, 130); and in the public duties which were expressed in the act of 1728, chap, 6, § 3, 1 Prov. Laws, 497. But, at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams, as there understood.

However, the liability of upper land to be flowed is not a liability to be flowed without payment. The principal objection made to the law is that it makes no adequate provision for payment, if it is construed as it has been construed by the state court. There has been no substantial change in the form of this provision for the better part of a century. It reads: "A person whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint." Pub. Stat. chap. 190, § 4. The jury is to take into consideration damage to other land as well as the damage to the land overflowed (§ 14). It is to assess the damages sustained within three years (§ 16), and to determine what sum, to be paid annually, would be reasonable compensation for the damages that may be occasioned thereafter, and also a sum in gross for all damages from the use of the dam in the manner fixed by it (§ 18), the jury having power to regulate the height of the dam (§ 17). The complainant is given an election to take the gross sum, in which case the owner of the dam loses all benefit of the act after three months until he pays. §§ 19, 20. Otherwise the complainant has an action for the annual compensation and a lien on the dam and lands used with it. §§ 21 *et seq.* And, finally, if dissatisfied with the amount of the annual compensation, he may bring a new complaint. § 30.

*In considering whether these provisions [153] are sufficient, it is important to know exactly what the upper owner loses by the dam. The state court lays it down that there is no taking under the right of eminent domain. 186 Mass. 95, 104 Am. St. Rep. 563, 70 N. E. 1009. We assume this to mean what often has been said with regard to the mill acts, that under them no easement or title of any kind is gained in or over the upper land, and that the water could be diked out, *Storm* v. *Manchaug Co.* 13 Allen, 10, 13; *Lowell* v. *Boston*, 111 Mass. 454, 466, 15 Am. Rep. 39; although the language has not been uniform, and it seems to have been held otherwise when the damages are paid in gross. *Isele* v. *Arlington Five Cents Sav. Bank*, 135 Mass. 142. Taking the law to be as stated by the court, it would follow that only the damage physically suffered is to be paid for. When a title is taken, for instance, to the waters of a stream, it is held that the whole

value of the title must be paid, although a considerable use may be left in fact to the party aggrieved. *Howe* v. *Weymouth*, 148 Mass. 605, 20 N. E. 316; *Imbescheid* v. *Old Colony R. Co.* 171 Mass. 209, 50 N. E. 609. Flowage under the mill acts seems to be regarded as presenting the converse case. As no title is gained to have the water on the upper land, the dam owner pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified than could be sustained when the title is lost. So far as security goes, looking to the reasonable probabilities in such cases, it would seem to be sufficient. We must bear in mind, as we presume the state court meant to suggest by its citation of the case of *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394, 397, 8 N. E. 119, that,—as was said there in words that need but little change,—if other remedies proved ineffectual, the "court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam." In other words, the right to an injunction, if necessary, is taken into account in Massachusetts, in deciding whether the security for payment is sufficient, even when there
[154]is a taking by eminent domain. See *also *Atty. Gen.* v. *Old Colony R. Co.* 160 Mass. 62, 90, 22 L. R. A. 112, 35 N. E. 252; *Manigault* v. *Springs*, 199 U. S. 473, 485, 486, *ante*, 274, 280, 281, 26 Sup. Ct. Rep. 127. This seems an answer to the objection that, in the state of the business of the courts, a judgment for past damages may not be recorded for several years, that the defendant may be insolvent, the dam inadequate security, and valuable improvements destroyed. It is said that the lower owner might abandon his dam and thereby escape liability for gross damages after an election to take them. But we presume that in that case he would be held to pay the temporary damage caused, and the case would stand like one where the choice had been the other way. *Hunt* v. *Whitney*, 4 Met. 603, 608.

Again, we cannot wholly neglect the long settled law and common understanding of a particular state in considering the plaintiff's rights. We are bound to be very cautious in coming to the conclusion that the 14th Amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a state. *Eldridge* v. *Trezevant*, 160 U. S. 452, 466, 40 L. ed. 490, 498, 16 Sup. Ct. Rep. 345. For a century the remedy given by the statute has been supposed to be sufficient, and in 1832 it was decided to be so under a somewhat similar statute, which was held to create a servitude. *Boston & R. Mill Corp.* v. *Newman*, 12 Pick. 467, 23 Am. Dec. 622. We are not prepared to pronounce the statute void on the ground that the security for payment is not enough.

But it is argued that not all the serious damage which is or may be suffered is compensated. It is said that only damages caused by flowing can be recovered. But the cases cited only show that damages regarded as too remote on general principles are disallowed (*Fuller* v. *Chicopee Mfg. Co.* 16 Gray, 46), or that, not being within the protection of the mill acts, they are to be recovered by an action at common law (*Eames* v. *New England Worsted Co.* 11 Met. 570). And the statute now expressly provides for a "person whose land is overflowed or otherwise injured" (§ 4), and that the jury *shall take into consideration[155] any damage occasioned to other land as well as that to the land overflowed (§ 14). A graver doubt is raised by another argument. It is decided that the prior right is gained by the dam first begun, provided it is completed and put in operation within a reasonable time. If, as in the present case, the upper owner builds a dam in the meantime, it may be held that he is entitled to no compensation for its being rendered useless, even if he builds without notice of the earlier appropriation, as well might happen. On the other hand if he refrains from using his land as he desires, he may be denied compensation for being deprived of the use of his land. We do not perceive why the latter result should follow. As to the former, it may be held that, notwithstanding the priority of the lower owner, the upper owner has a right to improve his land until it actually is flowed. Otherwise the former might have it in his power to keep the latter in suspense for a year or two, and then abandon his dam. Because the plaintiff was too late to prohibit the defendant's dam, it does not follow that it may not be entitled to all the damages which it suffers when the flowing takes place. That it would be entitled to them perhaps may be inferred from *Baird* v. *Wells*, 22 Pick. 312, decided under a different statute, but still applicable so far as this principle is concerned. See further, *Storm* v. *Manchaug Co.* 13 Allen, 10, 15; *Edwards* v. *Bruorton*, 184 Mass. 529, 532, 69 N. E. 328.

The state court has confined itself to a general declaration that the act is valid, and has not expressed itself definitely upon these points. Yet our opinion upon the constitutional question may depend upon its interpretation of the statute in a case which could not be brought here. Obviously, it would be unjust that the plaintiff should be concluded upon a doubtful construction assumed by us which the state court hereafter

may not adopt. Therefore it seems to us proper that this bill should be dismissed without prejudice, or retained until the plaintiff's rights shall have been determined in the proceedings for damages under the statutes, which it is admitted have been
[156] *brought. The objection to the act on the ground of want of notice does not impress us except in its bearing upon the point just mentioned. The right of the lower owner only becomes complete when the land is flowed, and as, even then, it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam, subject to paying for the harm actually done, we see nothing to complain of in that regard.

Decree modified and affirmed.

Ex Parte NATIONAL ENAMELING & STAMPING COMPANY and Lalance & Grosjean Manufacturing Company, *Petitioners.*

(See S. C. Reporter's ed. 156–165.)

1. Appeal—from decree granting interlocutory injunction—cross appeal.—The exception to the rule that only final decrees are appealable, which the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), § 7, as amended by the acts of February 18, 1895 (28 Stat. at L. 666, chap. 96), and June 6, 1900 (31 Stat. at L. 660, chap. 803, U. S. Comp. Stat. 1901, p. 550), makes in favor of appeals to the circuit courts of appeals from interlocutory orders or decrees of district or circuit courts granting an injunction, does not authorize a cross appeal by complainants from a decree in a patent infringement suit, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed.

2. Appeal—final decree.—A decree in a patent infringement suit against a single defendant, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed, is not, as to such dismissal, a final decree from which complainants can appeal.

[No. 17, Original.]

Argued February 19, 1906. Decided March 19, 1906.

PETITION for a writ of mandamus to require the judges of the Circuit Court of Appeals for the Second Circuit to take jurisdiction of the cross appeal taken by complainants from a decree of the Circuit Court for the Southern District of New York in a patent infringement suit, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed. *Rule discharged and application denied.*

Statement by Mr. Justice **Brewer:**

In March, 1903, the petitioners filed their bill in the circuit *court of the United [157] States for the southern district of New York against the New England Enameling Company, to restrain the further infringement by that company of letters patent of the United States, No. 527,361, for improvements in enameling metal ware, and to recover damages for past infringement. After answer and proofs, the case came on for hearing, and on July 8, 1905, a decree was entered, reciting that nine of the twelve claims in the patent were good and valid, that three were invalid and void by reason of the fact that the patentee was not the original or first inventor or discoverer, that five of the nine valid claims had been infringed by the defendant, but the remaining four had not been. As to the claims held invalid and those found to have been not infringed, it was ordered that the bill of complaint be dismissed. As to the remaining five claims,—those held to be infringed,—it was ordered that the plaintiffs recover the gains, profits, savings, and advantages which the defendant had derived by reason of the infringement, and that the case be referred to a master to report the amount thereof, and also that an injunction issue against further infringement. On August 1, 1905, the defendant appealed from said decree to the court of appeals and filed its assignment of errors. On August 8 the plaintiffs also appealed to the circuit court of appeals and assigned as errors the rulings in the decree adverse to them. On January 3, 1906, this cross appeal of the plaintiffs was dismissed by the court of appeals, on the ground that it had no jurisdiction thereof. Thereupon the plaintiffs filed in this court this petition for a writ of mandamus,

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NOTE.—*As to review in circuit court of appeals of interlocutory decrees in patent cases*—see notes to Consolidated Piedmont Cable Co. v. Pacific Cable R. Co. 3 C. C. A. 572; Southern P. Co. v. Earl, 27 C. C. A. 189; and United States Frechold Land & Emigration Co. v. Gallegos, 32 C. C. A. 484.

As to what judgments or decrees are final for purposes of review—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

commanding the judges of the circuit court of appeals to take jurisdiction of said cross appeal, and to dispose of it simultaneously with the appeal of the defendant.

Mr. **Louis Marshall** argued the cause, and, with *Messrs. Arthur* v. *Briesen* and *Walter D. Edmonds*, filed a brief for petitioners.

Mr. **Robert N. Kenyon** argued the cause, and, with *Messrs. Walter F. Rogers* and *Jacob Steinhardt*, filed a brief for respondents.

Mr. Justice **Brewer** delivered the opinion of the court:

The decree entered by the circuit court was interlocutory, and not final. *Barnard* v. *Gibson*, 7 How. 650, 12 L. ed. 857; *Humiston* v. *Stainthorp*, 2 Wall. 106, 17 L. ed. 905, and cases cited in note; *Estey* v. *Burdett*, 109 U. S. 633, 637, 27 L. ed. 1058, 1059, 3 Sup. Ct. Rep. 531; *McGourkey* v. *Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170 (in this case is a full discussion of the differences between an interlocutory and a final decree); *Hohorst* v. *Hamburg-American Packet Co.* 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407.

Plaintiffs brought one suit upon a single patent. The findings of the circuit court that three of the twelve claims were invalid and that the remaining nine were valid, but that four of them had not been infringed by the defendant, did not break this one suit into twelve. They were a guide to the master in his ascertainment of the damages, and indicated the scope of the final decree.

In the Federal courts no appeal can, as a general rule, be taken, except from a final decree. As said by Mr. Chief Justice Taney in *Forgay* v. *Conrad*, 6 How. 201, 205, 12 L. ed. 404, 406:

"In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory [161] order of *the Chancellor, which decides a right of property in dispute. . . . But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees." See also *McLish* v. *Roff*, 141 U. S. 661, 665, 35 L. ed. 893, 894, 12 Sup. Ct. Rep. 118.

In the latter case this was held persuasive against extending the right of review given by § 5 of the circuit court of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), to other cases than those in which there was a final judgment or decree, although the word "final" is omitted in some of the clauses of the section.

By § 7 of that act, however, an appeal was provided from certain interlocutory orders or decrees. That section has been twice amended. 28 Stat. at L. 666, chap. 96; 31 Stat. at L. 660, chap. 803; U. S. Comp. Stat. 1901, p. 550. As it now stands it reads:

"Sec. 7. That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken, under the provisions of this act, to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: *Provided, further*, That the court below may, in its discretion, require, as a condition of the appeal, an additional bond."

It will be noticed that the appeal is allowed from an interlocutory order or decree granting or continuing an injunction, that it must be taken within thirty days, that it is given precedence in the appellate court, that the other proceedings in the lower court are not to be stayed, and that the lower *court may [162] require an additional bond. Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. It may be true, as alleged by petitioners, that "it is of the utmost importance to all of the parties in said cause that there shall be the speediest possible adjudication by the United States circuit court of appeals as to the validity of all of the claims of the aforesaid letters patent which are the subject-matter thereof." But it was not intended by this section to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings, and

not an advancement generally over other litigation.

Petitioners rely mainly on *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407. In that case it was held that when an appeal is taken from an interlocutory order granting or continuing an injunction, the whole of the order is taken up, and the appellate court may (if, upon an examination of the record, as thus presented, it is satisfied that the bill is entirely destitute of equity) direct a dismissal, and is not limited to a mere reversal of the order granting or continuing the injunction. Take an ordinary patent case. If an injunction is granted by an interlocutory order and the order is taken on appeal to the circuit court of appeals, and that court is of opinion that the patent is, on its face, absolutely void, it would be a waste of time and an unnecessary continuance of litigation to simply enter an order setting aside the injunction and remanding the case for further proceedings. The direct and [163] obvious way is to order *a dismissal of the case, and thus end the litigation. And such is the scope of the opinion in that case. After noticing the general rule that appeals will not lie until after final decree, and that an order or decree in a patent case granting an injunction and sending the cause to a master for accounting is interlocutory only, and therefore not reviewable on appeal before the final decree in the case, it referred to the provision of § 7, and said (p. 525, L. ed. p. 812, Sup. Ct. Rep. p. 410):

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

But nowhere in the opinion is it intimated that the plaintiff was entitled to take any cross appeal or to obtain a final decree in the appellate court. This view of the scope of § 7 was reaffirmed in *Mast, F. & Co.* v. *Stover Mfg. Co.* 177 U. S. 485, 494, 495, 44 L. ed. 856, 860, 861, 20 Sup. Ct. Rep. 708.

It is suggested that, as to the claims held to be invalid and those held to be valid, but not infringed, the bill was dismissed; that thus, in fact, a final decree was entered which entitled the plaintiff to an appeal. *Forgay* v. *Conrad*, 6 How. 201, 205, 12 L. ed. 404, 406, and *Hill* v. *Chicago & E. R. Co.* 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690, are cited as authorities. In both these cases there were several defendants and the decrees were adjudged final only in respect to certain of the defendants. In the first the circuit court passed a decree declaring sundry deeds to be fraudulent and void and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him $11,000, and "that the complainant *do have [164] execution for the several matters aforesaid, in conformity with law and the practice prescribed by the rules of the Supreme Court of the United States." The court refused to dismiss the appeal, holding that, while the decree was not final in the strict technical sense of the term, yet, in view of the effect of the orders entered, and the fact that unless review was granted at once there might be irreparable injury, the decree must be regarded as final to that extent. At the same time it criticised the terms of the decree, said that the final orders should have been delayed until the master's report was received, and added, after its comments upon the procedure below (p. 206, L. ed. p. 406):

"These remarks are not made for the purpose of censuring the learned judge by whom this decree was pronounced, but in order to call the attention of the circuit courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the objects and policy of the acts of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated, by successive appeals, to produce great and unreasonable delays in suits in chancery. For it may well happen that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the circuit court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily and with less expense have been decided in one."

In the subsequent case of *Beebe* v. *Russell*, 19 How. 283, 15 L. ed. 668, in which the rule in reference to the finality of decrees was further considered, it was said, in explanation of the decision in the *Forgay Case* (p. 287, L. ed. p. 669):

"In *Forgay's Case*, it [the question] was made upon the decree given by the court below, and it was adjudged by this court to be final to give this court jurisdiction of it. But it was so, upon the ground that the whole merits of the controversy between the parties had been determined, *that exe-*

[165] *cution *had been awarded,* and that the case had been referred to the master merely for the purpose of adjusting the accounts. The fact is, *the order of the court in that case for referring it to a master was peculiar,* making it doubtful, if it could in any way control or qualify the antecedent decree of the court upon the whole merits of the controversy, or modify it in any way, *except upon a petition for a rehearing.*"

In *Hill* v. *Chicago & E. R. Co.* 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690, there had been an order of dismissal in favor of some of defendants, together with a reference to a master of a separable controversy between the plaintiff and other parties, and the court observed (p. 54, L. ed. p. 332, Sup. Ct. Rep. p. 691):

"But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy, and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed: that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened except on appeal from that decree. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment."

But, as held in *Hohorst* v. *Hamburg-American Packet Co.* 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590, that rule does not apply to cases where the liability of the defendants is alleged to be joint; and, therefore, cannot to a case in which there is but a single defendant.

The rule is discharged, and the application for a writ of mandamus is denied.

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[166] ***Ex parte* AUTOMATIC SWITCH COMPANY of Baltimore City, *Petitioner.***

(See S. C. Reporter's ed. 166.)

This case is governed by the decision in *Ex Parte National Enameling & S. Co., ante,* 707.

[No. 18, Original.]

Argued February 19, 1906. Decided March 19, 1906.

PETITION for a writ of mandamus to require the judges of the Circuit Court of Appeals for the Second Circuit to take jurisdiction of a cross appeal from a decree of the Circuit Court for the Southern District of New York in a patent infringement suit, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims found not to be infringed. *Rule discharged and application denied.*

Mr. **Philip Mauro** argued the cause, and, with *Messrs. Harold Binney* and *C. A. L. Massie,* filed a brief for petitioner.

Mr. **W. Clyde Jones** argued the cause, and, with *Mr. John Ridout,* filed a brief for respondents.

Mr. Justice **Brewer** delivered the opinion of the court:

This case, though differing in its facts somewhat from the one immediately preceding, presents the same question, and the same order will be entered.

A. LESCHEN & SONS ROPE COMPANY, *Appt.,*
v.
BRODERICK & BASCOM ROPE COMPANY.

(See S. C. Reporter's ed. 166–172.)

Trademark — registration — indefiniteness of description.—The description of a trademark for wire rope as "a red or other distinctively colored streak applied to or woven in a wire rope" is too indefinite to be the subject of registration under the act of March 3, 1881 (21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401), as a trademark.

[No. 187.]

Argued March 1, 1906. Decided March 19, 1906.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree affirming a decree of the Circuit Court for the Eastern District of Missouri, sustaining a demurrer to, and dismissing, a bill to restrain the infringement of an alleged trademark for wire rope. *Affirmed.*

See same case below, 67 C. C. A. 418, 134 Fed. 571.

Statement by Mr. Justice **Brown:**

This was a bill in equity brought in the

circuit court for the eastern district of Missouri by the appellant, a Missouri corporation, against the appellee, another Missouri corporation, for the infringement of a trademark for wire rope, registered under the act of Congress of March 3, 1881 (21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401).

The bill alleged that the plaintiff, the A. Leschen & Sons Rope Company, in 1888 had "adopted for its use as a trademark for its highest and best grade of wire rope, a strand of a different color from the other strands of the rope, the said trademark then and now being effected by your orator by painting one of the strands of the rope so as to make it distinctly unlike the other strands of the rope;" that it had continuously used the trademark to the present day; that it had been extensively advertised; that its sale had been very great, and that the company had obtained, December 4, 1900, a registration of such trademark in the office of the Commissioner of Patents.

The bill further averred that early in the year 1900 the defendant company "commenced to paint one of the strands of its wire rope so as to make it of a distinctly different color from the other strands of the rope;" that on October 31, 1900, it applied to the Commissioner of Patents for a registration; that the Commissioner declared an interference with the plaintiff, upon which
[168] proofs were taken, the case fully argued, and plaintiff was declared to be the first to adopt the trademark; that notwithstanding this, defendant continued its unlawful use of this trademark with the intent to defraud plaintiff, to deceive the public, and to take unfair advantage of the demand for plaintiff's wire ropes, and that said mark is being used by said defendant to make sales of rope upon the strength of plaintiff's reputation. The bill further alleged the use of the trademark by both parties in commerce between the United States and foreign countries.

Defendant demurred on the ground that the trademark set up in the bill was not a lawful and valid trademark. The demurrer was sustained, the bill dismissed (123 Fed. 149), and the decree of the circuit court affirmed by the circuit court of appeals. 67 C. C. A. 418, 134 Fed. 571.

Mr. **Melville Church** argued the cause, and, with *Messrs. Hervey S. Knight, J. C. Jones,* and *George H. Knight,* filed a brief for appellant.

No counsel appeared for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

As both parties are citizens of the state of Missouri, the jurisdiction of the circuit court can only be sustained upon the theory that the case is one arising under the Constitution and laws of the United States.

By an act of Congress of July 8, 1870 (16 Stat. at L. 198–210, § 77, chap. 230), to revise the statutes relating to patents and copyrights (Rev. Stat. § 4937), permission was given citizens of the United States and some others, "who are entitled to the exclusive use of any lawful trademark, or who intend to adopt and use any trademark for exclusive use within the United States," to obtain registration of such trademark in the Patent Office; and by act of August 14, 1876 (19 Stat. at L. 141, chap. 274), a punishment was provided for a fraudulent use of such trademarks by others. But in the *Trademark Cases,* 100 U. S. 82, 25 L. ed. 550, this legislation was declared to be unconstitutional, upon the ground that it was intended to embrace all commerce, including that between citizens of the same state; and it was held that, if the power of Congress extended to the registration of trademarks at all, it must be limited to their use in commerce with foreign nations and between the several states and with the Indian tribes.

Apparently in consequence of this decision, Congress, by act of March 3, 1881 (21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401), passed a new act, declaring that the "owners of trademarks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall *be[170] domiciled in the United States, or located in any foreign country, or tribes, which by treaty, convention, or law affords similar privileges to citizens of the United States, may obtain registration of such trademarks . . . by causing to be recorded in the Patent Office a statement specifying name, domicil, location, and citizenship of the party applying; . . . a description of the trademark itself with facsimiles thereof, and a statement of the mode in which the same is applied and affixed to goods," etc.

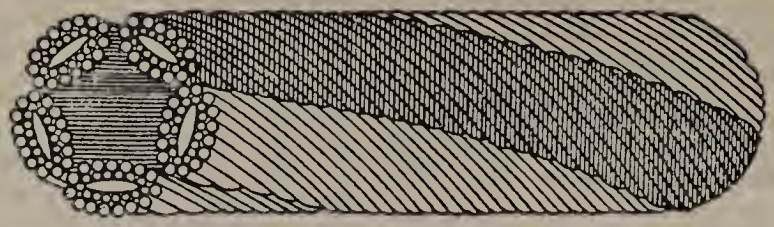
The registration of the trademark in question contains the following description:

"The trademark consists of a red or other distinctively colored streak applied to or woven in a wire rope. The color of the streak may be varied at will, so long as it is distinctive from the color and body of the rope.

"The essential feature of the trademark is the streak of distinctive color produced in or applied to a wire rope.

"This mark is usually applied by painting one strand of the wire rope a distinctive color, usually red."

It is true that the drawing annexed to the registration, a copy of which is here



given, as well as the exhibits furnished, show one of the strands colored red; and if the trademark were restricted to a strand thus colored, perhaps it might be sustained; but the description of a colored streak, which would be answered by a streak of any color painted spirally *with* the strand, longitudinally *across* the strands, or by a circular streak around the rope, was held by both courts, and we think properly, too indefinite to be the subject of a valid trademark. Certainly a trademark could not be [171] claimed of a rope, the entire *surface of which was colored; and if color be made the essential feature, it should be so defined, or connected with some symbol or design, that other manufacturers may know what they may safely do. Upon the plaintiff's theory, a wire rope containing a streak of any description or of any color would be an infringement, and a manufacturer honestly desiring to distinguish his wire rope from that of the plaintiff's by difference in color might, by adopting a white streak running along the length of the rope across the strands, find himself an infringer, when his real object may have been to obtain a mark which would distinguish his manufacture from that of the plaintiff's. Even if it were conceded that a person might claim a wire rope colored red or white, or any other color, it would clearly be too broad to embrace all colors. So, although it might be possible to claim the imprint of a colored figure on a wire rope, the figure should be so described that other manufacturers would know how to avoid it. If the trademark be a colored streak, it should be, at least, described, and a statement of the mode in which the same is applied and affixed to the rope; and a trademark which may be infringed by a streak of any color, however applied, is manifestly too broad.

It would not aid plaintiff's case even if it were shown that it made use of a colored strand, and that defendant made use of a strand similarly colored, since the trademark must stand or fall in its entirety, and if the description therein be too broad, it cannot be sustained by showing that defendant imitated its color and its method of applying it. Perhaps, however, the defendant might be liable under a bill framed upon the theory that it was endeavoring to dispose of its goods as those of the plaintiff.

Whether mere color can constitute a valid trademark may admit of doubt. Doubtless it may, if it be impressed in a particular design, as a circle, square, triangle, a cross, or a star. But the authorities do not go farther than this. In the case of *Re Hanson's Trademark*, L. R. 37 Ch. Div. 112, in which a trademark was claimed for a red, white, and blue label, in imitation *of the French [172] tri-color, for French coffee, it was held not entitled to registration under the English statute, which requires a trademark to be distinctive in order to be valid. The court remarked as follows:

"It is the plain intention of the act that, where the distinction of the mark depends upon color, that will not do. You may register a mark, which is otherwise distinctive, in color, and that gives you the right to use it in any color you like; but you can not register a mark of which the only distinction is the use of a color, because practically, under the terms of the act, that would give you a monopoly of all the colors of the rainbow."

It is unnecessary to express an opinion whether, if the trademark had been restricted to a strand of rope distinctively colored, it would have been valid. As already observed, the claim is much broader than this. Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trademark, valid under the act of Congress, and, for the reasons above given, we think it has not.

Affirmed.

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*ST. LOUIS DRESSED BEEF & PROVI- [173] SION COMPANY

v.

MARYLAND CASUALTY COMPANY.

(See S. C. Reporter's ed. 173–183.)

Insurance—employer's liability—effect of compromise of suit.—The amount paid by an employer in the prudent settlement of suits against it, founded on the

negligence of an employee, may be recovered from the insurer against loss because of such negligence, who had denied all liability, and refused to defend the suits, as provided in the policy, although such policy contains a condition against compromising any claim without the written consent of the insurer, and provides that no action shall lie against the insurer as respects any loss under the policy unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.

[No. 197.]

Argued March 7, 1906. Decided March 19, 1906.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions respecting a right to recover, under a policy insuring an employer against loss because of the negligence of an employee, the amount paid in a compromise, in violation of the conditions of the policy, of suits brought against the insured, founded on such negligenee, where the insurer had denied all liability, and refused to defend the suits, as provided in the policy. Answered by upholding the right of recovery.

Statement by Mr. Justice **Holmes:**

This case was brought here on the following certificate:

"The judgment which the writ of error challenges sustained a demurrer to the petition and dismissed the action. The plaintiff in its petition alleged the existence of these faets: The plaintiff is a corporation of the state of Missouri, and the defendant is a corporation of the state of Maryland. On June 16, 1900, the defendant, in consideration of the payment of $168, issued to the plaintiff a policy which contained these provisions: 'In consideration of the application for this policy, a copy of which is hereto attaehed and which is made
[174] part *of this contract, and of one hundred sixty-eight dollars ($168) premium, Maryland Casualty Company, of Baltimore, Maryland (hereinafter called "the company"), does hereby agree to indemnify St. Louis Dressed Beef & Provision Company of St. Louis, county of——, state of Missouri, hereinafter called "the assured," for the term of one year, beginning on the 5th day of July, 1900, at noon, and ending on the 5th day of July, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application, and while in the charge of the assured or his employees. Provided, however, that:

" 'A. The company's liability for an accident resulting in injuries to, or in the death of, one person, is limited to five thousand dollars ($5,000) and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of, any number of persons is limited to ten thousand dollars ($10,000).

" 'This insurance is subject to the following conditions, which are to be eonstrued as conditions precedent of this contract:

" '1. The assured, upon the oeeurrence of an accident, shall give immediate notice thereof in writing, with full particulars, to the home office of any elaim which may be made on account of such accident.

" '2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause "A" of special agreements, as limited therein.

*" '3. The assured shall not settle any [175] claim, exeept at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company, previously given in writing, but he may provide at the time of the aceident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information and evidenee, and in effeeting settlements, and in case the company calls for the attendance of any employee or employees as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.'

" '8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within whieh a claimant might sue the assured for damages unless, at the expiry of such period, there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that of minors shall any action lie against the company

after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

"'This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed.'

"The portion of the policy hereinbefore quoted, commencing with the words 'against [176]loss from common-law or statutory *liability' and ending with the words 'entitled to make under this policy,' at the close of paragraph numbered 8, were printed on the slip attached to the policy.

"On May 25, 1901, the plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman, and caused through the negligence of the plaintiff by means of a horse and vehicle in its service and the use thereof, as described in the application for the policy, and while in charge of one John Berry, who was one of the plaintiff's employees. The plaintiff immediately gave the defendant notice of the accident and of the fact that Nellie Heideman made a claim against the plaintiff for damages on account of the bodily injuries she had suffered from the accident, and that Henry Heideman, her husband, also made a claim for damages against it on account of the loss of the services of his wife and of the expenses of physicians and nurses which resulted to him from her bodily injuries. On August 16, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under its policy because, as it alleged, the driver of the plaintiff's wagon was not an employee of the plaintiff, but the fact was that this driver was an employee of the plaintiff, and the accident and the damages were covered by the policy. On November 23, 1901, Nellie Heideman sued the plaintiff for $10,000 damages on account of the bodily injuries to her caused by the negligence of the plaintiff's driver and by the accident, and Henry Heideman brought an action against it for $3,000 damages, which he alleged he sustained from the same cause. On November 29, 1901, the plaintiff in writing notified the defendant of the commencement of these suits, and requested it to undertake the defense of said suits as its said policy provides it would do. But the defendant declined to undertake the defense, upon the alleged ground that its policy did not cover the accident or the claims, while the fact was that it covered both. The injuries to Mrs. Heideman were, among others, the breaking of her right hip-joint socket bone, were serious and permanent, and *the plaintiff was liable for dam- [177]ages in each of the suits. It feared heavy judgments if the actions were permitted to proceed to trial. Thereupon, on April 15, 1902, it compromised the suits, and paid Mrs. Heideman $2,000 damages and her husband $500 damages on account of the injuries caused by the accident and the negligence of its driver.

"The petition also contained the following averments: 'The plaintiff served on defendant a written notice, notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlements and pay said amounts, and to hold defendant responsible for such payment under its aforesaid policy; that defendant interposed no objection to said proposed settlements, relying upon its said disclaimer of any liability under said policy by reason of its alleged claim that the driver of said wagon was not in the employ of the plaintiff herein; and that said defendant, by reason of the said denial and disclaimer of any liability, waived all the conditions of the said policy as herein set forth. Plaintiff further states that by reason of defendant's failure and refusal to defend said actions brought by Nellie Heideman and Henry Heideman against plaintiff, and by reason of the waiver aforesaid, it was obliged to and did defend said actions and employed counsel for that purpose, at an expense of two hundred and fifty dollars ($250.00), and that said employment of counsel was reasonably necessary, and that said sum of $250.00 is the reasonable value of said services so performed.'

"And the circuit court of appeals for the eighth circuit further certifies that the following questions of law are presented by the assignment of errors in this case, that their decision is indispensable to a decision of this case, and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

"1. Did the denial of all liability by the assurer and its refusal *to defend the suits [178]in the name and on behalf of the assured, as provided by paragraph 2 of the policy, constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3, that it would

not settle any claim except at its own cost without the consent of the assurer, previously given in writing, and from the provision of paragraph 8, that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

"2. Were the provisions of paragraphs 3 and 8 of the policy, that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy, and by its failure and refusal to defend the suits against the assured, according to the provision in paragraph 2?

"3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them, and the payment by the assured of the damages claimed of it pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or a trial of the issues, prevent the assured from seeuring any recovery of the assurer upon the policy on aecount of the negligence, accident, and injuries described?

"4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured, according to the provision in paragraph 2?

"5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured?

[179] *"6. Under the terms of the policy, may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer, where the assurer has denied its liability under the policy, and has refused to defend an action brought against the assured by the injured person?"

Mr. **Ford W. Thompson** argued the cause, and, with *Messrs. William B. Thompson* and *Ralph Crews*, filed a brief for the St. Louis Dressed Beef & Provision Company:

This contract of insurance is one in whieh the insurer agreed not only to indemnify against loss or damage, but also to indemnify the assured against liability for loss or damages.

Fenton v. *Fidelity & C. Co.* 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Hoven* v. *Employers' Liability Assur. Corp.* 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46.

A judgment against an indemnitee, after notice to the insurer to defend suit, is conclusive of the amount and liability.

16 Am. & Eng. Enc. Law, p. 180, note 4; *Showers* v. *Wadsworth*, 81 Cal. 270, 22 Pac. 663.

Such a judgment, without any notice to an indemnitor, is presumptive evidence of liability and its amount only.

16 Am. & Eng. Enc. Law, p. 180, note 5; *Kansas City, M. & B. R. Co.* v. *Southern R. News Co.* 151 Mo. 373, 45 L.R.A. 380, 74 Am. St. Rep. 545, 52 S. W. 205; *Laing* v. *Hanson* (Tex. Civ. App.) 36 S. W. 116.

The provision for the judgment and its payment is of the same nature and effect as the provision in fire insurance policies for a determination of amount and liability by arbitration, and that such arbitration shall be a condition precedent to any right of action in law or in equity to recover for such loss. Such contracts are valid and binding as long as the indemnitor proceeds in accordance with them, and does not deny its liability.

Hamilton v. *Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 252, 34 L. ed. 419, 422, 10 Sup. Ct. Rep. 945.

But they are ineffective and are waived when the insurer denies all liability.

Wainer v. *Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; *Savage* v. *Phœnix Ins. Co.* 12 Mont. 458, 33 Am. St. Rep. 591, 31 Pac. 66; *Pencil* v. *Home Ins. Co.* 3 Wash. 485, 28 Pac. 1031.

A denial of all liability waives the provision that no action can be maintained until sixty days after proofs of loss, and makes it available immediately.

Tayloe v. *Merchants' F. Ins. Co.* 9 How. 390, 403, 13 L. ed. 187, 192; *California Ins. Co.* v. *Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577; 4 Joyce, Ins. § 3211.

A denial of liability waives the provision requiring proof of loss by fire, and avoids the provision that no action shall be maintained until sueh proofs have been furnished.

Knickerbocker L. Ins. Co. v. *Pendleton*, 112 U. S. 696, 710, 28 L. ed. 866, 870, 5 Sup. Ct. Rep. 314; 4 Joyce, Ins. § 3257.

The provision in a policy that no suit or action against this company for recovery of any claim for loss by virtue of this policy

shall be sustained in any court of law or chancery unless award of loss by arbitration, as herein provided for, shall have been first returned, is waived by a denial of all liability, and an action is then at once maintainable.

Bailey v. *Ætna Ins. Co.* 77 Wis. 336, 46 N. W. 440.

The general rule is that arbitration, appraisal, and all other acts which are made conditions precedent to an action upon a contract of insurance, are waived by a denial of all liability.

Beach, Ins. § 1244.

Messrs. **George Weems Williams** and **Frank Gosnell** argued the cause and filed a brief for the Maryland Casualty Company:

In contracts of indemnity, where the obligation is to perform some specific thing or to save the obligee from a charge or liability, it seems the contract is broken when there is a failure to do the specific act, or when such charge or liability is incurred.

But where the obligation is that the party indemnified shall not sustain damage or molestation by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained.

And, in such cases, a judgment recovered against the party indemnified on account of the acts or neglect of another for which he is answerable, without payment of the judgment, or some part thereof, does not entitle him to sustain an action against the indemnitors.

Frye v. *Bath Gas & Electric Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Travelers Ins. Co.* v. *Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720; *Finley* v. *United States Casualty Co.* 113 Tenn. 592, 83 S. W. 2; *Cushman* v. *Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *O'Connell* v. *New York, N. H. & H. R. Co.* 187 Mass. 272, 72 N. E. 979; *Munro* v. *Maryland Casualty Co.* 96 N. Y. Supp. 705; *Henderson* v. *Maryland Casualty Co.* 29 Pa. Super. Ct. 398; *Connolly* v. *Bolster*, 187 Mass. 266, 72 N. E. 981.

The policy should be construed as though entered into between individuals.

Imperial F. Ins. Co. v. *Coos County*, 151 U. S. 452, 462, 38 L. ed. 231, 235, 14 Sup. Ct. Rep. 379; *Baltimore & O. S. W. R. Co.* v. *Voigt*, 176 U. S. 499, 44 L. ed. 561, 20 Sup. Ct. Rep. 385; *Riddlesbarger* v. *Hartford F. Ins. Co.* 7 Wall. 390, 19 L. ed. 259.

Mr. Justice **Holmes** delivered the opinion of the court:

An elementary remark or two will do something toward answering these questions. The form of the declaration does not appear, but we may suppose a count upon the casualty company's refusal to defend the suit against the plaintiff. If the defendant's contention is right, that breach made it impossible for the plaintiff to entitle itself to the payment promised in the policy according to its terms. But the defendant could not set *itself free by so[181] simple a device. In general, when one party, by his fault, prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit, less the value or cost of what the plaintiff would have had to do to get it. In this case the plaintiff had nothing more to do or to pay after it had been compelled to satisfy the claim against it. And therefore on general principles, it would be entitled to demand the whole amount which the jury might find that it would have received had the contract been performed. *Hinckley* v. *Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875.

It is suggested, to be sure, that the plaintiff should have defended the suit against it. But not only was that not one of the plaintiff's undertakings, but it was expressly forbidden to the plaintiff by the contract, as no doubt the defendant would have pointed out had that course been taken. Moreover, the defendant, by its refusal, cut at the very root of the mutual obligation, and put an end to its right to demand further compliance with the supposed term of the contract on the other side. The only concern of the plaintiff was to establish reasonable ground for believing that if the defendant had not broken its contract it would have been called on to make a payment to the plaintiff, and how much that payment would have been.

Looking at the substance of the matter, it makes no practical difference, no difference in the amount of the defendant's liability, whether we say that the defendant, by its conduct, made performance of the conditions by the plaintiff impossible, and therefore was chargeable for the sum which it would have had to pay if those conditions had been performed, or answer, in the language of the questions, that performance of the conditions was waived. The sole difference would be in the form of the declaration. In either case the plaintiff would declare upon the policy, only the breaches assigned would not be the same. In the former, the breach would be the refusal to defend; in the latter, the refusal to pay. If it is necessary to consider *the question in[182] a technical aspect, we think that the plaintiff was entitled to treat the contract as on

foot, notwithstanding the defendant's act, and go on with it *cy-près*. Under the circumstances it could not comply literally with the words, and was justified in doing the best thing that could be done for the interest of both. The defendant, by its abdication, put the plaintiff in its place, with all its rights. To limit its liability as if its only promise was to pay a loss paid upon a judgment is to neglect the meaning and purpose of the reference to a judgment, and even the words of the promise. The promise in form is to indemnify against loss by certain kinds of liability. The judgment contemplated in the condition is a judgment in a suit defended by the defendant in case it elects not to settle. The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and with such safeguards as the defendant may insist upon. It saw fit to insist upon none.

We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise, no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution.

But there is another aspect of the eighth condition of the slip which requires a few words more. It is said that this condition expressly contemplates a breach of contract by the company, and defines the plaintiff's rights in that case. The words "no action shall lie against the company as respects any loss under this policy unless," etc., certainly do contemplate a case in court in which the company may turn out to be in the wrong, and therefore technically guilty of a breach of contract. But notwithstanding the contrary suggestion in *Sanders* v. *Frankfort Marine, Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 498, 499, 101 Am. St. Rep. 688, 57 Atl. 655, we think that the only
[183] breach which that condition has *in view is a refusal by the company to pay after the decision in a case of which it has taken charge, when, notwithstanding the judgment, it conceives itself to have a defense. The action referred to is an action for money alleged to be due under the policy. Contracts rarely provide in detail for their nonperformance. It would be stretching the words quoted to a significance equally hurtful to both parties, and probably equally absent from the minds of both, to read them as having within their scope an initial repudiation of liability by the defendant, and a requirement that, in that event, the plaintiff should be bound to try the case against itself, although it should be plain that by a compromise it could reduce its claim on the defendant as well as its own loss.

If there is anything in the doubt whether the defendant, by assuming the defense of the original suit, would not lose its right to deny that the policy applied, even if it purported to save that right, it does not change our opinion. The requirement of a trial and judgment would not accomplish the object suggested, to make collusion impossible. The objections to thus hampering the *dominus litis* have been touched upon, and there would be presented the anomaly, if not the monstrosity, of a party attempting to provide by contract that if he should do what, by general principles of contract, forfeited his right to make further requirements of the other side, his conduct, on the contrary, should impose new obligations on the other side. If the defendant kept its contract, it would defend the suit, and the plaintiff would have no duties. If it refused to do as it had promised, we cannot think that it was entitled to complain that the plaintiff did not do it, when the interest of both was the other way. Before a policy should be construed to have such an extraordinary effect honesty requires that the assured should be notified of his duties in unmistakable words.

We answer the first, second, fourth, and fifth questions in the affirmative, the third in the negative, and the sixth in the affirmative, so far as the question is warranted by the facts set forth. It will be so certified.

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*FRANK COLE BROWN, *Plff. in Err.*, [184]
v.
CHARLES DUNCAN GURNEY. (No. 97.)

JOSIAH APPLETON SMALL, *Plff. in Err.*,
v.
FRANK COLE BROWN. (No. 98.)

FRANK COLE BROWN, *Plff. in Err.*
v.
JOSIAH APPLETON SMALL. (No. 99.)

(See S. C. Reporter's ed. 184–194.)

1. Appeal—questions reviewable—existence of facts assumed at trial.—Neither party will be heard in the appellate court

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NOTE.—*On conflicting mining locations*—see notes to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859; Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

On lodes or veins within placer claims—see note to Mt. Rosa Min. Mill. & Land Co. v. Palmer, 50 L.R.A. 289.

As to location of a mining claim as abandoned or forfeited—see note to Wilson v. Freeman, 68 L.R.A. 833.

to question the facts whose existence was assumed in the trial court, and on which assumption the trial proceeded without objection, and the case was decided,—especially where the alleged omissions might have been supplied if called to the attention of the trial court.

2. **Mines—lode location—amendment.**—An amended relocation of a mining claim, made after the land has reverted to the public domain, cannot cure the defect in the original relocation arising out of the fact that the land was not then subject to entry, where intervening rights in favor of a third person have been created.

3. **Mines—lode location—reversion to public domain—relocation.**—The south end of a lode mining claim, separated from the rest of the claim by a patented placer claim, did not revert to and become part of the public domain, and, as such, subject to relocation, until the claimant elected to retain and patent the north end of the claim, although such election was not made within the sixty days given for that purpose by the Land Department in refusing a patent for the entire claim because divided by the placer claim, but was deferred until after the unsuccessful termination in the Land Department of a contest with the placer claimant, begun after the decision refusing the patent.

4. **Mines—lode location—reversion to public domain—relocation.**—An election to retain the north end of a lode mining claim, separated from the rest of the claim by a patented placer claim, made after the unsuccessful termination in the Land Department of a contest with the placer claimant, begun after a patent for the entire claim was refused because divided by the placer claim, took effect *eo instanti* as an abandonment of the south end of such claim, which became at once subject to relocation, although the entry as to such tract had not then been formally canceled.

5. **Public lands—decision of Land Department—collateral attack.**—Rulings of the Land Department as to the tract covered by a lode mining claim are as free from collateral attack where final entry has been made as though patent had issued.

[Nos. 97, 98, 99.]

Argued and submitted December 5, 1905.
Decided April 2, 1906.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which, reversing the judgments of the District Court of Teller County, in that state, held that the south end of a lode mining claim reverted to the public domain and became subject to relocation when the claimant elected to retain the north end of the claim, after patent for the entire claim had been refused and the Land Department had decided a contest with a placer claimant against the contention of a known vein in the placer conflict. *Affirmed.*

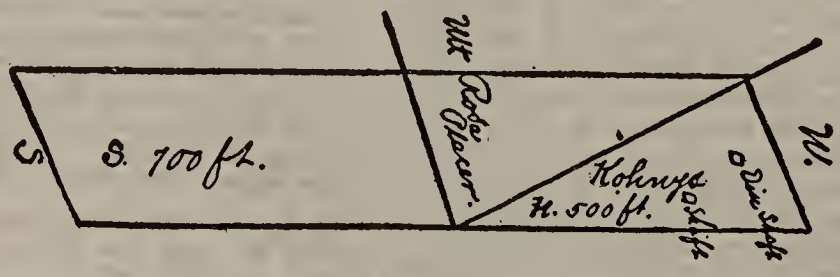
See same case below, 32 Colo. 472, 77 Pac. 357.

Statement by Mr. Chief Justice **Fuller:**

Brown applied for patent on a mining claim, known as the Scorpion, and Gurney adversed this application as the owner and claimant of the Hobson's Choice, as did Small, *also, as the owner and claimant of [185] the P. G. claim. Thereafter each brought suit in support of his adverse claim in the district court of Teller county, Colorado. The cases were tried together on an agreed statement of facts. This showed that the Scorpion, Hobson's Choice, and P. G. locations covered substantially the same tract of ground, and were all made in compliance with law, with the exception repeated in connection with each of said locations: "*Provided, however*, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain."

It appeared that prior to May 28, 1895, a mining lode location called the Kohnyo was owned by the Cripple Creek Mining Company, which claim was divided into two noncontiguous tracts by the Mt. Rosa placer claim. The north end of the Kohnyo, comprising 500 feet of the claim, was where the discovery of mineral was made, and it also contained a discovery shaft and the other workings and improvements of the claim. The south end, being 700 feet in length, did not show mineral, and was without development work of any kind.

The following diagram illustrates the situation:



The local land office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Department ultimately refused to issue a patent for such

tracts, basing the refusal upon the ground that two portions of a lode mining claim, separated by a patented placer, could not be included within one patent. The land office gave the applicant, however, the privilege to apply for a patent upon either of
[186] *the segregated tracts, and directed that, in default of an election or appeal by the claimant within sixty days from the date of the order, the entry of that portion of the claim lying south of the Mt. Rosa claim should be canceled without further notice. This decision was rendered May 28, 1895, and no appeal was taken from it; but the claimant of the Kohnyo instituted proceedings against the claimant of the Mt. Rosa placer, the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer claim which conflicted with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict.

June 14, 1898, the claimant of the Kohnyo filed in the land office a written instrument, dated June 10, by which it elected to retain and patent the north end of the Kohnyo claim, and in which it also waived any right to further question or review the decision of the Secretary of the Interior of May 7, 1898, affirming the decision of May 28, 1895.

July 15, 1898, the Commissioner of the General Land Office canceled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer.

May 13, 1898, Brown located this 700 feet as the Scorpion lode claim. June 23, 1898, Gurney located the same premises as the Hobson's Choice lode claim, and July 16, 1898, Small located the same ground as the P. G. lode claim. July 15 and 16, 1898, the claimant of the Scorpion filed amended and second amended certificates.

On these facts, judgment was rendered for defendant in each case, from which plaintiffs appealed to the supreme court of the state. That court reversed the judgment in *Gurney* v. *Brown*, and entered judgment that Gurney recover the premises included in the Hobson's Choice location, and for costs; and reversed the judgment in *Small* v. *Brown*, and entered judgment "that neither party has established any right to
[187] the *premises in controversy," and for costs. The opinion is reported in 32 Colo. 472, 77 Pac. 357.

Mr. **William C. Prentiss** argued the cause, and, with *Messrs. Charles F. Potter* and *Horace F. Clark*, filed a brief for for Brown:

The identity of the ground in question with the southerly part of the Kohnyo location, and the existence of the Kohnyo location and entry, cannot be established by *concessum* of counsel on appeal, or by any permissible legal inference from the record.

Pueblo v. *Robinson*, 12 Colo. 593, 21 Pac. 899; *Parker* v. *People*, 7 Colo. App. 56, 42 Pac. 172; *Reddicker* v. *Lavinsky*, 3 Colo. App. 159, 32 Pac. 349; *Martin* v. *Force*, 3 Colo. 199; *Evans* v. *Young*, 10 Colo. 316, 3 Am. St. Rep. 583, 15 Pac. 424; *Leach* v. *Lothian*, 10 Colo. 439, 15 Pac. 816; *Schwed* v. *Robson*, 12 Colo. 400, 21 Pac. 189; *Parker* v. *People*, 13 Colo. 155, 4 L.R.A. 803, 21 Pac. 1120; *Empire Land & Canal Co.* v. *Engley*, 14 Colo. 289, 23 Pac. 452; *Townsend* v. *Fulton Irrigating Ditch Co.* 17 Colo. 145, 29 Pac. 453; *Zadig* v. *Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; *Parkison* v. *Boddiker*, 10 Colo. 503, 15 Pac. 806.

The pendency of a mineral entry does not prevent location by another of the ground covered thereby, and such location becomes effective if the entry be canceled or relinquished and the possessory title forfeited or abandoned.

Lavagnino v. *Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716.

Possessory rights to mining claims may be acquired and maintained irrespective of patent proceedings, unless such proceedings culminate in the issuance of patent.

Clipper Min. Co. v. *Eli Min. & Land Co.* 194 U. S. 220, 226, 48 L. ed. 944, 949, 24 Sup. Ct. Rep. 632; *Little Pauline* v. *Leadville Lode*, 7 Land Dec. 506; *Cain* v. *Addenda Min. Co.* 29 Land Dec. 62; *Re Wolenberg*, 29 Land Dec. 302, 488; *Re Lucky Find Placer*, 32 Land Dec. 200; *Adams* v. *Polglase*, 32 Land Dec. 477; *Jaw Bone Lode* v. *Damon Placer*, 34 Land Dec. 72; *Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877.

A location duly made before cancelation of the entry becomes valid upon such cancelation, if the possessory title upon which entry was made falls for any reason.

Murray v. *Polglase*, 23 Mont. 401, 59 Pac. 439; *Adams* v. *Polglase*, *supra*; 33 Land Dec. 30.

The location can be valid only to the extent of the lode, and if the lode terminates at a point within the location, the location beyond such point is invalid.

Armstrong v. *Lower*, 6 Colo. 393; *Patterson* v. *Hitchcock*, 3 Colo. 533; *Zollars* v. *Evans*, 5 Fed. 172.

The petition of August 14, 1895, was, in effect, an application for reinstatement and amendment.

Re Kohnyo & F. Lodes, 28 Land Dec. 451; *Guillory* v. *Buller*, 24 Land Dec. 209; *Northern P. R. Co.* v. *De Lacey*, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791.

The application for reinstatement takes effect as of the date formal application is made to the register of the local office for republication of notice.

Jaw Bone Lode v. *Damon Placer, supra.*

Under the rules of the Land Department, a decision takes effect at once, and is not in suspense pending the time for appeal or review, and during such time entries are received subject to the right of appeal or review.

Re Instructions, 3 Land Dec. 119; *Re Reed*, 6 Land Dec. 563; *Re Gauger*, 10 Land Dec. 221; *Thomas* v. *Rathbun*, 12 Land Dec. 243; *Perrott* v. *Connick*, 13 Land Dec. 598; *Vradenburg* v. *Orr*, 16 Land Dec. 35.

Mr. **Charles C. Butler** submitted the cause for Gurney:

Abandonment rests upon intention, and takes effect instantly; while forfeiture takes place by operation of law, and is not complete until someone else has attempted to initiate a right to the forfeited property.

Lindley, Mines, § 643.

A relocation of a mining claim may be made after entry and before cancelation of the receiver's receipt, under conditions that would warrant such relocation in the absence of entry; a relocator simply taking the hazard of the entry being ultimately sustained.

Morrison, Mining Rights, 9th ed. 76; *Swigart* v. *Walker*, 49 Kan. 100, 30 Pac. 162; *Smuggler Min. Co.* v. *Trueworthy Lode Claim*, 19 Land Dec. 356; Barringer & A. Mines & Mining, p. 375.

The including of the discovery shaft in a patent issued to another renders the original location invalid, and restores the territory to the public domain.

Miller v. *Girard*, 3 Colo. App. 278, 33 Pac. 69; *Gwillim* v. *Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; Barringer & A. Mines & Mining, 299; *Re Adams Lode*, 16 Land Dec. 233.

Where one goes to patent for a part of his claim, excluding the other portion from his patent, even though there be no formal relinquishment, as there is in this case, the portion thus omitted reverts to, and becomes a part of, the public domain.

Re Welch, 4 Land Dec. 172.

The cancelation of a mineral patent entry —of the receiver's receipt—does not of itself alone ever operate to restore the land to the public domain and render it subject to relocation.

Lindley, Mines, § 772; *McGowan* v. *Alps Consol. Min. Co.* 23 Land Dec. 115; *Re Magruder*, 1 Land Dec. 527; Barringer & A. Mines & Mining, 316; *Rebecca Gold Min. Co.* v. *Bryant*, 31 Colo. 119, 102 Am. St. Rep. 17, 71 Pac. 1110.

Where a certain fact is accepted in the trial court, and the trial proceeds without objection, upon the assumption that such fact exists, and the court decides the cause, relying upon such assumption, neither party will be heard in the court of review to question the existence of the fact.

2 Cyc. Law & Proc. p. 675; *Blish* v. *McCornick*, 15 Utah, 188, 49 Pac. 529; *Pratt* v. *Conway*, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028; *Humes* v. *Proctor*, 151 N. Y. 520, 45 N. E. 948; *Consumers Brewing Co.* v. *Lipot*, 21 Misc. 532, 47 N. Y. Supp. 718; *Allen* v. *St. Louis, I. M. & S. R. Co.* 137 Mo. 205, 38 S. W. 957; *Warner* v. *Delbridge & C. Co.* 110 Mich. 590, 34 L.R.A. 701, 64 Am. St. Rep. 367, 68 N. W. 283; *Lemmon* v. *Sibert*, 15 Colo. App. 136, 61 Pac. 202; *Gallup* v. *Wortmann*, 11 Colo. App. 312, 15 Pac. 247; *Jennings* v. *First Nat. Bank*, 13 Colo. 423, 16 Am. St. Rep. 210, 22 Pac. 777; Elliott, App. Proc. §§ 489, 491, 492, 494, 496, 500.

The action of the Land Department in matters within its jurisdiction is just as conclusive and binding and impervious to collateral attack as is judicial action by one of the ordinary and usual judicial tribunals.

Stcel v. *St. Louis Smelting & Ref. Co.* 106 U. S. 450, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 640, 26 L. ed. 876; Lindley, Mines, § 208.

No brief was filed for Small.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The question in these cases, which was intended to be, and was passed upon, is when, in respect of the three locations, did the premises in controversy become subject to location?

In the state supreme court, counsel for Brown contended that the judgments below must be affirmed because the agreed facts failed to identify the premises in dispute as part of the Kohnyo claim; did not establish the validity of that location; and did not affirmatively show that the premises, when located *as the Scorpion, were not part [190] of the unappropriated public domain.

But the supreme court applied the rule that where the existence of certain facts is assumed in the trial court and the trial proceeds, without objection, on that as-

sumption, and the case is decided in reliance thereon, neither party will be heard in the court of review to question there, for the first time, the existence of the facts, and especially not where the alleged omissions might have been supplied if called to the attention of the trial court. And properly applied it, for the identity of the ground in controversy and the validity of the original Kohnyo location were conceded by both parties; and, indeed, counsel really does not deny them as matters of fact, but simply objects that the stipulation did not include them. Moreover, we think the stipulation and exhibits attached containing the various proceedings before the Commissioner of the General Land Office and the Secretary of the Interior establish the validity of the Kohnyo location. According to that record, the Kohnyo claim had passed to final entry; this entry had been recognized by the Commissioner of the General Land Office and the Secretary; the question litigated in the Land Department for something like three years, as to the knowledge of the placer applicant at the time of his application for patent of the existence of the Kohnyo vein in the placer ground, had been decided adversely to the Kohnyo claim; the Kohnyo claimant had thereupon accepted this decision, acquiesced therein, and availed himself of the privilege extended by the Commissioner's decision of May 28, 1895, and elected to retain the northerly tract of the Kohnyo claim, which amounted to a relinquishment of the southerly tract, and the entry as to that tract was thereafter formally canceled.

It may be added also that in adverse proceedings each party is practically a plaintiff and must show his title. *Jackson* v. *Roby*, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 301; *Perego* v. *Dodge*, 163 U. S. 160, 167, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971. By the act of Congress of March 3, 1881 (21 Stat. at L. 505, chap. 140, U. S. Comp. Stat. 1901, p. 1431), it was provided that if, in an [191] adverse suit, "title to the ground *in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict." Under that act it is held that before the applicant for a patent can have judgment, he must prove his claim of title to the ground. The object of the statute was, as we said in *Perego* v. *Dodge*, *supra*, to provide, in the case of a total failure of proof of title, for an adjudication "that neither party was entitled to the property, so that the applicant could not go forward with the proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed." 2 Lindley, Mines, § 763, and cases cited.

Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.

It seems to us that when the Scorpion locator attempted to make that location he conceded the validity of the Kohnyo location and the segregation by that location from the public domain of the southerly portion of that claim, but assumed that the decision of the Secretary of May 7, 1898, operated to restore that tract to the public domain as of that date, since he relocated it on May 13, and on the following 15th of July filed an amended location. But the filing of the latter certificate did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo's claim, and the filing of the amended certificate could not perfect the Scorpion location in view of the previous location of the Hobson's Choice, which created intervening rights in favor of a third person.

The stipulation of facts was evidently prepared in respect of the inquiry concerning the date at which the ground in controversy reverted to and became a part of the public domain, and that embraced the question whether that resulted from the decision of the Secretary of May 7, 1898; or from *the filing by the Kohnyo claimant of [192] its election to retain the northerly tract and relinquish the other, June 14, 1898; or upon the formal cancelation of the entry, July 15, 1898.

Nevertheless, it is further contended that the proceedings in the Land Department between May 28, 1895, and May 7, 1898, did not suspend the operation of the decision of the Commissioner of May 28, 1895, and since by that order the Kohnyo's applicant was required to make its election within sixty days from that date, as to which end of the claim it would retain and patent, in default of which election the entry of the southerly portion became canceled, and the Kohnyo's claimant did not make such election until June, 1898, that the entry became canceled as to the ground in controversy at the expiration of sixty days from May 28, 1895, and thereupon the tract reverted to the public domain. The Land Department ruled otherwise. It treated the order of May 28, 1895, as suspended during the intermediate period, while the proceedings as

to the knowledge of the placer claimant of the existence of the Kohnyo lode were pending. Manifestly because, if it was known by the placer applicant at the time of application for the patent that the Kohnyo vein extended through the placer ground, then the vein did not pass by the patent, and the Kohnyo's claimant might be entitled to patent both ends of its claims, embracing the vein and a strip through the placer location.

And when on July 15, 1898, the Department canceled the Kohnyo entry as to the tract in controversy, it was declared that: "In view of the fact that no motion for a review of the departmental decision of May 7, 1898, affirming the decision of this office of May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final, and it now devolves upon this office to execute the same."

The election, then, by the Kohnyo claimant, filed in the land office June 14, 1898, was an abandonment of the south 700 feet of the Kohnyo claim, which took effect *eo instanti*. Lindley, Mines, §§ 642–644; *Derry* [193] v. *Ross*, 5 Colo. 295, 300. *This was voluntarily done, and took effect notwithstanding the receiver's receipt had not been formally canceled. The order of cancelation of July 15 simply recorded a pre-existing fact, and did not change the effect of the previous abandonment. By reason of that abandonment, the southerly tract, for the first time, reverted to and became a part of the public domain. And as the Hobson's Choice was the first location of the ground made after such abandonment, it follows that it was valid, and that its owner was entitled to a decision in its favor.

We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice was located when the premises had reverted to the public domain; and that the location of the P. G. was after that date.

We have accepted the rulings of the Land Department that the Kohnyo location covered the southerly as well as the northerly end of that claim. Such was the decision of May 28, 1895, and that of the Secretary of the Interior of May 7, 1898, and the formal cancelation of July 15, 1898. In this separate distinct proceeding counsel cannot challenge these rulings. The attack is collateral and cannot be entertained. *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 26 L. ed. 875. True, those decisions refer to instances where the patent had issued, but the principle of freedom from collateral attack is equally applicable where final entry has been made. The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent. We are advised in argument that the patent was issued, but it is objected that though such may be the fact, it is not so stated in the facts agreed.

The cancelation of the entry of the 700 feet did *not rest on any defect in the origi- [194] nal location. On the contrary, the Land Department held the proceedings sufficient to entitle the Kohnyo's claimant to proceed to patent for this particular tract if he should so elect. It was only when the Kohnyo claimant abandoned that tract by making his election that he waived his right to patent it, and permitted the receiver's receipt to be canceled to that extent.

That cancelation did not itself operate to restore the southerly tract to the public domain, which had already taken place by the action of the Kohnyo claimant in compliance with the judgment of the Land Department.

We concur in the conclusions of the Supreme Court of Colorado, and the judgments are affirmed.

ANTONIO JOSÉ AMADEO, for the Use of and together with the Pastor Marquez Company, in Liquidation, *Plffs. in Err.*,

v.

NORTHERN ASSURANCE COMPANY.

(No. 199.)

ANTONIO JOSÉ AMADEO, for the Use of and together with the Pastor Marquez Company, in Liquidation, *Plffs. in Err.*,

v.

ROYAL INSURANCE COMPANY.

(No. 200.)

FEDERICO AMADEO, for the Use of and Jointly with the Pastor Marquez Company, in Liquidation, *Plffs. in Err.*,

v.

ROYAL INSURANCE COMPANY.

(No. 201.)

(See S. C. Reporter's ed. 194–202.)

1. Appeal—parties to writ of error.— The death of the insured after judgment in

favor of defendant in an action on the policy, in which the insured was originally named as the sole plaintiff, does not require the dismissal of a writ of error sued out to review the judgment without reviving the action, suggesting the death on the record, or giving notice to the succession, where, to meet the plea that the plaintiff had no interest in the cause of action, the caption in the declaration was amended to show that the action was brought for the use of a specified corporation, and an averment of an assignment of the policy to such corporation was inserted in the body of the pleading.

2. **Appeal—parties to writ of error.**—The objection that a writ of error sued out on behalf of a liquidating company to review a judgment for defendant in an action on a policy of insurance could only be prosecuted by the liquidator will not require dismissal of such writ, where to meet the plea that the insured, who was originally named as the sole plaintiff, had no interest in the cause of action, the caption of the declaration was amended to show that the action was brought for the use of such company, and an averment of the assignment of the policy to such company "in liquidation, and of which Pedro Salazar is liquidator," was inserted in the body of the pleading, and no objection in this regard was made below.

[Nos. 199, 200, 201.]

Argued March 8, 1906. Decided April 2, 1906.

IN ERROR to the District Court of the United States for the District of Porto

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NOTE.—*Parties to appellate proceedings in the Federal Supreme Court.*

The appellate jurisdiction of the Supreme Court of the United States can only be invoked by a party to the record. Bayard v. Lombard, 9 How. 530, 13 L. ed. 245; Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co. 109 U. S. 168, 27 L. ed. 895, 3 Sup. Ct. Rep. 108; *Ex parte* Cutting, 94 U. S. 14, 24 L. ed. 49; *Ex parte* Cockcroft, 104 U. S. 578, 26 L. ed. 856; South Carolina v. Wesley, 155 U. S. 542, 39 L. ed. 254, 15 Sup. Ct. Rep. 230; Georgia v. Jesup, 106 U. S. 458, 27 L. ed. 216, 1 Sup. Ct. Rep. 363; Connor v. Peugh, 18 How. 394, 15 L. ed. 432; The Burns (The Burns v. Reynolds) 9 Wall. 237, 19 L. ed. 620; Payne v. Niles, 20 How. 219, 15 L. ed. 895; Farmers' Loan & T. Co. v. Waterman, 106 U. S. 265, 27 L. ed. 115, 1 Sup. Ct. Rep. 131; Oliver v. Alexander, 6 Pet. 143, 8 L. ed. 349; Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 287; Hill v. Harding, 131 U. S. cc., Appx. and 26 L. ed. 310; United States v. Conway, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13; Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689.

It is enough, however, if the person invoking this appellate jurisdiction was actually made a party before decree, either by an express order of the court to that effect, or by acting or being treated as such. Savannah v. Jesup, 106 U. S. 563, 27 L. ed. 276, 1 Sup. Ct. Rep. 512; Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933; *Ex parte* Jordan, 94 U. S. 248, 24 L. ed. 123; Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; Macker v. Thomas, 7 Wheat. 530, 5 L. ed. 515; Hinckley v. Gilman, C. & S. R. Co. 94 U. S. 467, 24 L. ed. 166; Blossom v. Milwaukee & C. R. Co. 1 Wall. 655, 17 L. ed. 673; Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559, 4 Sup. Ct. Rep. 638.

All the parties against whom a joint judgment or decree has been rendered must join in the writ of error or appeal (Hampton v. Rouse, 13 Wall. 187, 20 L. ed. 593; Wilson v. Life & F. Ins. Co. 12 Pet. 140, 9 L. ed. 1032; Owings v. Kincannon, 7 Pet. 399, 8 L. ed. 727; Williams v. Bank of United States, 11 Wheat. 414, 6 L. ed. 508; Clifton v. Sheldon, 23 How. 481, 16 L. ed. 429), unless there have been a summons and severance (Shannon v. Cavazos, 131 U. S. lxxi. Appx. and 15 L. ed. 929; Mussina v. Cavazos, 20 How. 280, 15 L. ed. 878; Estis v. Trabue, 128 U. S. 225, 32 L. ed. 437, 9 Sup. Ct. Rep. 58; Mason v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062), or some equivalent proceeding (Inglehart v. Stansbury, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; Feibelman v. Packard, 108 U. S. 14, 27 L. ed. 634, 1 Sup. Ct. Rep. 138; Simpson v. Greeley, 20 Wall. 152, 22 L. ed. 338; Beardsley v. Arkansas & L. R. Co. 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786; Masterson v. Herndon [Masterson v. Howard] 10 Wall. 416, 19 L. ed. 953; Downing v. McCartney, 131 U. S. xcviii. Appx. and 19 L. ed. 757; O'Dowd v. Russell, 14 Wall. 402, 20 L. ed. 857).

But, as Mr. Chief Justice Fuller points out in AMADEO V. NORTHERN ASSUR. CO., parties whose legal interests will not be affected by the success or failure of the appellate proceedings need not join therein. Hanrick v. Patrick, *supra;* Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301; Gilfillan v. McKee, 159 U. S. 303, 40 L. ed. 161, 16 Sup. Ct. Rep. 6; City Nat. Bank v. Hunter, 129 U. S. 557, 32 L. ed. 752, 9 Sup. Ct. Rep. 346; Germain v. Mason, 12 Wall. 259, 20 L. ed. 392; Cox v. United States, 6 Pet. 172, 8 L. ed. 359; Norwich & W. R. Co. v. Johnson, 15 Wall. 8, 21 L. ed. 118; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415.

The death of either party after judgment and while a writ of error or appeal is pending does not abate the suit, but his representatives may voluntarily become parties or may be compelled to do so. Green v. Watkins, 6 Wheat. 261, 5 L. ed. 256; Noonan v. Bradley, 12 Wall. 121, 20 L. ed. 279; Illinois C. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154, 4 Sup. Ct. Rep. 5.

The proceeding will abate, however, if appearance on behalf of such representatives be not seasonably made after the suggestion of death (Phillips v. Preston, 11 How. 294, 13 L. ed. 702) unless steps have previously been taken by the adverse party to compel an appearance (U. S. Supreme Court Rule 10; Barribeau v. Brant, 17 How. 43, 15 L. ed. 34).

The old rule that the death or retirement

Rico to review three several judgments of that court in favor of defendant in actions on policies of fire insurance. *Reversed* on the authority of *Royal Ins. Co.* v. *Miller*, 199 U. S. 353, *ante*, 226, 26 Sup. Ct. Rep. 46, and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **Fritz v. Briesen** argued the cause, and, with *Mr. Charles M. Boerman*, filed a brief for plaintiffs in error.

Mr. **Frederic D. McKenney** argued the cause, and, with *Messrs. Francis H. Dexter* and *John Spalding Flannery*, filed a brief for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In No. 199 the action was commenced April 21, 1903, by Antonio José Amadeo, as sole plaintiff, to recover from the Northern Assurance Company damages in the sum of $10,000 on a certain fire insurance policy issued on property in Porto Rico. The policy was dated December 21, 1884, and insured plaintiff against loss by fire for one year from that date. The loss was alleged to have occurred February 7, 1885.

Defendant filed several pleas, and, among others, that "the alleged cause of action did not accrue within fifteen years before this suit," and that prior to the institution of the suit the policy and its proceeds had been duly sold and transferred by plaintiff "to the firm of Pastor Márquez & Company, who are the only persons entitled to sue herein."

*Plaintiff demurred to both these pleas, [198] but subsequently, by leave of court, amended his declaration by adding to the caption, after the name Amadeo, the words "for the use of and together with Pastor Marquez Company, in liquidation," and by inserting in the body of the declaration the following: "And plaintiff avers that about the month of August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator."

Thereafter plaintiff's demurrer to defendant's pleas of prescription was overruled by the court, and plaintiff excepted, and subsequently replied that the prescription pleaded had been interrupted "extrajudicially." To that replication defendant interposed a demurrer, which was sustained by the court. Plaintiffs thereupon declined to plead further and the court entered judgment, January 12, 1904, as follows: "And

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of a Federal official pending a writ of error sued out in a suit in relation to the discharge of his official duties abated the proceeding (United States *ex rel.* Warden v. Chandler, 122 U. S. 643, Appx. 30 L. ed. 1244; United States v. Boutwell, 17 Wall. 604, 21 L. ed. 721; United States *ex rel.* Bernardin v. Butterworth, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441) is superseded by statute (Caledonian Coal Co. v. Baker [New Mexico *ex rel.* Caledonian Coal Co. v. Baker] 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. Rep. 375).

Under this statute (act Feb. 8, 1899, 30 Stat. at L. 822, chap. 121, U. S. Comp. Stat. 1901, p. 697), authorizing substitutions in actions of this character when necessary to obtain a settlement of the questions involved, the court held, in the case last above cited, that the successor in office of a judge of a territorial court might be substituted on an appeal to the Federal Supreme Court from a final judgment denying mandamus to compel his predecessor to take jurisdiction of an action attempted to be brought in his court.

Only those can be substituted upon the death of a party pending an appeal who succeed to the interest which he had. Hence, where a party after suit brought conveyed his interest to another, and, after appeal, died, such other cannot be substituted in his place on the appeal. Barribeau v. Brant, *supra*.

On an appeal from a decree against all of the defendants below jointly, the appeal, after the death of one of the appellants, may proceed at the suit of the survivors, under U. S. Rev. Stat. § 956, U. S. Comp. Stat. 1901, p. 697, providing that, upon the death of one or more of the parties, if the cause of action survives to the surviving plaintiffs or against the surviving defendants, the writ or action shall not be abated, but, upon the suggestion of the death, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants. Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391, 6 Sup. Ct. Rep. 38.

So, where one of three parties plaintiff below dies after the writ of error is sued out to review a judgment against them, and the cause of action survives, it is not necessary to make the heirs and representatives of the deceased parties to such writ. M'Kinney v. Carroll, 12 Pet. 66, 9 L. ed. 1002.

Whenever either party to a final judgment or decree of a circuit court dies before the time for invoking the appellate jurisdiction has expired, a formal revivor is, by the express terms of the act of March 3, 1875 (18 Stat. at L. 470, § 9, chap. 137, U. S. Comp. Stat. 1901, p. 508), made unnecessary. His representative may file a certified copy of his appointment, and thereupon may take his appeal or sue out his writ of error as the decedent might have done. If the decedent was the successful party, notice shall be given to his representatives, as in the case of the death of a party after appeal taken or writ of error brought.

Where four years have elapsed after an appeal without giving the notice prescribed by this section, and there has been no voluntary appearance, it is too late to cure the defect. Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217, 11 Sup. Ct. Rep. 584.

Where a writ of error is sought on behalf of a deceased party, the motion to revive, if necessary, should be made in the court below, and not in the Federal Supreme Court. McClane v. Boon, 6 Wall. 244, 18 L. ed. 835.

Where the suit cannot be revived in the court below because the deceased party has

it is therefore adjudged by the court that issue is found in favor of the defendant, and that the plaintiffs recover nothing herein, and that the defendant go hence with judgment for cost against the plaintiffs." It now appears that plaintiff Amadeo died intestate May 14, 1904. September 20, 1904, application was made for the allowance of a writ of error from this court to review the judgment, which was allowed September 21, 1904. On December 20, 1904, an appeal bond in the sum of $500, wherein Pastor Marquez & Company was named as principal and Lucas Amadeo and Felix Salazar as sureties, was filed in the clerk's office of the district court, but the bond did not bear the approval of the judge. The bond was entitled "Antonio José Amadeo and Pastor Marquez & Company *vs.* Northern Assurance Company;" recited that "whereas the above-named plaintiffs have sued out a writ of error to the Supreme Court," etc., and was conditioned that "the above-named plaintiffs shall prosecute said writ to effect," etc. It was signed "Pastor Marquez & Com. en Liquid. E. Salazar, Lucas Amadeo, Felipe Salazar." The writ of error, which is dated December 31, 1904, bears the allowance of the district judge, who *also signed the citation under that[199] date. The writ of error and the citation described "Antonio José Amadeo for the use of and together with the Pastor Marquez Company, in liquidation," as plaintiffs in error. The writ of error asserts that the error complained of wrought damage to "said Antonio José Amadeo for the use of and together with the Pastor Marquez Company in liquidation." The transcript of record was docketed in this court March 15, 1905.

In No. 200, the action was brought by Antonio José Amadeo alone, upon two policies of insurance against the Royal Insurance Company, April 21, 1903. The policies of insurance were dated September 15 and December 21, 1884, respectively, and insured plaintiff against loss and damage for one year from their respective dates. The loss as alleged occurred February 7, 1885. Defendant, among other defenses, pleaded prescription of fifteen years and transfer by plaintiff, prior to the institution of the suit, of the policies and all interest therein. To these pleas plaintiff at first demurred, but subsequently, with leave of the court, amended his declaration as follows: In the title, after the name of the plaintiff, by adding

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no representative within the jurisdiction of the court which rendered final judgment, and there exists a proper representative in some other state or territory, provision is made by U. S. Supreme Court Rule 15 for writ of error or appeal, and for bringing in such representative as a party.

Where a decree is pronounced against an executor as defendant, and, before an appeal is prayed, the executor is removed and an administrator *de bonis non* with the will annexed is appointed, an appeal cannot be taken until the administrator is made a party to the suit in the court below. Taylor v. Savage, 1 How. 282, 11 L. ed. 132, 2 How. 395, 11 L. ed. 313.

Where a receiver has taken an appeal in the name of his predecessor from a decree entered after a change in the receivership, and he has become surety on the appeal bond, he may be substituted in the Federal Supreme Court upon motion, under the power of amendment authorized by U. S. Rev. Stat. § 954, U. S. Comp. Stat. 1901, p. 696, without prejudice to the proceeding had; and a motion to dismiss will be denied. Bowden v. Johnson (Adams v. Johnson) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246.

In the above case the court said that its action was similar to that taken in Gates v. Goodloe, 101 U. S. 612, 25 L. ed. 895, where an assignee in bankruptcy was substituted as plaintiff in error for the original plaintiffs in error, who had sued out the writ after receiving their discharge in bankruptcy.

An assignee in bankruptcy might have been substituted for the bankrupt as appellant in the Federal Supreme Court, under the provision of the bankruptcy law authorizing such assignee to prosecute and defend in his own name all suits pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in the same manner and with like effect as they may have been prosecuted or defended by the bankrupt. Herndon v. Howard, 9 Wall. 664, 19 L. ed. 809.

So, where a writ of error sued out by the judgment debtor, who had obtained a discharge in bankruptcy after the suit was instituted, was dismissed because of his lack of interest in the suit, the court said the assignee in bankruptcy might be substituted on an application to reinstate the cause, made during the term, were it not for the fact that no jurisdictional question was contained in the record. Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414.

Such substitution was refused in United States v. Peck, 102 U. S. 64, 26 L. ed. 46, where the assignee had lain by a long time and allowed the case to go on in the other's name, at his expense, and under his management, or that of the creditors for whose use he was prosecuting the case.

An assignee in bankruptcy will not be substituted as a party to a writ of error to review a judgment rendered against the defendant after his adjudication in bankruptcy, since the bankrupt may prosecute such writ in his own name, and the assignee, if any of the questions involved may effect the bankrupt estate, will be heard on such questions by his counsel when the case comes up for argument. Hill v. Harding, 131 U. S. cc. Appx. and 26 L. ed. 310.

For a more extended discussion of these questions as well as all other questions relating to the *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal*, see note to Wedding v. Meyler, 66 L.R.A. 833.

the following words, "for the use of and together with the Pastor Marquez Company in liquidation,' and by adding in the body of the declaration the following: "And plaintiff avers that on or about August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator." Plaintiff's demurrer to defendant's pleas of prescription having been overruled and exception thereto noted, plaintiff replied that the prescription had been interrupted "by extrajudicial demand;" to which replication defendant interposed a demurrer, which was sustained. And plaintiff having refused to plead further to defendant's pleas of prescription, and "failing to offer proofs as to the other issues made and tendered," judgment was, on the 15th day of January, 1904, entered for defendant as follows: "That the plaintiffs herein, Antonio José Amadeo, for himself and for the use and benefit of the firm [200] of Pastor *Marquez & Company, and Pedro Salazar as liquidating partner of the said Pastor Marquez & Company, take nothing by either of their said suits, and that the defendants go hence without day and recover of and from the said plaintiffs all costs in this behalf incurred or expended, for which execution may issue." Petition for allowance of writ of error was filed September 20, 1904, and allowed the next day. An appeal bond entitled "José Antonio Amadeo and Pastor Marquez & Company *vs.* Royal Insurance Company" was "filed and approved Dec. 20th, 1904," but the copy of the bond in the transcript of record does not show the approval of the district judge. This bond was signed by "Pastor Marquez & Co. en liqui., E. Salazar, Felipe Salazar, Lucas Amadeo," Pastor Marquez & Company being described as principal and Lucas Amadeo and Felipe Salazar as sureties. The writ of error and citation were as in case No. 199. Record filed March 15, 1905.

No. 201 was a consolidation of two similar actions, and the course of procedure was like that in Nos. 199 and 200. The judgment was rendered January 15, 1904, in favor of defendant and against "Frederico Amadeo, for himself and for the use and benefit of the firm of Pastor Marquez & Company, and Pedro Salazar as liquidating partner of the said Pastor Marquez & Company."

The appeal bond was filed December 20, 1904, and was signed by "Pastor Marquez & Company, in liquidation, E. Salazar, Felipe Salazar, and Lucas Amadeo;" and did not bear the approval of the district judge. The record was filed March 15, 1905.

The sureties on each of the appeal bonds in Nos. 199, 200, and 201 made affidavit as to their responsibility before the clerk of the district court, and acknowledged the execution of the bonds before him.

It was admitted at the bar that, on the merits, these judgments must be reversed. *Royal Ins. Co.* v. *Miller*, 199 U. S. 353, *ante*, 226, 26 Sup. Ct. Rep. 46.

But it is insisted that the writs of error in Nos. 199 and 200 *should be dismissed [201] because Antonio José Amadeo died after judgment, and before the writs of error were sued out, and the Pastor Marquez Company, if otherwise competent, could not prosecute the writs until after notice to the succession of the deceased. And further, that as it appeared that Pastor Marquez Company was in liquidation, the writs of error as well as the actions could only be prosecuted in the name of the liquidator, which was denied to be the fact here. And that the writ of error in No. 201 should be dismissed on the latter ground as well as because of want of summons and severance.

Antonio José Amadeo was dead when the writs of error issued in Nos. 199 and 200, and it is contended that the writs cannot be maintained because the actions had not been revived below, the death was not suggested on the record, and no notice of intention to take out the writs was given to his succession. Defendant, however, pleaded, among other defenses, that Amadeo had no interest in the cause of action, because the policies and their proceeds had been duly sold and transferred to Pastor Marquez & Company, who were alone entitled to sue. And thereafter the complaints were amended, as previously stated. For the purposes of these motions to dismiss, defendant in error cannot be permitted in this court to assert that Amadeo was other than a nominal plaintiff, and the cases fall within the principle, occasionally applicable, that parties having no legal interest in maintaining or reversing a judgment or decree are not necessary parties to a writ of error or appeal. *Basket* v. *Hassell*, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; *Germain* v. *Mason*, 12 Wall. 259, 20 L. ed. 392; *Forgay* v. *Conrad*, 6 How. 201, 12 L. ed. 404.

And although these records are much confused and very carelessly made up, we think that it may be properly held that the effect of the amendments was to bring the liquidator into court with the liquidating company, and, at all events, that, in view of defendants' pleas, the amendments thereupon, and the want of objection below in respect of the liquidator, that objection should not now be entertained in defeat of our jurisdiction. These considerations control the disposition of No. 201.

*As to the suggested irregularities in the [202] appeal bonds, they do not render the writs

of error void, and we do not feel called on to enter any orders in regard to them, as these cases must go back for further proceedings.

Judgments reversed and causes remanded for further proceedings in conformity with law.

STATE OF WISCONSIN, *Complainant*,
v.
ETHAN ALLEN HITCHCOCK, Secretary of the Interior

(See S. C. Reporter's ed. 202–215.)

Public lands — school lands — Indian right of occupancy.—The state of Wisconsin has not, by reason of the cession for school purposes in the enabling act of August 6, 1846 (9 Stat. at L. 57, chap. 89), of the 16th section in every township, not sold or otherwise disposed of, any such interest, present or prospective, in the several 16th sections of the lands ceded to the United States by the Chippewa Indians in the treaty of March 23, 1843 (7 Stat. at L. 592), where those Indians have not surrendered the right of occupancy reserved therein, as entities that state to interfere with the administration, by the Interior Department, for the benefit of the Indians, of such sections of the land so ceded as were subsequently included within the tracts set aside as a part of the Bad River or La Pointe, and the Flambeau reservations.

[No. 12, Original.]

Argued February 21, 1906. Decided April 2, 1906.

ORIGINAL BILL in equity to enjoin the Secretary of the Interior from interfering with the use, possession, or enjoyment by the state of Wisconsin of certain lands embraced within the Bad River or La Pointe and the Flambeau reservations. *Dismissed.*

The facts are stated in the opinion.

Mr. **T. W. Spence** argued the cause, and, with *Mr. L. M. Sturdevant*, filed a brief for complainant:

The privilege of temporary Indian occupancy was destroyed and terminated by the mere act of admitting the state into the Union.

Ward v. *Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

The state being prior in right, the subsequent survey perfected and completed its title as against subsequent promises of the government to the Indians.

Beecher v. *Wetherby*, 95 U. S. 524, 24 L. ed. 441.

The obligation of the United States respecting relief invoked is sufficient to enable it to maintain an action to revoke a patent, and no reason is apparent why the same rule should not apply to a state.

United States v. *San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States* v. *Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083.

Mr. **A. C. Campbell** argued the cause, and, with *Mr. Frank L. Campbell*, filed a brief for defendant:

The words of an Indian treaty are to be construed as they were understood by the Indians, and not to their prejudice.

Worcester v. *Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396, 46 L. ed. 954, 966, 22 Sup. Ct. Rep. 650; *United States* v. *Rickert*, 188 U. S. 432, 443, 47 L. ed. 532, 538, 23 Sup. Ct. Rep. 478; *Re Heff*, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rep. 506; *United States* v. *Winans*, 198 U. S. 371, 380, 381, 49 L. ed. 1089, 1092, 1093, 25 Sup. Ct. Rep. 662; *Francis* v. *Francis*, 136 Mich. 288, 99 N. W. 14.

The grant describes and is confined to public lands. Lands are not public unless they are subject to sale or other disposal under the general land laws. They are not subject to sale and disposal under such laws if, at the date of the grant, they are burdened with an Indian right of occupancy. Nor are they public lands, as the term is understood, until surveyed into townships and designated by sections.

Newhall v. *Sanger*, 92 U. S. 761, 763, 23 L. ed. 769, 770; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 741, 23 L. ed. 634, 637; *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 119, 38 L. ed. 377, 380, 14 Sup. Ct. Rep. 496; *Northern P. R. Co.* v. *Musser-Sauntry Logging & Mfg. Co.* 168 U. S. 604, 609, 42 L. ed. 596, 598, 18 Sup. Ct. Rep. 205; *Re Thompson*, 32 Land Dec. 468.

No title to sections mentioned in a school grant vests in a state until the same are identified by a public survey.

Gaines v. *Nicholson*, 9 How. 356, 365, 13 L. ed. 172, 176; *Cooper* v. *Roberts*, 18 How. 173, 179, 15 L. ed. 338, 340; *Sherman* v. *Buick*, 93 U. S. 209, 214, 215, 23 L. ed. 849–851; *Heydenfeldt* v. *Daney Gold & S. Min. Co.* 93 U. S. 634, 640, 23 L. ed. 995, 996; *Beecher* v. *Wetherby*, 95 U. S. 517, 524, 24 L. ed. 440, 441; *Natoma Water & Min. Co.* v. *Bugbey*, 96 U. S. 165, 167, 24 L. ed. 621, 622; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 393, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650; *Bullock* v. *Rouse*, 81 Cal. 591, 22 Pac. 919; *Re Colorado*, 6 Land Dec. 412; *Barnhurst* v. *Utah*, 30 Land Dec. 314; *Re Mahoganey No. 2 Lode Claim*, 33 Land Dec. 37.

Sections of land contemplated by a school grant, which, while unsurveyed, fall within an Indian reservation, are subject to the Indian right of occupancy; and, until such occupancy has been extinguished, such sections are in suspension.

Cherokee Nation v. *Georgia*, 5 Pet. 1, 48, 8 L. ed. 25, 42; *Wilcox* v. *Jackson*, 13 Pet. 498, 513, 10 L. ed. 264, 271; *Gaines* v. *Nicholson*, 9 How. 356, 364, 365, 13 L. ed. 172, 176; *United States* v. *Cook*, 19 Wall. 591, 593, 22 L. ed. 210, 211; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 742, 743, 745, 23 L. ed. 634, 638, 639; *Beecher* v. *Wetherby*, 95 U. S. 517, 526, 24 L. ed. 440, 441; *Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 66, 70, 71, 30 L. ed. 330, 334, 336, 7 Sup. Ct. Rep. 100; *Bardon* v. *Northern P. R. Co.* 145 U. S. 535, 538, 539, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856; *United States* v. *Thomas*, 151 U. S. 577, 582–584, 38 L. ed. 276, 278, 279, 14 Sup. Ct. Rep. 426; *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 116–121, 38 L. ed. 377, 379, 380, 14 Sup. Ct. Rep. 496; *Spalding* v. *Chandler*, 160 U. S. 394, 402–405, 40 L. ed. 469, 472, 473, 16 Sup. Ct. Rep. 360; *Pine River Logging & Improv. Co.* v. *United States*, 186 U. S. 279, 284, 46 L. ed. 1164, 1167, 22 Sup. Ct. Rep. 920; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388, 389, 46 L. ed. 954, 963, 22 Sup. Ct. Rep. 650; *Barker* v. *Harvey*, 181 U. S. 481, 490–492, 45 L. ed. 963, 968, 969, 21 Sup. Ct. Rep. 690; *United States* v. *Rickert*, 188 U. S. 432, 437, 441, 47 L. ed. 532, 536, 537, 23 Sup. Ct. Rep. 478; *Scott* v. *Carew*, 196 U. S. 100, 109, 111, 49 L. ed. 403, 405, 406, 25 Sup. Ct. Rep. 193; *United States* v. *Winans*, *supra*; *Northern P. R. Co.* v. *Maclay*, 9 C. C. A. 609, 15 U. S. App. 438, 61 Fed. 554; *Gibson* v. *Anderson*, 65 C. C. A. 277, 131 Fed. 39; *Buster* v. *Wright*, 68 C. C. A. 505, 135 Fed. 947; *United States* v. *Blendauer*, 122 Fed. 703; *Francis* v. *Francis*, 136 Mich. 288, 99 N. W. 14; *Re Colorado*, *supra*; *Callanan* v. *Chicago, M. & St. P. R. Co.* 10 Land Dec. 285; *Re Sherry*, 12 Land Dec. 176; *Re Louisiana*, 17 Land Dec. 440; *Re Wisconsin*, 19 Land Dec. 518; *Re Minnesota*, 28 Land Dec. 374.

If, at the time of the public survey, a tract of land contemplated by a school grant is encumbered by a right of occupancy in an Indian tribe, the state may elect to take equivalent lands, or it may wait until such right of occupancy has been extinguished, and take the land contemplated.

Minnesota v. *Hitchcock*, 185 U. S. 373, 392, 393, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650; *Re Colorado*, *supra*; *Re Colorado*, 12 Land Dec. 70; *Re Louisiana*, *supra*.

If, at the date of a school grant to a state, the sections are not identified by the government survey, and are within an Indian reservation, Congress is not obliged to transform them from their original status, and may dispose of them for other purposes.

Minnesota v. *Hitchcock*, 185 U. S. 373, 393, 394, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650.

It is not necessary that the treaty providing for a reservation should describe the particular tract to be thereafter occupied by the Indians, nor is it necessary that a particular tract be designated for that purpose by Congress or by the President. If, after the treaty is signed, the Indians occupy a particular tract without objection by, or interference from, the government, such tract is a reservation to the same extent as though it had been specifically designated by the treaty.

United States v. *Carpenter*, 111 U. S. 347, 349, 28 L. ed. 451, 452, 4 Sup. Ct. Rep. 435; *Spalding* v. *Chandler*, 160 U. S. 394, 404, 40 L. ed. 469, 473, 16 Sup. Ct. Rep. 360; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 390, 391, 46 L. ed. 954, 963, 964, 22 Sup. Ct. Rep. 650; *Re Minnesota*, 22 Land Dec. 388.

A treaty which provides for a reservation for the Indians is a grant of rights from, and not to, them, and a retention to them of rights not granted.

United States v. *Winans*, 198 U. S. 371, 381, 49 L. ed. 1089, 1092, 25 Sup. Ct. Rep. 662.

The Secretary of the Interior, under the direction of the President, has the power, and it is his duty, to prevent intrusion upon Indian reservations, and to remove intruders therefrom.

Morris v. *Hitchcock*, 194 U. S. 384, 391, 392, 48 L. ed. 1030, 1033, 1034, 24 Sup. Ct. Rep. 712; *United States* v. *Mullin*, 71 Fed. 682; *Eells* v. *Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; *Beck* v. *Flournoy Live-Stock & Real Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30, 163 U. S. 686, 41 L. ed. 305, 16 Sup. Ct. Rep. 1201; *Pilgrim* v. *Beck*, 69 Fed. 895; *Maxey* v. *Wright*, 3 Ind. Terr. 243, 54 S. W. 807, 23 Ops. Atty. Gen. 218.

Where a treaty with an Indian tribe, or an act of Congress, provides that an Indian reservation shall be allotted to the Indians in severalty, the Secretary of the Interior, pending allotment, has jurisdiction over the reservation, and the power to remove intruders therefrom, and the courts will not interfere with his action in respect to allotment, or with the exercise of his power to remove intruders.

Morris v. *Hitchcock*, *supra*; *Brown* v. *Hitchcock*, 173 U. S. 473, 477, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485; *New Orleans* v.

Paine, 147 U. S. 261, 264, 267, 37 L. ed. 162, 163, 164, 13 Sup. Ct. Rep. 303.

Mr. Justice **Harlan** delivered the opinion of the court:

The state of Wisconsin seeks by this suit to enjoin the defendant, as Secretary of the Interior, from interfering, in anywise, with its use, possession, or enjoyment of certain lands, embraced within the present La Pointe or Bad River and the Flambeau Indian reservations in that state.

[203] *The state traces its title back to the act of Congress of August 6th, 1846, authorizing the people of Wisconsin territory to form a state constitution, and providing for the admission of such state into the Union. 9 Stat. at L. 56, chap. 89.

The defendant, Hitchcock, as Secretary of the Interior, demurred to the bill upon the ground, among others, that it did not appear that the state was entitled to the relief asked.

The general question is whether the state has such interest, present or prospective, in the lands in dispute, as to preclude their being administered by the Secretary of the Interior for the benefit of certain Indians.

The case, as presented by the record and by official documents of which judicial notice may be taken, is as follows:

On the 23d day of March, 1843, by a treaty between the United States and the Chippewa Indians of "the Mississippi and Lake Superior," the latter ceded to the United States all the country embraced within a specified boundary, including the lands here in controversy. The second and third articles of that treaty provided: "Art. 2. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges *of occupancy, until required to remove by the President of the United States*, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress. Art. 3. It is agreed by the parties to this treaty that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands shall be the common property and home of all the Indians party to this treaty." [7 Stat. at L. 592.] In consideration of the above cession the United States (art. 4) engaged to pay the Indians annually for twenty-five years certain sums; and this consideration for the ceded lands was paid by the United States. Revision of Indian Treaties, 217.

By an act of Congress approved August 6th, 1846, the people of the then territory of Wisconsin were authorized to form a constitution *and state government for the pur- [204] pose of being admitted into the Union on an equal footing with the original states in all respects whatsoever, with certain specified boundaries. The 7th section of that act was as follows: "That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the state of Wisconsin, for acceptance or rejection; and if accepted by said convention, and ratified by an article in said constitution, they shall be obligatory on the United States: First. That section numbered sixteen, in every township of the public lands in said state, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. . . ." 9 Stat. at L. 57, chap. 89.

The conditions prescribed by the enabling act of 1846 were duly accepted by Wisconsin, and that territory was admitted into the Union as a state by an act of Congress approved May 29th, 1848. 2 Charters and Constitutions, 2029; 9 Stat. at L. 233, chap. 50.

By a treaty made and concluded September 30th, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, and which treaty was proclaimed January 29th, 1855 (10 Stat. at L. 1109), the Chippewas of Lake Superior ceded to the United States the lands heretofore owned by them in common with the Chippewas of the Mississippi within the present boundary of Minnesota and lying east of a certain boundary. The Chippewas of the Mississippi assented to that cession and agreed that the whole amount of the consideration money for the country ceded as above should be paid to the Chippewas of Lake Superior, the latter relinquishing to the Chippewas of the Mississippi all their interest in and claims to the lands theretofore owned by them in common, lying west of the above boundary line.

The lands described in the first article of the treaty of 1854 are within the present state of Minnesota, and constitute no part of the land embraced in the treaty of 1843.

By the second article of that treaty the United States agreed, *among other things, [205] to set apart and withhold from sale certain lands for the use of the La Pointe band and such other Indians as might settle with them. For the other Wisconsin bands, a tract of land was to be set apart and withheld from sale, "lying about Lac du Flambeau, and another tract on Lac Court Oreilles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed up-

on or fixed under the direction of the President." The lands described in that article of the treaty of 1854 to be set apart and withheld from sale "for the La Pointe band" and "for the other Wisconsin bands" *were part of the lands ceded to the United States by the treaty of* 1843.

The third article of the treaty was in these words: "Article 3. The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The bill alleges: "That under the enabling [206] act of Congress *aforesaid, and under the state Constitution, and under and in view of the cession of their lands by said Chippewa Indians, contained in said treaty of 1843, all of the lands surveyed and to be surveyed as sections 16 of the various townships within the territory covered by said treaty vested in the state of Wisconsin, and said state of Wisconsin has at all times heretofore, since its admission to the Union, claimed a right to the fee of all lands in sections 16 in the several townships within said reservations, and, since the sectional survey thereof by the United States, has claimed the actual fee in said sections, and has exercised dominion and ownership over the same, and has issued sundry and divers patents to divers persons and corporations for portions thereof, sundry of which persons and corporations, grantees of the state as aforesaid, have also exercised acts of ownership thereof, and have paid taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned; that patents for all of said sections 16 within said La Pointe reservation have heretofore been issued by said state to divers parties, and patents upon about fourteen forties of said sections 16 within said Lac du Flambeau reservation have been issued by said state to divers parties, and there still remain about twenty-nine forties in said sections 16 within said Lac du Flambeau reservation, the title to which is still in and claimed by said state. That under the treaty of 1854, aforesaid, and in carrying out its provisions, the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac du Flambeau reservation 80 acres *per capita* of lands within said reservations, and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States, and have terminated their tribal relations, and have ceased to *occupy any material part of [207] said reservation in common. That the lands within said reservation, exclusive of the lands in section 16, are sufficient to secure 80 acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said sections 16. That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and servants under them, have set up on behalf of said La Pointe and other bands of Indians, or the members thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the state of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the state to enter or make improvements or cut any timber thereon, and have thereby cast a cloud upon the title of the state and its grantees to said lands, and have interfered with, and are continuing to interfere with, the use and enjoyment of the same by the owners

thereof. . . . That by chap. 95 of the laws of the state of Wisconsin for the year 1903, approved April 20th, 1903, the attorney general of the state of Wisconsin was duly authorized to institute proceedings in this court under the provisions of the act of Congress passed March 2d, 1901 [31 Stat. at L. 950, chap. 808, U. S. Comp. Stat. 1901, p. 1384], and hereinbefore referred to, to determine the rights of said state to what are commonly known as school lands, within any reservation or Indian cession within said state, where any Indian tribe claims any right to or interest in said lands, or to the disposition thereof by the United States, and particularly to determine the title to the lands embraced within sections 16 in the several townships constituting the present Bad River or La Pointe and the Flambeau Indian reservations within said state."

The state contends that the effect of the
[212] treaty of 1843 was *that the Chippewa Indians relcased to the United States all of their claim of title or interest in or to the lands therein described and each and every part thereof, and ceded the same to the United States, which thereupon became the absolute owner thereof free from any claim of said Indians; and that the state, upon its acceptance of the conditions prescribed by the enabling act of 1846, and its admission into the Union, became vested with an absolute right in and to all the sections 16 within said territory previously surveyed, as well as to the lands subsequently surveyed by the United States, with the right in the state to have the temporary possession or occupancy of the Indians terminated by the United States.

The determination of the question suggested by this contention and the decision of this case is controlled by *United States* v. *Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426. That case involved the rights of the state of Wisconsin in and over certain lands in the Lac Court Oreilles reservation, as established for the benefit of the Chippewa Indians. Thomas, an Indian of the Chippewa tribe, was indicted for the murder of another Indian of the same tribe, committed within the limits of that reservation. The evidence showed that the offense was committed upon section 16, a township embraced in the reservation. The accused contended that, by the provisions of the enabling act by which Wisconsin was admitted into the Union, section 16 in every township in that state was ceded to it for school purposes, and could not be subsequently taken by the United States as part of an Indian reservation. It appeared that previous to the alleged murder, namely, in 1859, the section upon which the crime was committed had been settled, platted, and set apart by the United States as a part and parcel of said reservation, and was continuously thereafter occupied by the Indians as such, although claimed and sold by the state as and for a part of the school land ceded to it by the act of Congress. By act of Congress, approved March 3d, 1885, chap. 341, 23 Stat. at L. 362, 385, it was provided that Indians committing certain crimes, among them murder, "against the person or property of another Indian or *other person within the
[213] boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." So the question was distinctly presented as to the relative rights of the state and the Indians in said section 16 within the Indian reservation on which the alleged murder was committed.

This court said: "The Indians have never been removed from the lands thus ceded [meaning by the treaty of 1842] and no Executive order has ever been made for their removal, and no change has taken place in their occupancy of the lands, except as provided by the treaty of September 30, 1854 (10 Stat. at L. 1109). By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships, and their boundaries to be established under the direction of the President. One of these included the tract comprised in the Lac Court Oreilles reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandering lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations. As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the lands until they were required to surrender it by the President of the United States, which requirement was

never made. Whatever right the state of
[214] Wisconsin acquired *by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated. . . . The general rule established by the Land Department in reference to the school lands in the different states is that the title to them vests in the several states in which the land is situated, subject to any prior right of occupation by the Indians or others which the government had stipulated to recognize."

Again: "We therefore are of opinion that, by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, that the title and right which the state may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The state of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the state, except as subordinate to that right of occupation of the Indians." *United States* v. *Thomas*, 151 U. S. 577, 582, 584, 38 L. ed. 276, 278, 279, 14 Sup. Ct. Rep. 426, 428, 429.

It is true that the *Thomas Case* did not have reference to the particular Indian reservations involved in the present suit,—the Bad River or La Pointe and Flambeau reservations,—but only to the Lac Court
[215] Oreilles Indian reservation. But all *three reservations, had their origin alike in the same treaties,—that of 1842, proclaimed in 1843, and that of 1854: and the effect of those treaties was considered in that case in connection with the enabling act of 1846, under which the state now claims, as it claimed in that case, absolute title to, and full control over, all the sections 16 named in that act. What the court said in the *Thomas Case*, as to the rights of Indians in virtue of their occupancy of the lands set apart for their use in the Lac Court Oreilles reservation, is strictly applicable to the rights of the Indians who have occupied, and, so far as appears, still occupy, the Bad River or La Pointe and Flambeau reservations. We could not sustain the claim of the state in the present suit without overruling the principles announced in the *Thomas Case;* and that we are not disposed to do. The principles of the *Thomas Case* were recognized and enforced in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391, 46 L. ed. 954, 964, 22 Sup. Ct. Rep. 650, 657, *et seq.*, which related to an act of Congress for the admission of Minnesota into the Union, and which act contained a provision similar to the one found in the enabling act for Wisconsin, namely, that certain sections "in every township of public lands in said state, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

Without repeating all that was said in previous decisions, we hold, on the authority of those decisions, that the state is not entitled to the relief asked nor to any order that would interfere, at this time, with the administration by the Interior Department, of the lands in question for the benefit of the Indians for whom the Bad River or La Pointe reservation and the Flambeau reservation were established. Consequently, *the bill must be dismissed.*

It is so ordered.

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*HENRIETTA S. CHRISTOPHER and John G. Christopher, *Plffs. in Err.*,
[216]

v.

JOSEPH W. NORVELL, Receiver of the First National Bank of Florida.

(See S. C. Reporter's ed. 216–230.)

National banks—stockholder's liability—effect of coverture.—The coverture of the legatee of shares of stock in a national bank when her name was placed upon the bank's books as a stockholder and when she received the certificate of stock does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency to pay the debts of the bank,

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NOTE.—*As to who are liable as shareholders in national banks*—see Beal v. Essex Sav. Bank, 15 C. C. A. 130.

As to the enforcement of statutory liability of stockholders in national banks—see note to Williamson v. American Bank, 52 C. C. A. 6.

although a married woman may be incapable, under the local law, of making or binding herself personally by contract, if such law does not incapacitate her from becoming an owner of such stock, by bequest or otherwise.

[No. 211.]

Submitted March 9, 1906. Decided April 2, 1906.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Florida, enforcing, as against a married woman, the statutory liability of a stockholder in a national bank. *Affirmed.*

See same case below, 67 C. C. A. 438, 134 Fed. 842.

The facts are stated in the opinion.

Mr. **H. H. Buckman** submitted the cause for plaintiffs in error:

The relation between the shareholders and the corporation is a contractual one, and the liability for an assessment upon stock in the case of insolvency is clearly settled to be a liability growing out of a contract, and not in the nature of a penalty.

Cook, Corp. 4th ed. § 10, note 1, pp. 30, 31, 420; Cook, Corp. § 64, note 3, §§ 66, 67, 318–320; *Godfrey* v. *Terry*, 97 U. S. 171, 24 L. ed. 944; *Carrol* v. *Green*, 92 U. S. 509, 23 L. ed. 738; *Norris* v. *Wrenschall*, 34 Md. 492; *Erickson* v. *Nesmith*, 46 N. H. 371; *Corning* v. *McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Coleman* v. *White*, 14 Wis. 700, 80 Am. Dec. 797; *Huntington* v. *Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; 2 Purdy's Beach, Corp. § 220.

Whether a liability exists or not must be determined by the status of the persons at the time when, and according to the law of the place where, the contract was made, and not by the national banking act or the act creating the corporations.

1 Purdy's Beach, Corp. § 390.

The competency of a married woman to take, hold, and transfer shares of stock is governed by the law of her domicil.

Ibid.

The personal competency or incompetency of persons to contract, such as infants, persons under duress or under coverture, is to be governed by the law of the place of domicil.

Story, Confl. L. §§ 97, 103; *Huey's Appeal*, 1 Grant, Cas. 51; 2 Rawle's Bouvier, Law Dict. p. 199.

The personal competency or incompetency —*i. e.*, status—of parties to a contract can always be set up as a defense to the avoidance of such alleged contract, or as to any liability growing out of the same; and this includes idiots, infants, persons under duress, and persons under coverture.

Gould, Pl. pp. 257, 258.

No person under legal disability could therefore be included in the legal contemplation of the terms "persons" and "shareholders" used in the national banking act, as such persons would be incapable of entering into the contractual relation in those states or jurisdictions where those disabilities existed; and, at common law, neither an infant, a married woman, nor a person *non compos* could make a contract, and could not, therefore, be a shareholder in a corporation.

Cook, Corp. 4th ed. §§ 66, 250, 318–320, p. 30, note 1; 9 Ry. & Corp. L. J. 197; 1 Parsons, Contr. p. 369; *Canal Bank* v. *Partee*, 99 U. S. 325, 25 L. ed. 390.

The common law is still in force in Florida, and a married woman cannot make a contract; and no action at law may be brought or judgment rendered against her.

Andrews, Am. Law, pp. 708, 709; 1 Parsons, Contr. 2d ed. p. 369; 2 Parsons, Contr. 2d ed. p. 688; *Dollner* v. *Snow*, 16 Fla. 86; *De Graum* v. *Jones*, 23 Fla. 83, 6 So. 925; *Hodges* v. *Price*, 18 Fla. 342; *Goss* v. *Furman*, 21 Fla. 406; *Randall* v. *Bourguardez*, 23 Fla. 264, 11 Am. St. Rep. 379, 2 So. 310.

Mr. **Duncan Upshaw Fletcher** submitted the cause for defendant in error:

If plaintiff in error can own and hold such stock, her liability and the means of enforcing it are controlled by the laws of the United States, and not by those of the state. She became liable as a shareholder under the laws of the United States, and the remedy of the receiver is an action at law, as in the case of any other shareholder.

Keyser v. *Hitz*, 133 U. S. 138–150, 33 L. ed. 531–537, 10 Sup. Ct. Rep. 290; *Re First Nat. Bank*, 49 Fed. 120; *Bundy* v. *Cocke*, 128 U. S. 188, 32 L. ed. 397, 9 Sup. Ct. Rep. 42; Zane, Banks & Banking, pp. 77, 674. See also *Lamaster* v. *Keeler*, 123 U. S. 376, 31 L. ed. 238, 8 Sup. Ct. Rep. 197.

Even if a married woman should subscribe for stock, and only pay in a part of the par value, she might be assessed with other stockholders, and be obliged to pay, because her obligation is created by statute of the United States. The element of power to contract might enter into such a case, perhaps, but, in the case at bar, the stock was bequeathed to Mrs. Christopher, and transferred to her on the books, and she received and accepted it, as she avers in her plea. Her obligation, in this instance particularly, is created by the acts of Congress, and not by any law of Florida.

McDonald v. *Thompson*, 184 U. S. 71, 73, 74, 46 L. ed. 437, 439, 22 Sup. Ct. Rep. 297;

Aldrich v. *Campbell*, 38 C. C. A. 347, 97 Fed. 663.

A married woman is liable to assessment, whether her stock was bought by her or bequeathed to her.

Witters v. *Sowles*, 32 Fed. 767, 1 L.R.A. 64, 35 Fed. 640, 38 Fed. 700, 39 Fed. 403; *Kerr* v. *Urie*, 86 Md. 72, 38 L.R.A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; *Keyser* v. *Hitz*, 133 U. S. 139, 33 L. ed. 534, 10 Sup. Ct. Rep. 290.

The obligation of the stockholder to pay the assessment is created by statute.

McDonald v. *Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; 3 G. & T. notes, pp. 695, 701.

A married woman, notwithstanding her disability under the common law, if she is authorized to own national bank stock, is liable to a judgment for an assessment levied upon her stock.

Keyser v. *Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290.

The coverture of Mrs. Christopher does not prevent the receiver from recovering judgment against her, and her liabilities depend on the statutes of the United States, and so does the right of the receiver to sue her at law and recover.

Keyser v. *Hitz*, 133 U. S. 138, 150, 33 L. ed. 531, 537, 10 Sup. Ct. Rep. 290; *Witters* v. *Sowles*, 32 Fed. 130; *Anderson* v. *Line*, 14 Fed. 405; *Re First Nat. Bank*, *supra*; *Kerr* v. *Urie*, 86 Md. 72, 38 L.R.A. 121, 63 Am. St. Rep. 493, 37 Atl. 789; *Robinson* v. *Turrentine*, 59 Fed. 554; *Bundy* v. *Cocke*, 128 U. S. 185, 32 L. ed. 396, 9 Sup. Ct. Rep. 42; Zane, Banks & Banking, 77, 674; *Hobart* v. *Johnson*, 19 Blatchf. 359, 8 Fed. 493; 5 Cyc. Law & Proc. pp. 576–578; *Witters* v. *Sowles*, *supra*; *Price* v. *Abbott*, 17 Fed. 506; *Yardley* v. *Dickson*, 47 Fed. 835; *Brown* v. *Smith*, 88 Fed. 565; *Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. ed. 476; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; Smith, Receiverships, 441, note 3, pp. 100, 101, Appx.; Boone, Banking, §§ 316, 317, 364, and notes, 5th ed. § 250; 1 Cook, Corp. § 250, p. 544; 21 Am. & Eng. Enc. Law, 2d ed. p. 341, note 4; 1 G. & T. notes, p. 933.

A married woman is liable on national bank stock, even though she purchased the stock without the consent of her husband, and the statutes of the state provided that a married woman should not be liable on a contract without such written consent.

1 Cook, Corp. § 250, pp. 540–544; *Kerr* v. *Urie*, *supra*.

Mr. Justice **Harlan** delivered the opinion of the court:

By the Revised Statutes of the United States it is provided that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; that persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders, the estates and funds in their hands being liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be if living and competent to act and hold the stock in his own name; and that a receiver of a national bank may, if necessary, to pay the debts of such association, enforce the individual liability of the stockholders. Rev. Stat. §§ 5151, 5152, 5234, U. S. Comp. Stat. 1901, pp. 3465, 3507.

Proceeding under these statutes the receiver of the First National Bank of Florida brought this action against Henrietta S. Christopher (her husband, John G. Christopher, being joined as codefendant) to recover the amount due from her as a shareholder of that bank under an assessment made by the Comptroller of the Currency against the stockholders of that bank in order to pay its debts.

The case made by the record is this: At the time of the failure *of the bank, on [222] March 14th, 1903, fifteen shares of its stock stood in the name of Mrs. Christopher. The stock was bequeathed to her by her father in 1886, and his executors caused it to be transferred to her name on the books of the bank. This was done without any request from or direction by her. Although not aware of such transfer until the stock had been issued and delivered to her in November, 1887, since that date she has held the certificate for the fifteen shares. It is shown that in 1894, she joined with other shareholders in securing an amendment of the bank's articles of association, which extended the corporate existence of the bank until the close of business on May 26th, 1914. It further appears that she received several semiannual dividends, from 3 to 5 per cent, on her stock from November, 1887, up to and including February 1st, 1896, at which time the last dividend on the capital stock of the bank was declared and paid to stockholders. The dividends were paid by checks made payable to her order and personally indorsed by her. After the transfer of the stock Mrs. Christopher's name appeared on the registry of shareholders as the owner of the fifteen shares of stock, and the books kept by the bank showed the

amount of dividends paid to her from time to time on those shares.

A personal judgment was rendered in the circuit court against Mrs. Christopher for the amount due on the assessment made by the Comptroller. The judgment was affirmed by the circuit court of appeals, which held that nothing in the law of Florida disabled married women from owning, in their own right, stock in national banking associations, and from incurring the liabilities resulting therefrom. 67 C. C. A. 438, 134 Fed. 842.

That the Comptroller had authority to make the assessment against stockholders, and that such assessment is conclusive as to the amount to be collected, cannot be questioned. *Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey* v. *Galli*, 94 U. S. 681, 24 L. ed. 307; *Keyser* v. *Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; *Bushnell* v. *Leland*, 164 U. S. 684, 685, 41 L. ed. 598, 599, 17 Sup. Ct. Rep. 209.

[223] *Did the coverture of Mrs. Christopher at the time her name was placed on the books of the bank as a shareholder, as well as when she received the certificate of stock, protect her against a *personal* judgment at law for the amount due under the assessment made by the Comptroller of the Currency? That is the controlling question in the case.

This question is, we think, substantially answered by the judgment of this court in *Keyser* v. *Hitz*, 133 U. S. 138, 150–152, 33 L. ed. 531, 537, 538, 10 Sup. Ct. Rep. 290, 294, 295. That was an action at law against Mrs. Hitz, a married woman, who owned shares of stock in a savings bank which was converted into a national bank. The action against her was based on an assessment made by the Comptroller of the Currency. One of the contentions in the case was that the coverture of the defendant at the time she acquired the stock, as well as when the bank failed, protected her against an assessment under the act of Congress. The transaction occurred in the District of Columbia, where the bank was located. It was not contended that the defendant was incapacitated by the laws of the District from becoming the owner of bank stock, and hence the court did not consider what would have been the result if the local statutes had prohibited married women from becoming the owners of bank stock. Upon that basis, the court said: "Assuming, then, that she was not incapacitated from becoming the owner of stock in a bank, and that she was a shareholder in the savings bank,—she became, upon the conversion of that bank into a national bank, a shareholder in the latter. Rev. Stat. § 5154, U. S. Comp. Stat. 1901, p. 3466. In that event she became, *by force of the statute*, individually responsible to the amount of her stock, at the par value thereof, for the contracts, debts, and engagements of the national bank, equally and ratably with other shareholders. Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women. The only persons holding shares of national bank stock, whom the statute exempts from this personal responsibility, are executors, administrators, guardians, or trustees. § 5152. It is not for *the courts, by mere construc-[224] tion, to recognize an exemption which Congress has not given." Again: "We are of opinion that the coverture of the defendant did not prevent the plaintiff from recovering a judgment against her for the amount of the assessment in question, if she was, *within the meaning of the statute*, a shareholder in the bank at the time of its suspension. But the question as to what property may be reached in the enforcement of such judgment is not before us, and we express no opinion upon it."

The present defendant insists that she was incapacitated under the Constitution of Florida and under the decisions of the supreme court of that state from becoming the owner of the stock bequeathed to her by her father. In support of this proposition we are referred to the following provision in a statute of Florida enacted November 6th, 1829: "The common and statute laws of England which are of a general, and not of a local, nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, be and the same are hereby declared to be in force in this state, provided the same be not inconsistent with the Constitution and laws of the United States and the acts of the legislature of this state." Also, to the following provisions of the Constitution of Florida: "All property, real and personal, of a wife, owned by her before marriage or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent, given by some instrument in writing, executed according to the law respecting conveyances by married women." Art. 11, § 1. "A married woman's real or personal property may be charged in equity and sold or the uses, rents, and profits thereof sequestrated for the purchase money thereof; or for money or things due upon any agreement made by her in writing for the benefit of her separate property, or for the price of any property purchased by her, or for labor and material used with her knowledge or

[225] assent in *the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon with her knowledge or consent." Art. 11, § 2.

The argument is that at common law a married woman could not make, or bind herself personally by, a contract, and was incapable, by the law of Florida, as at common law, of entering into a contract, at least one that would subject her to personal liability; that the relation of a shareholder to a national banking association was of a contractual character; and consequently, to render a personal judgment against the defendant Mrs. Christopher was, in effect, to hold her personally bound by a contract which, under the laws of Florida, she was incapable of making.

The vice in this argument is in the assumption that the liability of Mrs. Christopher as a shareholder arises *wholly* out of *contract* between herself and the bank or its creditors; whereas, upon becoming a shareholder, she made, strictly, no direct contract with anyone, and became, as was held in *Keyser* v. *Hitz, supra, by force of the statute* individually responsible to the amount of her stock, for the contracts, debts, and engagements of the bank equally and ratably with other shareholders. Such statutory liability was created for the protection of creditors, and in order to strengthen the bank in the confidence of the public. The bank, although its shares of stock were private property, was an instrumentality of the general government in the conduct of its affairs. *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 33, 23 L. ed. 196, 198. In *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 283, 40 L. ed. 700, 701, 16 Sup. Ct. Rep. 502, 503, the court said that "national banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." This principle was reaffirmed in *Easton* v. *Iowa*, 188 U. S. 220, 237, 47 L. ed. 452, 459, 23 Sup. Ct. Rep. 288. See also *Pacific Nat. Bank* v. *Mixter*, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718.

In *McClaine* v. *Rankin*, 197 U. S. 154, 161–163, 49 L. ed. 702, 705–707, 25 Sup. Ct. Rep. 410, 412, 413, which was an action against a shareholder of a national bank to recover the amount due on an assessment [226] made by the Comptroller of *the currency, and in which the question was as to the nature of the cause of action, this court said: "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If § 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of § 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely imposes a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of *its* contract to pay, and is collateral and *statutory*. . . . But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order *was the basis of the suit*. The statute of limitations did not commence to run until assessment made, and then it ran as against an action *to enforce the statutory liability*, and not an action for breach of contract."

In *Robinson* v. *Turrentine*, 59 Fed. 554, 555, it was held that the liability of a married woman for an assessment upon national bank stock did not grow out of contract, although it was one of a class of liabilities which may be enforced by an action in form *ex contractu*. In the same case it was said: "By the banking laws of the United States all the shares in the stock of national banks are liable to an assessment like the one levied on the stock of plaintiff's bank. To hold that a state law, were there such a law, could except certain shares from the liability, would enable states to defeat the policy of the Federal government in establishing the national banking system. That the Congress has power to establish and legislate for such banks has not, since 1819, been an open question. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. If a purchase of stocks in a national bank by a married woman without the written consent of her husband gives her the ownership of such stock, judgment must be given against the *feme* defendant. *If she owned [227] the stock at the failure of the bank, she is liable to the assessment; if she did not, she is not liable. While the Federal government exclusively controls the question of the liabilities of stockholders in national banks, it is not doubted but that a state has power to say that, for reasons seeming good to its legislature, and not in conflict with organic law, a particular class of persons shall not be permitted to own particular classes of property."

In *Kerr* v. *Urie*, 86 Md. 72, 77, 38 L. R. A. 119, 121, 63 Am. St. Rep. 493, 496, 37 Atl. 789, 791, it was held that a married woman residing in Maryland was capable

of holding shares of stock in a national bank located in Texas, and as such shareholder was subject to the personal liability imposed by the national banking laws, without regard to the question whether she was entitled, under the laws of the state where the bank was located, to become the owner of such stock. The court said: "We conclude, therefore, that by virtue of the transfer in Maryland, and without regard to the laws of Texas, Mrs. Urie became the equitable and real holder of the stock in question; and if this be so, no question as to her powers of disposition, or as to whether she is or is not capable under the laws of Texas to make contracts, can arise in this case, for the liability of a stockholder arises not under any law of Texas, which it is contended has not been proven in this case, but under the act of Congress; and the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank. *Witters* v. *Sowles*, 1 L. R. A. 64, 35 Fed. 641; U. S. Rev. Stat. § 5152. The right to be a stockholder is given to her by the law of the state where she resides, and her rights *and liabilities* as such as are provided *by the acts of Congress.*"

Recurring to the provisions in the statute and Constitution of Florida it is clear that they do not incapacitate a married woman in that state from becoming the owner, by request or otherwise, of stock in a national banking association. On the contrary, it seems that all property, real or personal, owned by a married woman before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or pur-
[228] chase, is her *separate property. Nevertheless, it is said, by the settled course of decisions in that state a married woman cannot bind herself personally by contract at law or in equity, or by becoming a partner, or by making a promissory note. *Dollner* v. *Snow*, 16 Fla. 86; *Hodges* v. *Price*, 18 Fla. 342; *Goss* v. *Furman*, 21 Fla. 406; *De Graum* v. *Jones*, 23 Fla. 83, 6 So. 925, and *Randall* v. *Bourgardez*, 23 Fla. 264, 11 Am. St. Rep. 379, 2 So. 310. But those cases are not in point here; for, in each of them, the personal liability attempted to be imposed upon the married woman arose *entirely* out of contract, express or implied, on her part, and not by force of any statute. The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each shareholder, in whatever way he may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. *First Nat. Bank* v. *Hawkins*, 174 U. S. 364, 372, 43 L. ed. 1007, 1011, 19 Sup. Ct. Rep. 739; *Whitman* v. *National Bank*, 176 U. S. 559, 565, 566, 44 L. ed. 587, 591, 592, 20 Sup. Ct. Rep. 477; *Matteson* v. *Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute.

*In *McDonald* v. *Thompson*, 184 U. S. 71, [229]
73, 46 L. ed. 437, 439, 22 Sup. Ct. Rep. 297, 298, which was the case of a formal subscription to the capital stock of a national bank, and which also involved the meaning of the words "contract or promise in writing" in a statute of limitations, the court said: "There was no contract in writing with the creditors or depositors of the bank, and none with the bank itself, to which the receiver could be said to be a privy, except to pay for the stock as originally issued. Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract within the meaning of the Nebraska act [of limitation], since the writing—that is, the subscription—contained no reference whatever to the statutory obligation, and no promise to respond beyond the amount of the subscription. In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association." All shareholders of stock in national banks become such, subject to the

condition, declared by statute, that liability, to the extent of their shares, is imposed upon them for the contracts, debts, and engagements of the bank. The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts, and engagements of the bank. In other words, the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders,—executors, administrators, guardians, or trustees only being exempted from individual liability. No exception is made in favor of married women holding property. If the Constitution or statutes of Florida had expressly incapacitated or for-
[230] bidden *a married woman from becoming, under any circumstances, the owner of bank shares,—as counsel for plaintiff in error insists is the case,—a question would be presented that does not arise upon the record of this case; and as the local law does not forbid married women from becoming the owners of bank stock, we do not go beyond what is necessary for the decision of the present case under the national banking law. All that we now decide is that the court below properly interpreted the statute, and did not err in rendering a personal judgment against Mrs. Christopher, as a shareholder in the bank, for the amount due under the assessment of the Comptroller. In what way the plaintiff may proceed in order to obtain satisfaction of the judgment is not a question to be determined in this action.

Judgment affirmed.

Mr. Justice **White** and Mr. Justice **McKenna** concur in the result.

HENRY F. WYMAN *et al., Appts.,*
v.
SUMNER WALLACE *et al.*

(See S. C. Reporter's ed. 230–244.)

1. Courts—jurisdiction of Federal circuit court—case arising under Federal laws.—A case arising under the laws of the United States, of which a Federal circuit court has jurisdiction without reference to diversity of citizenship, is presented by a bill filed by the holder of a non-negotiable note, given by a national bank which afterwards went into voluntary liquidation, to exact in behalf of himself and all other creditors of the bank the stockholder's liability imposed by U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465, which, under the act of June 30, 1876 (19 Stat. at L. 63, chap. 156, U. S. Comp. Stat. 1901, p. 3509), § 2, may be enforced by a bill in the nature of a creditors' bill whenever the bank has availed itself of the provisions of § 5220 (U. S. Comp. Stat. 1901, p. 3503), for voluntary liquidation.

2. Pleading—creditors' bill—multifariousness.—A bill filed by the holder of a non-negotiable note given by a national bank which afterwards went into voluntary liquidation is not multifarious because the complainant seeks by such bill, on behalf of himself and all other creditors, the winding up of its affairs, the determination of the amount due on his note, the ascertainment of all the creditors and the amount of their claims, the subjection of the remaining assets to the payment of those claims, and the enforcement of the statutory liability of the stockholders.

3. Equity—creditors' bill—necessity of judgment at law.—No judgment at law on a note given by a national bank is prerequisite to a suit by the holder, one object of which is to subject to the satisfaction of the debt certain property conveyed to the trustee as security therefor.

4. National banks—stockholder's liability—valid obligations.—The notes of a national bank, given when embarrassed by pressing demands, in part consideration of the assumption by the payee of all its outstanding obligations, secured by a pledge of all its assets remaining after turning over cash and such bills receivable as the payee would accept at par, are its valid obligations, which can be enforced against its stockholders after voluntary liquidation.

[No. 191.]

Submitted March 6, 1906. Decided April 2, 1906.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska in favor of complainant in a suit by the holder of a note given by a national bank to enforce the statutory liability of its stockholders. *Affirmed.*

See same case below, 68 C. C. A. 40, 135 Fed. 286.

Statement by Mr. Justice **Brewer:**

Prior to December 21, 1895, the American

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

On multifariousness—see note to Gains v. Chew, 11 L. ed. U. S. 402.

As to when a judgment at law and execution are necessary before bringing creditors' bill—see note to Jones v. Green, 17 L. ed. U. S. 553.

On the enforcement of statutory liability of stockholders in national banks—see note to Williamson v. American Bank, 52 C. C. A. 6.

National Bank and the Union National Bank, hereinafter called respectively the American and Union bank, were each engaged in business in the city of Omaha, Nebraska. During that month the American bank was in such financial condition that it became necessary for it to provide for the payment of a large amount of deposits on or about January 1, 1896, and, though possessed of abundant nominal assets, did not have sufficient funds to make such payment. It knew that a neglect to pay would precipitate a run and bring on a failure of the bank. Thereupon, in order to obtain the money necessary therefor, its officers and leading stockholders entered into negotiations with the Union bank for the payment of its immediate obligations, and thus enabling it to secure an opportunity to realize upon its assets. As a result of such negotiations a contract was entered into by and between the two banks, through their boards of directors. By its terms the Union bank was to assume the payment of all the liabilities of the American bank, receiving therefor cash and such bills receivable as it was willing to accept at par and without recourse. The difference between the amounts so received and the liabilities assumed was to be represented by three non-negotiable promissory notes of the American bank, the payment of which was to be secured by a pledge of all its remaining assets to Thomas L. Kimball, as trustee. This contract was carried out. The Union bank moved into and took possession of the offices of the American bank. Upon adjustment, as above indicated, the difference was found to be $201,000, for which the American bank executed to the Union bank three non-negotiable promissory
[232] *notes, each being for $67,000, and payable in one, two, and three years, respectively. In accordance with the contract the remaining assets of the American bank were placed in the hands of the trustee, Thomas L. Kimball, who proceeded to collect them and apply the proceeds on the notes until his death during the pendency of this suit. Subsequently a successor was appointed, who continued in performance of the trust until the entry of the decree. The execution of the contract of December 21, 1895, by the president and cashier of the American bank, was directed by resolution of its board of directors. On January 14, 1896, at an annual meeting of the shareholders of that bank, at which were represented 1,665¾ shares out of a total of 2,000, a resolution was adopted instructing the directors to take action looking to the liquidation of the bank. On February 25, 1896, another meeting of the shareholders was held, at which 1,696 shares were represented, and a resolution for voluntary liquidation was adopted by an affirmative vote of 1,639¾ shares. The Union bank fulfilled its obligations under the contract, having taken up all the liabilities assumed by it. The trustee meeting with little success in collection of the assets, this suit was, after the first note had matured, instituted in the circuit court of the United States for the district of Nebraska by Sumner Wallace, a citizen of New Hampshire, to whom the note had been transferred, against the Union bank, Thomas L. Kimball, the trustee, the American bank and its stockholders, including the appellants. By an amended bill the complainant sought, on behalf of himself and all other creditors of the American bank, the winding up of the affairs of that bank, the determination of the amount due upon his note, the ascertainment of all the creditors and the amounts of their claims, the subjection of the remaining assets to the payment of those claims, and the enforcement of the liability of the stockholders. He had not reduced the note to judgment prior to the commencement of this suit. Upon a final hearing a decree was entered ascertaining the amounts due the complainant and the Union bank * (they being the only creditors) [233] after the application of all credits, the number of shares of stock held by each shareholder of the American bank, and directing a recovery of $97.23 on account of each share of stock. This decree was affirmed by the United States circuit court of appeals for the eighth circuit (68 C. C. A. 40, 135 Fed. 286), from whose decision an appeal was taken to this court.

Mr. **Westel W. Morsman** submitted the cause for appellants. *Mr. Howard B. Smith* was on the brief:

Directors have no power to perform acts not within the ordinary business of the corporation.

Chicago City R. Co. v. *Allerton*, 18 Wall. 233, 21 L. ed. 902.

Corporations (including national banks) have such powers, and such powers only, as are expressly or impliedly conferred upon them; and any act which is not within the powers so conferred is impliedly prohibited.

Germania Safety-Vault & T. Co. v. *Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 366, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831.

National banks are public corporations, and the banking laws governing them are complete in themselves, provide expressly when and by whom a bank shall be liquidated, and exclude all other methods.

Cook County Nat. Bank v. *United States*, 107 U. S. 445, 27 L. ed. 537, 2 Sup. Ct. Rep. 561; *Re Manufacturers' Nat. Bank*, 5 Biss. 499, Fed. Cas. No. 9,051; *First Nat. Bank* v. *Colby*, 21 Wall. 609, 22 L. ed. 687; *Hunt* v. *American Grocery Co.* 81 Fed. 532; *Bank Comrs.* v. *Bank of Brest*, 1 Harr. Ch. (Mich.) 106.

Assuming, *arguendo*, that the transaction in the case at bar is one where a contract had been executed on one side only, the Supreme Court holds that the fact that a contract has been executed by one party, and the other party has received the benefit thereof, does not give the contract validity, and further holds that no action will lie on the contract, and that stockholders of a bank may show the nature of the transaction, *i. e.*, that it was not such as to impose any liability upon them.

Pearce v. *Madison & O. R. Co.* 21 How. 441, 16 L. ed. 184; *Central Transp. Co.* v. *Pullman's Palace Car Co. supra; Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.* 174 U. S. 552, 567, 43 L. ed. 1081, 1088, 19 Sup. Ct. Rep. 817; *O'Brien* v. *Wheelock*, 184 U. S. 450, 490, 46 L. ed. 636, 654, 22 Sup. Ct. Rep. 554; *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Ward* v. *Joslin*, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807.

The liability of shareholders in national banks is a restricted liability, and the transaction between the banks was of such a nature that appellants are not liable for any deficit arising therefrom.

Richmond v. *Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Schrader* v. *Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. Rep. 238; *Ward* v. *Joslin*, 186 U. S. 142, 152, 46 L. ed. 1093, 1099, 22 Sup. Ct. Rep. 807; *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826.

Appellants have not done anything to estop them to deny their liability to make good the balance remaining unpaid upon the notes.

Scovill v. *Thayer*, 105 U. S. 143, 26 L. ed. 968; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Bloomfield* v. *Charter Oak Nat. Bank*, 121 U. S. 121, 135, 30 L. ed. 923, 928, 7 Sup. Ct. Rep. 865; *Union Mut. L. Ins. Co.* v. *Mowry*, 96 U. S. 544, 547, 24 L. ed. 674, 675; *Central Transp. Co.* v. *Pullman's Palace Car Co. supra; California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank* v. *Hawkins*, 174 U. S. 364, 372, 43 L. ed. 1007, 1011, 19 Sup. Ct. Rep. 739; *Ward* v. *Joslin*, 186 U. S. 142, 151, 46 L. ed. 1093, 1099, 22 Sup. Ct. Rep. 807.

Mr. J. M. Woolworth submitted the cause for appellees. *Mr. R. S. Hall* was on the brief:

A suit arises under the Constitution and laws of the United States whenever its correct decision depends upon the construction of either.

Cohen v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Tennessee* v. *Davis*, 100 U. S. 257, 25 L. ed. 648; *Starin* v. *New York*, 115 U. S. 249, 29 L. ed. 389, 6 Sup. Ct. Rep. 28; *Southern P. R. Co.* v. *California*, 118 U. S. 112, 30 L. ed. 104, 6 Sup. Ct. Rep. 993; *Union Nat. Bank* v. *Miller*, 15 Fed. 703.

A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and its cash and cash assets, and the further assignment to a trustee, for its benefit, of bills receivable and securities, is not *ultra vires*, but is within its power conferred by statute to conduct a general banking business.

Schofield v. *State Nat. Bank*, 38 C. C. A. 179, 97 Fed. 282.

A national bank which uses in its business money obtained by its vice president as a loan to it from another national bank cannot escape liability to account therefor, upon the ground that the loan was not negotiated by its directors, or that it could not itself have legally borrowed the money.

Aldrich v. *Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498.

The American National would be "liable for money had and received to its use."

Ditty v. *Dominion Nat. Bank*, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769; *Cary* v. *Curtis*, 3 How. 236, 11 L. ed. 576; *Kennedy* v. *Baltimore Ins. Co.* 3 Harr. & J. 367, 6 Am. Dec. 499; *Bayne* v. *United States*, 93 U. S. 642, 643, 23 L. ed. 997, 998; *United States* v. *State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647; *State* v. *St. Johnsbury*, 59 Vt. 332, 10 Atl. 531.

The directors and stockholders of a bank on the verge of collapse and insolvency have the right to borrow money and pay their depositors by a pledge of part or all of their assets.

See *Nebraska* v. *First Nat. Bank*, 88 Fed. 947; *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 127, 23 L. ed. 679; *Western Nat. Bank* v. *Armstrong*, 152 U. S. 347, 38 L. ed. 471, 14 Sup. Ct. Rep. 572; *Armstrong* v. *Chemical Nat. Bank*, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 565.

A preference given for an actual advance of money which goes to the bank, and is used for the benefit of the bank, is good, and not void.

Stapylton v. *Stockton*, 33 C. C. A. 542, 63 U. S. App. 412, 91 Fed. 326.

If the language in this contract is at all

ambiguous, the way in which the parties understood it and acted upon it will be of aid to the court.

Schofield v. *State Nat. Bank*, 38 C. C. A. 179, 97 Fed. 285; *Topliff* v. *Topliff*, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; *Chicago* v. *Sheldon*, 9 Wall. 50–54, 19 L. ed. 594–596.

The doctrine of *ultra vires* will not be allowed by the courts to defeat the ends of justice or work a legal wrong.

Ohio & M. R. Co. v. *McCarthy*, 96 U. S. 267, 24 L. ed. 695; *Bensiek* v. *Thomas*, 13 C. C. A. 451, 27 U. S. App. 765, 66 Fed. 104; *American Nat. Bank* v. *National Wall-Paper Co.* 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85; *Sheldon Hat Blocking Co.* v. *Eickemeyer Hat Blocking Mach. Co.* 90 N. Y. 613; *Farmers' Loan & T. Co.* v. *Toledo, A. A. & N. M. R. Co.* 67 Fed. 49.

The contention that the statute means a judgment creditor is unsound.

Darragh v. *H. Wetter Mfg. Co.* 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 7; *National Surety Co.* v. *State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Jones* v. *Mutual Fidelity Co.* 123 Fed. 508.

The general creditor interested in a trust fund, or having a lien thereon, can enforce the trust under the general equity powers of the court.

King v. *Pomeroy*, 58 C. C. A. 209, 121 Fed. 291.

Mr. Justice **Brewer** delivered the opinion of the court:

A matter of jurisdiction is first presented. The note, which is the foundation of plaintiff's suit, is one made by the American bank to the Union bank, both located in Nebraska, and, under the statute, for the purpose of jurisdiction, to be considered citizens of Nebraska. 25 Stat. at L. 436, chap. 866, § 4 (U. S. Comp. Stat. 1901, p. 514). The plaintiff is a citizen of New Hampshire. [241] He could not maintain *an action against the maker of the note, although a citizen of a state other than that of the maker and payee. 25 Stat. at L. 434, chap. 866, § 1. But if diverse citizenship was the sole basis of the jurisdiction of the circuit court, the decision of the court of appeals would be final and there would be no appeal to this court. 26 Stat. at L. 828, chap. 517, § 6 (U. S. Comp. Stat. 1901, p. 549). But the jurisdiction of the circuit court was not invoked on the ground of diverse citizenship,—at least, not on that alone. The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws. Section 5220, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3503), reads: "Any [national banking] association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock."

By § 5151, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3465), stockholders in national banks are made liable for "all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Section 2 of the act of June 30, 1876 (19 Stat. at L. 63, chap. 156, U. S. Comp. Stat. 1901, p. 3509), is as follows:

"Sec. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

More than two thirds of the stock voted, on February 25, 1896, for a voluntary liquidation, and on April 27, 1896, the Comptroller of the Currency formally approved the liquidation and notified the cashier of the American bank to that effect.

In proceeding, therefore, by this suit to enforce, in behalf *of himself and all other [242] creditors of the American bank, the extra liability imposed by Rev. Stat. § 5151, a case was presented arising under the laws of the United States, and of which, independently of the matter of diverse citizenship, the circuit court had jurisdiction.

The bill is not multifarious. "The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank." *Richmond* v. *Irons*, 121 U. S. 27, 50, 30 L. ed. 864, 871, 7 Sup. Ct. Rep. 788, 798.

It is suggested that no judgment had been obtained upon the note prior to this suit in equity, but as one object of the suit was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor, no judgment at law was a prerequisite. *Day* v. *Washburn*, 24 How. 352, 16 L. ed. 712; *Case* v. *Beauregard* (*Case* v. *New Orleans & C. R. Co.*) 101 U. S. 688, 691, 25 L. ed. 1004, 1005, in which the court said:

"Without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan* v. *Evans*, 11 N. H. 311; *Holt* v. *Bancroft*, 30 Ala. 193."

We come, then, to the final question in the case, and that is whether the notes executed by the American bank were its valid obligations. And in reference to this question these are the significant facts: The demands against the American bank were pressing. It had not the money with which to meet them. It arranged with the Union bank to advance the money for the payment of all its outstanding obligations. When the Union bank paid these obligations of the American bank it was the same as though it advanced money to that bank to pay them. To reimburse and secure the former the latter bank turned over certain property, and executed these notes for the balance, securing them by a pledge of all its other assets, which were placed in the hands of its president, as trustee.

[243] *All the stipulations and agreements made by the directors of the two banks were carried out in good faith; and, with full knowledge of what had been done, the stockholders voted for a voluntary liquidation. The borrowing of the money by the American bank did not necessarily put it into liquidation. It had a large amount of assets, and if the real had equaled the nominal value of these assets, it would have been enabled, after discharging its obligation to the Union bank, to continue business. But, on an examination, the stockholders felt that it was wiser to stop at once. But that decision did not at all impugn the wisdom or bona fides of the transaction by which the money was obtained to pay off the pressing demands of the American bank. The question, therefore, is, whether a national bank, finding itself embarrassed, with a large amount of assets, much in excess of its obligations, yet without the cash to make payment of those which are due and urgent, can borrow to meet those pressing demands. A very natural answer is, why not? It is not borrowing money to engage in a new business. It simply exchanges one creditor for others. There may be wisdom in consolidating all its debts into the hands of one person. At least such a consolidation cannot be pronounced beyond its powers. When time is obtained by the new indebtedness (in this case a year) it gives the borrowing bank and its officers and stockholders time to consider and determine the wisdom of attempting a further prosecution of business. In the case of an individual it would be a legitimate and often a wise transaction. It is not in terms prohibited by the national banking act. *Aldrich* v. *Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498, is very clearly in point. The opinion in that case is quite lengthy and considers many authorities, but the gist of the decision is expressed in these words (p. 635, L. ed. p. 617, Sup. Ct. Rep. p. 505):

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical bank was obtained under a loan negotiated by the vice president of the Fidelity bank, who assumed to represent it in the transaction, and as the Fidelity bank used the money so obtained in *its banking business and for [244] its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity bank could not, consistently with the law of its creation, have itself borrowed the money."

We are of the opinion that the notes given by the American bank for the money advanced by the Union bank were its valid obligations, and can, therefore, be enforced against its stockholders.

The decree of the Circuit Court of Appeals is affirmed.

PETER FRENZER *et al.*, *Appts.*,
v.
SUMNER WALLACE *et al.* (No. 192.)

EDGAR M. MORSMAN, *Appt.*,
v.
SUMNER WALLACE *et al.* (No. 193.)

GEORGE W. McCLELLAN, as Executor, etc., *et al.*, *Appts.*,
v.
SUMNER WALLACE *et al.* (No. 195.)

(See S. C. Reporter's ed. 244.)

These cases are governed by the decision in *Wyman* v. *Wallace*, *ante*, 738.

[Nos. 192, 193, 195.]

Submitted March 6, 1906. Decided April 2, 1906.

APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska in favor of the complainant

in a suit by the holder of a note given by a national bank to enforce the statutory liability of its stockholders. *Affirmed.*

See same case below, 68 C. C. A. 40, 135 Fed. 286.

Mr. **Westel W. Morsman** submitted the cause for appellants in No. 192. *Mr. Howard B. Smith* was on the brief. For their contentions see their brief as reported in *Wyman* v. *Wallace, ante,* 738.

Mr. **Westel W. Morsman** also submitted the cause for appellant in No. 193:

In order to invoke the jurisdiction granted of suits arising under a Federal statute, it is necessary to show, by proper averments in the bill, that the matter to be litigated is a Federal question.

Metcalf v. *Watertown,* 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co.* v. *Turck,* 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Arbuckle* v. *Blackburn,* 191 U. S. 413, 48 L. ed. 241, 24 Sup. Ct. Rep. 148.

It is not sufficient that the bill seeks to enforce a right created by Federal statute. It must show a controversy or dispute "arising under"—that is, involving, and making it necessary for the court to determine the effect or construction of—a Federal statute.

Little York Gold-Washing & Water Co. v. *Keyes,* 96 U. S. 199, 24 L. ed. 656; *Cooke* v. *Avery,* 147 U. S. 375–384, 37 L. ed. 209–212, 13 Sup. Ct. Rep. 340; *Filhiol* v. *Maurice,* 185 U. S. 108–111, 46 L. ed. 827, 828, 22 Sup. Ct. Rep. 560; *Filhiol* v. *Torney,* 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698; *Defiance Water Co.* v. *Defiance,* 191 U. S. 184–190, 48 L. ed. 140–142, 24 Sup. Ct. Rep. 63; *Arbuckle* v. *Blackburn,* 191 U. S. 405–413, 48 L. ed. 239–241, 24 Sup. Ct. Rep. 148.

The individual liability of the shareholders, created by the statute, cannot be enforced for the satisfaction of the obligations in question.

Richmond v. *Irons,* 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Schrader* v. *Manufacturers' Nat. Bank,* 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. Rep. 238; *Ward* v. *Joslin,* 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807; *California Nat. Bank* v. *Kennedy,* 167 U. S. 362–366, 42 L. ed. 198–200, 17 Sup. Ct. Rep. 831; *First Nat. Bank* v. *Hawkins,* 174 U. S. 366, 43 L. ed. 1008, 19 Sup. Ct. Rep. 739; *McCormick* v. *Market Nat. Bank,* 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

The Union National was a volunteer. It was not required to pay by any prior obligation or for the protection of some interest or right of its own. It assumed and paid the debts of the American National upon an original agreement, for a new consideration, and because it was believed to be a profitable venture. This creates no right to equitable subrogation.

Ætna L. Ins. Co. v. *Middleport,* 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625; *Wood* v. *Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; *New Jersey Midland R. Co.* v. *Wortendyke,* 27 N. J. Eq. 658; *Sandford* v. *McLean,* 3 Paige, 122, 23 Am. Dec. 773.

Ratification by a shareholder of, or acquiescence by him in, the *ultra vires* contract of the corporation, does not enlarge the individual liability of the shareholder, created and limited by statute. He does not, by consenting that the corporation be bound, enlarge his own liability.

Ward v. *Joslyn, supra.*

But the agreement, being *ultra vires,* was not the subject of ratification.

McCormick v. *Market Nat. Bank, supra; Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24–50, 35 L. ed. 55–65, 11 Sup. Ct. Rep. 478; *California Nat. Bank* v. *Kennedy,* 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71–82, 25 L. ed. 950–952; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1–22, 32 L. ed. 837–840, 9 Sup. Ct. Rep. 409; *Ward* v. *Joslin,* 186 U. S. 142–151, 46 L. ed. 1093–1099, 22 Sup. Ct. Rep. 807.

Mr. **Richard S. Horton** submitted the cause for appellants in No. 195. *Mr. Charles Battelle* was on the brief.

Mr. **J. M. Woolworth** submitted the cause for appellees. *Mr. R. S. Hall* was on the brief. For their contentions see their brief as reported in *Wyman* v. *Wallace, ante,* 738.

Per Mr. Justice **Brewer:**

These are separate appeals by other stockholders from the same decree, and present no questions other than those considered in the former opinion, and the same decrees of affirmance will be entered.

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*WILLIAM S. POPPLETON, *Appt.,* **[245]**

v.

SUMNER WALLACE *et al.*

(See S. C. Reporter's ed. 245.)

National banks—stockholder's liabil-

NOTE.—*On the enforcement of statutory liability of stockholders in national banks*—see note to Williamson v. American Bank, 52 C. C. A. 6.

ity.—Valid obligations of a national bank may, after voluntary liquidation, be enforced against a stockholder who voted against the resolutions looking towards such liquidation, where the requisite amount of stock was voted in favor of that course.

[No. 194.]

Argued and submitted March 6, 1906. Decided April 2, 1906.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska in favor of complainant in a suit by the holder of a note given by a national bank to enforce the statutory liability of its stockholders. *Affirmed.*

See same case below, 68 C. C. A. 40, 135 Fed. 286.

Mr. **Richard S. Horton** argued the cause and filed a brief for appellant.

Mr. **J. M. Woolworth** submitted the cause for appellees. *Mr. R. S. Hall* was on the brief. For their contentions see their brief as reported in *Wyman* v. *Wallace, ante*, 738.

Per Mr. Justice **Brewer:**

This case is also an appeal by a stockholder from the same decree, and presents only this difference: This stockholder voted against the resolutions passed by the stockholders, looking to a voluntary liquidation. There is, therefore, nothing of a personal estoppel to be adjudged against him, but we do not think that that is material. The requisite amount of stock was voted in favor of what was done in the way of voluntary liquidation, and he, as a stockholder, is bound by that, although personally he dissented from the action. The same decree of affirmance will be entered in this case.

MICHIGAN CENTRAL RAILROAD COMPANY, *Appt.*,

v.

PERRY F. POWERS, Auditor General of the State of Michigan.

(See S. C. Reporter's ed. 245–302.)

1. **Constitutional law—delegation of legislative power.**—Legislative functions are not unlawfully delegated by the provisions of Mich. Pub. Acts 1901, act No. 173, for the taxation of railroad and certain other corporate property at the average rate of taxation imposed on all other property within the state subject to ad valorem taxes because such average rate is to be ascertained by the state board of assessors by dividing the total tax levied on such other property by the value of such property as returned by the local assessors and board of state tax commissioners.

2. **Taxation of corporations—rate.**—The mere fact that all the other property in the state, wherever situated, is taken into consideration in fixing the average rate of taxation at which, under Mich. Pub. Acts 1901, act No. 173, railroad and certain other corporate property is to be assessed, does not carry with it such proof of injustice and inequality as necessarily to invalidate the tax.

3. **Taxation of corporations—validity under Federal Constitution.**—Nothing in the Federal Constitution prevents a state from singling out railroad and other corporate property and taxing it for state purposes in a manner and at a rate different from that applicable to other property.

4. **Taxation of corporations—necessity for equalization.**—The lack of any provision for an equalization of railroad property with other property in the state in Mich. Pub. Acts 1901, act No. 173, authorizing the taxation of railroad property at the average rate of taxation imposed on other property in the state, does not vitiate the assessment, where the statute names the time and place for the sessions of the assessing board, and gives to any person or company interested the right to be heard, and authorizes the board to correct the valuation.

[No. 397.]

Argued February 21, 23, 26, 1906. Decided April 2, 1906.

APPEAL from the Circuit Court of the United States for the Western District of Michigan to review a decree dismissing a bill to restrain the enforcement against a railroad company of the provisions of a state law for the assessment and collection of taxes on railroad and certain other corporate property. *Affirmed.*

See same case below, 138 Fed. 223.

Statement by Mr. Justice **Brewer:**

This suit was brought in the circuit court of the United States for the western district of Michigan to restrain the respondent, the auditor general of the state, from enforcing against the appellant the provisions of act No. 173 of the Michigan Laws of 1901, an act to provide for the assessment of the property of railroad and certain other companies, for the levying of taxes thereon by a state board of assessors, and for the collection of such taxes. The taxes involved in the suit are those for 1902, resulting from the first assessment under the statute.

NOTE.—*On the delegation of legislative power* —see note to Bradshaw v. Lankford, 11 L.R.A. 582.

On constitutional equality in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

Prior to the year 1900 the Constitution of Michigan contained, in art. 14, the following sections applicable to taxation:

"Sec. 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank road, and other corporations hereafter created.

"Sec. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

"Sec. 12. All assessments hereafter authorized shall be on property at its cash value.

"Sec. 13. The legislature shall provide for an equalization by a state board in the year one thousand eight hundred and fifty-one, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes.

"Section 14. Every law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

[248] *In that year §§ 10, 11, and 13 were amended so as to read as follows:

"Sec. 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value, by a state board of assessors, and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November sixth, A. D. nineteen hundred, shall be applied as provided for specific state taxes in § 1 of this article.

"Sec. 11. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: *Provided*, That the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes.

"Sec. 13. In the year one thousand nine hundred and one, and every fifth year thereafter, and at such other times as the legislature may direct, the legislature shall provide for an equalization of assessments by a state board, on all taxable property, except that taxed under laws passed pursuant to § 10 of this article."

This change in the Constitution was doubtless owing to a decision of the supreme court of the state (*Pingree* v. *Auditor General* [*Pingree* v. *Dix*] 120 Mich. 95, 44 L. R. A. 679, 78 N. W. 1025), of date of April 26, 1899, holding unconstitutional an act passed in 1881 in respect to the assessment and taxation of telegraph and telephone lines. An act 19 of 1899, passed March 15, 1899, and commonly called the "Atkinson bill," was subject to the same objections as the *act of [249] 1881, and was evidently regarded as equally unconstitutional. Indeed, though not directly involved in that suit, it was referred to in the opinion of Mr. Justice Montgomery.

The act in controversy (Pub. Acts 1901, act No. 173) provides that the board of state tax commissioners shall constitute a state board of assessors, who are to assess the railroad and certain other corporate property in the state. Section 5 contains the following:

"Sec. 5. The term 'property' as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, roadbed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switch boards and all other property used in carrying on the business of said corporations or owned by them respectively, and all other real and personal property and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property: *Provided, however*, That this definition shall not include, apply to, or subject to taxation, such real estate as is owned and can be conveyed by such corporations under the laws of this state which is not actually occupied in the exercise of their franchises or in use in the proper operation of their

On corporate taxation as impairing contract obligations—see note to Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On the taxation of corporate franchises—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

On taxation of tangible personal property of domestic corporations—see note to Teagan Transp. Co. v. Board of Assessors, 69 L.R.A. 431.

On the taxation of corporate capital stock—see note to State Board v. People, 58 L.R.A. 513.

roads or their corporate business; but such real estate so excepted shall be liable to taxation in the same manner and for the same purposes and to the same extent and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities in which the same may be situate. The term 'company,' 'corporations,' or 'associations,' wherever used in this act, shall apply to and be construed as referring respectively to any railroad company, union station and depot company, express company, car-loaning company, or refrigerator or fast freight line company, and any and all other corporations subject to taxation under this act. The term 'property having a situs in this state' shall include all the property,
[250] real and personal, *of the corporations enumerated in this act, owned, used, and occupied by them within the limits of this state, and also such proportion of the rolling stock, cars, and other property of such corporations as is used partly within and partly without this state, as herein provided to be determined."

By §§ 6 and 7 the several corporations are required to furnish information as to various matters of fact bearing on the matter of assessment. By § 8 property is to be assessed at its "true cash value" on the second Monday of April of each year, and, for the purposes of the assessment, the board of assessors is authorized to make personal inspection of the property, to take into consideration the reports filed under the act, and such other evidence as may be obtainable bearing thereon. In respect to the property of railroads running partly within and partly without the state, the board is directed to be guided in respect to the matter of taxation of property within the state by the relation which the number of miles of main track within the state bears to the entire mileage of the main track, both within and without the state. By § 10 the board is required to meet at the capitol at Lansing on the third Monday of December, and continue in session so long as may be necessary, not later than January 15 next thereafter, for the purpose of reviewing the assessment roll, and any person or company interested has the right to appear during said period and be heard by the assessors, and they are authorized on such application, or on their own motion, to correct the assessment or valuation. Sections 11 and 12 prescribe the method for fixing the rate of tax, the purpose being to impose upon the railroad property the average rate of taxation levied upon other property upon which ad valorem taxes are assessed. This method is accurately described by counsel for the railroad company in these words:

"The new and peculiar feature of the statute lies in the application to corporate property of a special rate of tax, known as the 'average rate,' which is derived by the following process: The total ad valorem taxes for all purposes,—state, county, city, *township, village, and school district,—paid [251] by property in Michigan which is taxed otherwise than under act 173, are divided by the total assessments of such property, whether made by one or another assessor, and the quotient resulting from this process of division is the rate of tax applied to corporate property under act 173."

By § 16 the taxes collected from corporations under this act are to "be applied in paying the interest upon the primary school, university, and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt other than the amounts due to educational funds, when such taxes shall be added to and constitute a part of the primary-school interest fund."

After a full hearing upon pleadings and proofs the circuit court entered a decree dismissing the bill (138 Fed. 223), whereupon the plaintiff appealed directly to this court, under § 5 of the circuit court of appeals act.

Mr. **Lloyd W. Bowers** argued the cause, and, with *Messrs. O. E. Butterfield, A. C. Angell, Henry Russell, Ashley Pond,* and *Benton Hanchett,* filed a brief for appellant:

There are features of taxation so planted in its very nature—so essential to prevent taxation from being a mere arbitrary exaction—that they are opposed to the very idea of any government by law.

Cooley, Taxn. 3d ed. 50, 83, 183; *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255; *Citizens' Sav. & L. Asso.* v. *Topeka,* 20 Wall. 655, 662, 663, 22 L. ed. 455, 461.

When elements, fundamental in the very conception of a tax, are absent, the charge is not a tax at all, but a form of confiscation.

Judson, Taxn. §§ 340, 341, 392; *State Tax Comrs.* v. *Holliday,* 150 Ind. 216, 42 L.R.A. 826, 49 N. E. 14; *Lexington* v. *McQuillan,* 9 Dana, 513, 35 Am. Dec. 159; *Woodbridge* v. *Detroit,* 8 Mich. 274; *State ex rel. White House School Dist. No. 71* v. *Readington Twp.* 36 N. J. L. 66; *Citizens' Sav. & L. Asso.* v. *Topeka,* 20 Wall. 655, 22 L. ed. 455.

Due process of law certainly requires the preservation of all features of taxation which are necessary to its fundamental justice, or to its consistency with the nature of free institutions.

Holden v. *Hardy*, 169 U. S. 366, 389, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *Hurtado* v. *California*, 110 U. S. 516, 535, 536, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 707, 708, 28 L. ed. 569, 571, 572, 4 Sup. Ct. Rep. 663; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; Cooley, Const. Lim. 355; *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 4 L. ed. 559; Guthrie, 14th Amendment, 66, 67, notes; Story, Const. 5th ed. § 1945; Judson, Taxn. §§ 318, 340, 343, 431.

The course of history and long-established usage are of large importance in ascertaining what is due process.

Den ex dem. Murray v. *Hoboken Land & Improv. Co.* 18 How. 272, 276, 15 L. ed. 372, 374; *Weimer* v. *Bunbury*, 30 Mich. 201; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

The taking of property by a state for private use (even with compensation) is not due process of law.

Missouri P. R. Co. v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Judson, Taxn. §§ 346, 350, 391.

The taking of property, even for public use, without compensation, is not due process.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; *Scott* v. *Toledo*, 1 L.R.A. 688, 36 Fed. 385; Guthrie, 14th Amendment, 93.

The attempt by a government to tax property beyond its jurisdiction is not due process.

Louisville & J. Ferry Co. v. *Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

Due process requires that the taxpayer be given opportunity for hearing concerning the amount of his tax.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; *Winona & St. P. Land Co.* v. *Minnesota*, 159 U. S. 526, 535, 40 L. ed. 247, 250, 16 Sup. Ct. Rep. 83; *Delaware, L. & W. R. Co.* v. *Pennsylvania, supra.*

Undue interference with liberty of contract is not due process of law.

Allgeyer v. *Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427.

Under the 14th Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice.

Turpin v. *Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20.

The 14th Amendment controls the action of all branches of government,—legislative, executive, and judicial.

Blake v. *McClung*, 172 U. S. 239, 260, 43 L. ed. 432, 440, 19 Sup. Ct. Rep. 165; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; *Scott* v. *McNeal*, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; *Ex parte Virginia*, 100 U. S. 339, 346, 347, 25 L. ed. 676, 679.

Due process of law requires taxes to be laid by a representative legislature,—*i. e.*, by a legislature which is chosen by the community to which the person or property taxed belongs, which acts in the interest of that community, and which is responsible to the taxpayers.

M'Culloch v. *Maryland*, 4 Wheat. 427, 4 L. ed. 606; *Providence Bank* v. *Billings*, 4 Pet. 514, 563, 7 L. ed. 939, 956; *Wilcox* v. *Paddock*, 65 Mich. 23, 31 N. W. 609; *People ex rel. Le Roy* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Wyandotte County* v. *Abbott*, 52 Kan. 148, 34 Pac. 416; *Schultes* v. *Eberly*, 82 Ala. 242, 2 So. 345; *Parks* v. *Wyandotte County*, 61 Fed. 436; *Harvard* v. *St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *United States* v. *New Orleans*, 98 U. S. 381, 392, 25 L. ed. 225; *Thompson* v. *Allen County*, 115 U. S. 550, 555, 29 L. ed. 472, 474, 6 Supt. Ct. Rep. 140; *Lexington* v. *McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; Cooley, Taxn. 3d ed. 95–98; *Wells* v. *Weston*, 22 Mo. 384, 66 Am. Dec. 627; Judson, Taxn. chap. 14.

The fundamental theory on which municipal corporations are allowed to be created is representative self-government. The grant by the state legislature of legislative power, including that of taxation, to such bodies, is a historical and recognized exception to the rule against delegation of legislative power, and is upheld only because it is strictly and entirely within the principle of representative government, and, indeed, is a more immediate and complete application of that principle.

Cooley, Taxn. 3d ed. 101.

It is fundamental, too, that taxation must be for the purposes of the very community that lays the tax.

Cooley, Taxn. chap. 5, p. 187; Judson, Taxn. § 354.

Due process of law requires, in judicial proceedings, a court having jurisdiction over the subject-matter and also over the person or property to be affected by the judgment.

Pennoyer v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572.

The right of appeal to the courts for relief

from action of the legislature which is claimed to violate private rights is requisite to due process of law; and therefore a statute which forbids it is unconstitutional.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418, 456, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The power to tax for state purposes is limited by a fair legislative discretion as to the amount of revenue needed by the state.

Reagan v. *Farmers' Loan & T. Co.* 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Schultes* v. *Eberly, supra*.

Constitutional limitations may be implied as well as express; and their application may result either from the essential nature of government or from the general plan of constitution.

Wyandotte County v. *Abbott, supra; State ex rel. White* v. *Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204.

The legislature of Michigan, in imposing the "average rate" of tax, cannot be supposed to have considered and determined that such tax will yield an amount of revenue proportioned to the state's need of revenue, unless it is reasonable to estimate the revenue which the state needs by the revenues which the counties, cities, towns, villages, and school districts of Michigan raise for their purely local purposes.

People v. *Fire Asso. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380.

This court will consider the real tendency of the taxing process prescribed by the statute in hand, with reference to the question whether it establishes a reasonable connection between state tax and the state's need of revenue.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The rule is that the determination of the legislature must be presumed to be just, and must be upheld unless it clearly appears to the contrary.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 91, 46 L. ed. 92, 101, 22 Sup. Ct. Rep. 30.

The Federal courts are not bound, in considering questions under the 14th Amendment, even to accept the views concerning the nature or effect of a state statute that may have been taken by the state courts.

Yick Wo v. *Hopkins*, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 100, 43 L. ed. 909, 911, 19 Sup. Ct. Rep. 609.

Courts may consider independently whether the purpose of the so-called tax is really public, even if the legislature has declared it in terms to be public; whether property sought to be taxed is really within the legislature's jurisdiction, even if the legislature has pronounced it to be; whether a tax is really uniform (when the state Constitution requires it to be uniform), even though the legislature, by adopting it, has given it presumptive propriety; and whether a thing called by the legislature a "tax" is really a tax at all, or rather a taking of private property for public purposes without compensation.

Holden v. *Hardy*, 169 U. S. 366, 395, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 473, 24 L. ed. 527, 531; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

By the pertinent test, *viz.*, whether the state's need of revenue can reasonably be judged by, and the state's revenue made to depend upon, the action of all the local legislatures in the state, in raising local taxes for local purposes of government and improvement, the statute in hand must fall.

Pingree v. *Auditor General*, 120 Mich. 95, 44 L.R.A. 679, 78 N. W. 1025.

The state legislature cannot impose taxes upon municipal corporations for their private purposes, though it may impose taxes for their governmental purposes.

People ex rel. Park Comrs. v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Davock* v. *Moore*, 105 Mich. 120, 28 L.R.A. 783, 63 N. W. 424; *Cook Farm Co.* v. *Detroit*, 124 Mich. 426, 83 N. W. 130; *Blades* v. *Water Comrs.* 122 Mich. 366, 81 N. W. 271; *Hasbrouck* v. *Milwaukee*, 13 Wis. 38, 80 Am. Dec. 718; *Mills* v. *Charleton*, 29 Wis. 413, 9 Am. Rep. 578; *People ex rel. McCagg* v. *Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Gage* v. *Graham*, 57 Ill. 144; *Wider* v. *East St. Louis*, 55 Ill. 133; *State ex rel. Board of Edu.* v. *Haben*, 22 Wis. 660; 2 Smith, Modern Law Mun. Corp. 1476, p. 1531; Cooley, Const. Lim. pp. 284, 285.

Municipalities may bind themselves by contract with private companies, authorizing the latter to do exclusively for the municipality, and even exclusively of the municipality, such work as meets only the private, as distinguished from the governmental, needs of the community.

Illinois Trust & Sav. Bank v. *Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *New Orleans Gaslight Co.* v. *New Orleans*, 42 La. Ann. 188, 7 So. 559; *Walla Walla* v. *Walla Walla*

Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *St. Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 647, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Little Falls Electric & Water Co.* v. *Little Falls*, 102 Fed. 663; *Cunningham* v. *Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *Los Angeles City Water Co.* v. *Los Angeles*, 88 Fed. 720; *Bartholomew* v. *Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; *Ludington Water-Supply Co.* v. *Ludington*, 119 Mich. 480, 78 N. W. 558; *Atlantic City Waterworks Co.* v. *Atlantic City*, 39 N. J. Eq. 367; *Adrian Waterworks* v. *Adrian*, 64 Mich. 584, 31 N. W. 529; *Newport* v. *Newport Light Co.* 84 Ky. 166; *State* v. *Orr*, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; *Indianapolis* v. *Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Atlantic City Waterworks Co.* v. *Atlantic City*, 48 N. J. L. 378, 6 Atl. 24.

The state cannot appropriate to itself, without compensation, the property obtained by a municipality with taxes raised and used for its nongovernmental purposes, even upon dissolution of the municipality.

People ex rel. Park Comrs. v. *Detroit* and *State ex rel. Board of Edu.* v. *Haben, supra; State ex rel. White* v. *Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204; *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. ed. 197; *Dubuque* v. *Illinois C. R. Co.* 39 Iowa, 56; *Grogan* v. *San Francisco*, 18 Cal. 590; *Spaulding* v. *Andover*, 54 N. H. 38; *Milwaukee* v. *Milwaukee*, 12 Wis. 93; *Atty. Gen.* v. *Burrell*, 31 Mich. 34; *Thompson* v. *Moran*, 44 Mich. 602, 7 N. W. 180; *Adrian Waterworks* v. *Adrian, Davock* v. *Moore, Blades* v. *Water Comrs.* and *Cook Farm Co.* v. *Detroit, supra.*

The rule that taxes must be founded upon the expenses of a government whose benefits the taxpayer shares is plain, both in principle and on authority.

Sleight v. *People*, 74 Ill. 47; *Allhands* v. *People*, 82 Ill. 234; *Drake* v. *Ogden*, 128 Ill. 603, 21 N. E. 511; *Bellepoint* v. *Pence*, 13 Ky. L. Rep. 371, 17 S. W. 197; *Talbot County* v. *Queen Anne's County*, 50 Md. 245; *Wells* v. *Weston*, 22 Mo. 387, 66 Am. Dec. 627; *Re Assessment of Lands*, 60 N. Y. 398; *Platt* v. *Milton*, 58 Vt. 608, 5 Atl. 558; *Simon* v. *Northrup*, 27 Or. 487, 30 L.R.A. 171, 40 Pac. 560; *Berlin Mills Co.* v. *Wentworth's Location*, 60 N. H. 156; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L.R.A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *Farris* v. *Vannier*, 6 Dak. 186, 3 L.R.A. 713, 42 N. W. 31.

This rule requires more than that the tax be laid by, and paid into the treasury of, a government from which the taxpayer benefits. It demands that one taxpayer be not charged more than others of the expenses of the government which they both enjoy, because of and in proportion to the taxes which those others pay for the support of other governments from which the first-named taxpayer does not benefit.

1 Cooley, Taxn. 3d ed. 187, 188; *Bellepoint* v. *Pence, supra; Howell* v. *Bristol*, 8 Bush, 493; *Prince George's County* v. *Laurel*, 70 Md. 443, 3 L.R.A. 528, 17 Atl. 388; *Ryerson* v. *Utley*, 16 Mich. 269; *State ex rel. Chouteau* v. *Leffingwell*, 54 Mo. 458.

The rule that persons and property cannot be taxed by or for governments under which they do not exist, and whose benefits they, therefore, do not share, is elementary.

State Treasurer v. *Auditor General*, 46 Mich. 224, 9 N. W. 258; *Callam* v. *Saginaw*, 50 Mich. 7, 14 N. W. 677; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; 1 Cooley, Taxn. 3d ed. 84, 249; Judson, Taxn. § 354.

The very nature of apportionment involves that the legislature determine and prescribe how the tax of one class shall compare with the taxes of other classes for the expenses of the same government.

People ex rel. Detroit & H. R. Co. v. *Salem*, 20 Mich. 453, 4 Am. Rep. 400; 1 Cooley, Taxn. 3d ed. 225–227, 411; *Atchison, T. & S. F. R. Co.* v. *Clark*, 60 Kan. 826, 47 L.R.A. 77, 58 Pac. 477; *Hutchinson* v. *Ozark Land Co.* 57 Ark. 554, 38 Am. St. Rep. 258, 22 S. W. 173; *State ex rel. Harris* v. *Laughlin*, 75 Mo. 147; *State ex rel. White House School Dist. No. 71* v. *Readington Twp.* 36 N. J. L. 66; *Kansas City* v. *Whipple*, 136 Mo. 475, 35 L.R.A. 747, 58 Am. St. Rep. 657, 38 S. W. 295; *Lund* v. *Chippewa County*, 93 Wis. 640, 34 L.R.A. 131, 67 N. W. 927; *State ex rel. New Richmond* v. *Davidson*, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067; *State ex rel. Garrett* v. *Froehlich*, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; Judson, Taxn. § 340; *Morton* v. *Comptroller General*, 4 S. C. N. S. 454; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 400; *Lexington* v. *McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Railroad Tax Cases*, 8 Sawy, 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 424; *Williams* v. *Detroit*, 2 Mich. 560; *State, Central R. Co., Prosecutor*, v. *State Assessors*, 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789; *State ex rel. White House School Dist. No. 71* v.

Readington Twp. supra; State v. *Hoyt*, 71 Vt. 59, 42 Atl. 973.

It is not enough for the state legislature to say that there shall be a tax, and then leave the amount of the tax to be fixed by others. There is no tax until its amount is prescribed; and the body that determines the amount levies the tax.

Cooley, Taxn. 3d ed. 557; *Morton* v. *Comptroller General*, 4 S. C. N. S. 430; *Houghton* v. *Austin*, 47 Cal. 646; *San Francisco & N. P. R. Co.* v. *State Board*, 60 Cal. 12.

And the legislature that taxes, and therefore fixes the amount of tax, must be that which represents the taxpayer; that is, the legislature which is chosen by the community which includes the taxpayer or his property. Nothing is more fundamental than this requirement.

M'Culloch v. *Maryland*, 4 Wheat. 427, 4 L. ed. 606; *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *Wilcox* v. *Paddock*, 65 Mich. 23, 31 N. W. 609; *People ex rel. Le Roy* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Wyandotte County* v. *Abbott*, 52 Kan. 148, 34 Pac. 416; *Schultes* v. *Eberly*, 82 Ala. 242, 2 So. 345; *Parks* v. *Wyandotte County*, 61 Fed. 436; *Harward* v. *St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *United States* v. *New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Thompson* v. *Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Lexington* v. *McQuillan*, *supra*.

In order to be representative, a legislature must be not only chosen by the community for which it acts, but likewise chosen to act for, and upon, the persons or property affected. Nobody outside the limits of a particular county, city, village, town, or school district participates in the selection of the members of its local legislature; and the purpose of their selection is to legislate for the particular community which chooses them.

People ex rel. Park Comrs. v. *Detroit*, *supra; Cook Farm Co.* v. *Detroit*, 124 Mich. 426, 83 N. W. 130; *United States* v. *Cruikshank*, 92 U. S. 542, 549, 23 L. ed. 588, 590.

The statute in question delegates the taxing power to the various local legislatures.

Houghton v. *Austin*, *supra; People ex rel. Hopkins* v. *Kings County*, 52 N. Y. 556; *Wyandotte County* v. *Abbott*, 52 Kan. 168, 34 Pac. 416; *Parks* v. *Wyandotte County*, *supra; Central R. Co.* v. *State Assessors*, 49 N. J. L. 1, 7 Atl. 306; *Muhlenburg County* v. *Morehead*, 20 Ky. L. Rep. 376, 46 S. W. 484; *Fleming* v. *Dyer*, 20 Ky. L. Rep. 689, 47 S. W. 444; *Dawson* v. *Ward*, 71 Tex. 72, 9 S. W. 106; *Wade* v. *State*, 22 Tex. App. 629, 3 S. W. 796; *McCabe* v. *Carpenter*, 102 Cal. 469, 36 Pac. 836; *Schultes* v. *Eberly*, *supra; Wells* v. *Weston*, 22 Mo. 384, 66 Am. Dec. 627; *Wilcox* v. *Paddock*, *supra; State ex rel. Howe* v. *Des Moines*, 103 Iowa, 76, 39 L.R.A. 285, 64 Am. St. Rep. 157, 72 N. W. 639; *Marr* v. *Enloe*, 1 Yerg, 452; *Leveeing Wabash River* v. *Houston*, 71 Ill. 318; *Gage* v. *Graham*, 57 Ill. 144; *King* v. *Concordia F. Ins. Co.* (Mich.) 103 N. W. 616; *Elliott* v. *Detroit*, 121 Mich. 611, 84 N. W. 820; *Bradshaw* v. *Langford*, 73 Md. 428, 11 L.R.A. 582, 25 Am. St. Rep. 602, 21 Atl. 66; *People* v. *Parks*, 58 Cal. 624; *Dowling* v. *Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; *O'Neil* v. *American F. Ins. Co.* 166 Pa. 77, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; *New York & N. J. Telcph. Co.* v. *Bound Brook*, 66 N. J. L. 168, 48 Atl. 1022; *Stevens* v. *Truman*, 127 Cal. 155, 59 Pac. 397; *Jernigan* v. *Madisonville*, 102 Ky. 313, 39 L.R.A. 214, 43 S. W. 448; *Schaezlein* v. *Cabaniss*, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Harmon* v. *State*, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; *Beasley* v. *Ridout*, 94 Md. 641, 52 Atl. 61; *State ex rel. Montgomery* v. *Rogers*, 71 Ohio St. 203, 73 N. E. 461.

The rule that a taxpayer is constitutionally entitled to a hearing on the amount of his tax includes the right of hearing on that point before the legislature. Such privilege is part of the general right of appearance before, or petition to, the legislature, which is part of the law of the land.

Cooley, Const. Lim. 7th ed. 497, 498; 2 Story, Const. § 1894; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *State Tax-Law Cases*, 54 Mich. 350, 20 N. W. 493; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112, 170, 174, 175, 41 L. ed. 369, 392, 394, 17 Sup. Ct. Rep. 56; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 339–341, 45 L. ed. 879, 887, 888, 21 Sup. Ct. Rep. 625.

The right of a taxpayer to be heard on the assessment of his property is fully established.

Cooley, Taxn. 3d. ed. 626; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Winona & St. P. Land Co.* v. *Minnesota*, 159 U. S. 526, 535, 40 L. ed. 247, 250, 16 Sup. Ct. Rep. 83.

Under ordinary ad valorem tax laws, any taxpayer has the constitutional right, if the rate of tax has not been named by the legislature, but is left to result from division of the amount of tax ordered by the legislature, by the total assessment, to be heard on assessments generally.

Cooper v. *Board of Works*, 14 C. B. N. S. 181; *Dundee Mortg. Trust Invest. Co.* v. *Charleton*, 32 Fed. 192; *State, Dickerson*

S. Min. Co., Prosecutor, v. *Dickerson*, 25 N. J. L. 427; *State ex rel. Goff* v. *Dodge County*, 20 Neb. 595, 31 N. W. 117; *State ex rel. Lincoln Land Co.* v. *Edwards*, 26 Neb. 705, 42 N. W. 882.

Indeed, a right of hearing before the proper body seems necessary concerning any act whose effect is to take property.

Alexander v. *Gordon*, 41 C. C. A. 228, 101 Fed. 91; *Re Rosser*, 41 C. C. A. 497, 101 Fed. 562; *Lamb* v. *Powder River Live Stock Co.* 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434.

The courts have recognized: 1. That persons are within the equal protection of the laws as to taxation.

2. That while the legislature, in imposing taxes, may exercise a wide discretion, in subjecting property to different forms and amounts of taxation, that discretion must rest upon a reasonable basis, and the discriminations made by the legislature in taxation of different sorts of property must not be arbitrary, in the sense of resting upon no fact that affords a just ground for such course.

3. That no more in taxation than in other fields of legislation are any persons to be deprived of those things that are more fundamental in our government, and are always essential to any real protection of the government's subjects, such as the decision of legislative questions by a popular and representative legislature; the right of appeal to the courts on questions of judicial character; opportunity for hearing before either the legislature or the court that determines the subject's rights; and the avoidance, in all fundamental ways, of such things as, in Justice Bradley's words, "are of an unusual character, unknown to the practice of our governments."

Yick Wo v. *Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Barbier* v. *Connolly*, 113 U. S. 27, 31, 32, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; *San Mateo County* v. *Southern P. R. Co.* 7 Sawy. 517, 13 Fed. 145; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722.

It will not do for a tax law directly and necessarily to tend to inequality,—at least of a kind that is unmistakably unreasonable and unjust.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 110, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 301, 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Railroad Tax Cases, supra.*

Classification means only the division of persons or properties into different classes on some basis or principle that, from its own nature and from the nature of the persons or properties classified, affords a reasonable and just ground for the different treatment of the different classes.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Stratton Claimants* v. *Morris Claimants* (*Dibrell* v. *Lanier*) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *State* v. *Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Lafferty* v. *Chicago & W. M. R. Co.* 71 Mich. 35, 38 N. W. 660; *Park* v. *Detroit Free Press Co.* 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; *Grand Rapids Chair Co.* v. *Runnels*, 77 Mich. 104, 43 N. W. 1006; *San Antonio & A. P. R. Co.* v. *Wilson*, 4 Tex. App. Civ. Cas. (Willson) § 323, 19 S. W. 910; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer* v. *People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Eden* v. *People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Janesville* v. *Carpenter*, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *State* v. *Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Pearson* v. *Portland*, 69 Me. 278, 31 Am. Rep. 276; *State* v. *Haun*, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; *Durkee* v. *Janesville*, 28 Wis. 464, 9 Am. Rep. 500.

The equality of all before the law, which the 14th Amendment requires, is inherent in a republican form of government.

United States v. *Cruikshank*, 92 U. S. 542, 554, 23 L. ed. 588, 592.

The Federal courts are not bound, in considering questions under the 14th Amendment, to accept the view of the nature or effect of a state statute which may have been taken by the state courts.

Yick Wo v. *Hopkins*, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 100, 43 L. ed. 909, 911, 19 Sup. Ct. Rep. 609.

The "equal protection of the laws" has a wider scope than "due process of law."

Santa Clara County v. *Southern P. R. Co. supra.*

Can property of the same kind, used in the same kind of business, be taxed in different ways and at different rates, according to the single fact whether it is owned by a corporation or by natural persons (either individually or in partnership or in joint stock associations)?

San Mateo County v. *Southern P. R. Co.*, *Railroad Tax Cases*, and *Santa Clara Coun-*

ty v. *Southern P. R. Co. supra; Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Vanzant* v. *Waddel*, 2 Yerg. 260; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 165, 166, 41 L. ed. 666, 668, 671, 672, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 104, 105, 43 L. ed. 909, 912, 913, 19 Sup. Ct. Rep. 609; *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Strauder* v. *West Virginia*, 100 U. S. 303, 309, 25 L. ed. 664, 666; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Judson, Taxn. § 455; *Northern P. R. Co.* v. *Walker*, 47 Fed. 681; Guthrie, 14th Amendment, pp. 120, 122.

Mr. **Benton Hanchett** also argued the cause, and, with *Messrs. O. E. Butterfield, A. C. Angell, Henry Russell, Ashley Pond,* and *Lloyd Bowers,* filed a brief for appellant:

The provision for the equal protection of the laws is to be liberally construed to carry out its purposes.

Strauder v. *West Virginia*, 100 U. S. 303, 307, 25 L. ed. 664, 665; *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; *Gulf C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 153, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255.

The inquiry is not limited to the operation of a single law. The question is whether, under the different and several laws of the state, a protection of rights is afforded to a part of the persons within the state which is denied to others.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

Wherever provisions are made by the laws of the state which give protection to one class of persons against the deprivation of life, liberty, or property, and those provisions are withheld from other persons who, in like conditions and for the same reasons, are in need of like protection, there is class legislation which contravenes the equal protection of the laws.

Barbier v. *Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Hayes* v. *Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 558–560, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431.

Inequalities in burdens of taxation imposed upon persons who are in like conditions, and which inequalities arise from different provisions of the law itself, and can be foreseen and provided against, constitute discrimination which is a denial of equal protection.

Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385, 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 391, 35 L. ed. 1051, 1053, 12 Sup. Ct. Rep. 255; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; *Stearns* v. *Minnesota*, 179 U. S. 223, 262, 45 L. ed. 162, 181, 21 Sup. Ct. Rep. 73; *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364, 366, 46 L. ed. 949, 950, 22 Sup. Ct. Rep. 673; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 558, 563, 46 L. ed. 679, 689, 691, 22 Sup. Ct. Rep. 431; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 110, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30.

If the probable effect of the provisions of the statutes of the state is to produce the discrimination against persons which the equal protection of the Constitution forbids, taxation by which such discrimination is made is unlawful.

San Francisco Nat. Bank v. *Dodge*, 197 U. S. 70, 78, 49 L. ed. 669, 673, 25 Sup. Ct. Rep. 384; *Davenport Nat. Bank* v. *Board of Equalization*, 123 U. S. 83, 86, 31 L. ed. 94, 97, 8 Sup. Ct. Rep. 73; *New York* v. *Weaver*, 100 U. S. 539, 544, 25 L. ed. 705, 706; *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143, 145, 146, 25 L. ed. 901, 902; *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Hills* v. *National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052.

Under the 14th Amendment the method for the assessment and collection of taxes provided by the state shall not be inconsistent with natural justice.

Turpin v. *Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20.

Other taxpayers of the state not subjected to taxation under said act No. 173 are protected by the principle everywhere recognized as fundamental, *viz.*, the principle of self-taxation by the legislative action of representatives who are directly responsible to the taxpayers of the district in which the taxes are levied. This is especially the fundamental principle of taxation in the state of Michigan.

Cooley, Taxn. 2d ed. 61–63, 141, 142, 241, 242; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Metropolitan Police* v. *Board of Auditors*, 68 Mich. 576, 36 N. W. 743; *Blades* v. *Water Comrs.* 122 Mich. 366, 81 N. W. 271; *Wilcox* v. *Paddock*, 65 Mich. 23, 31 N. W. 609; *People ex rel. Le Roy* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Cook Farm Co.* v. *Detroit*, 124 Mich. 426, 83 N. W. 130; *Atty. Gen.* v. *Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; *United States* v. *New Orleans*, 98 U. S. 381, 392, 25 L. ed. 225; *State Railroad Tax Cases*, 92 U. S. 575, 615, 23 L. ed. 663, 674; *Heine* v. *Levee Comrs.* 19 Wall. 655, 22 L. ed. 223; *Meriwether* v. *Garrett*, 102 U. S. 472, 501, 515, 26 L. ed. 197, 200, 205; *Thompson* v. *Allen County*, 115 U. S. 550, 555, 29 L. ed. 472, 474, 6 Sup. Ct. Rep. 140; *Harward* v. *St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *Parks* v. *Wyandotte County*, 61 Fed. 436.

The principles of due process of law as defined by this court in respect to taxation require that the process shall be pursued in the ordinary mode prescribed by law, be just to the parties affected, be adapted to the end to be attained, and, when necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought, and there must be the observance of those general rules established in our system of jurisprudence for the security of private rights.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; *Davidson* v. *New Orleans*, 96 U. S. 97, 107, 24 L. ed. 616, 620; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Lent* v. *Tillson*, 140 U. S. 316, 327, 35 L. ed. 419, 425, 11 Sup. Ct. Rep. 825; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, 29 L. ed. 414, 416, 6 Sup. Ct. Rep. 57; *Norwood* v. *Baker*, 172 U. S. 269, 277, 278, 43 L. ed. 443, 446, 447, 19 Sup. Ct. Rep. 187; *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; *Weimer* v. *Bunbury*, 30 Mich. 201; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 356, 45 L. ed. 879, 894, 21 Sup. Ct. Rep. 625; Miller, Const., p. 666; Cooley, Taxn. 2d ed. p. 51; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) *supra*; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385.

To determine the tax, when it is an ad valorem tax, requires that the legislature state the amount to be raised or the rate of the tax upon the dollar of the valuation. The determination of the amount to be raised, or the rate of taxation on the valuation, is the essential, the chief and necessary act in taxation. In the nature of the case, the determination of the amount, or the rate, is a legislative act. Being a necessary act of the legislature, it is not in the power of the state, in the preservation of the established principles of American law, which constitute the law of the land, to delegate or refer such determination to the action of any other body of officials. It cannot be referred to and made to depend upon the legislative or discretionary action of the municipalities.

Cooley, Taxn. 2d ed. pp. 61–63, 141, 142, 241, 242; *People ex rel. Park Comrs.* v. *Detroit*, *Metropolitan Police* v. *Board of Auditors*, *Blades* v. *Water Comrs.*, *Wilcox* v. *Paddock*, *People ex rel. Le Roy* v. *Hurlbut*, *Cook Farm Co.* v. *Detroit*, *Atty. Gen.* v. *Detroit*, *United States* v. *New Orleans*, *State Railroad Tax Cases*, *Heine* v. *Levee Comrs.*, *Meriwether* v. *Garrett*, *Thompson* v. *Allen County*, *Harward* v. *St. Clair & M. Levee & Drainage Co.* and *Parks* v. *Wyandotte County*, *supra*, *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 664, 22 L. ed. 455, 461.

In the determination of a tax by the legislature it is an essential of just legislation that the legislature act in view of, and determine the needs of the public in respect to, the objects for which moneys are to be raised by taxation, and of the amount necessary to provide for those needs, and also the extent to which it is just to burden the taxpayers against whom the taxes are to be charged. These are principles which are fundamental in taxation.

Midland Twp. v. *Roscommon Twp.* 39 Mich. 424; *Michigan Land & Iron Co.* v. *L'Anse Twp.* 63 Mich. 700, 30 N. W. 331.

Where the amount of the tax to be raised, or the rate of taxation, is determined by the legislature itself, the taxpayers who are to be charged with the taxes have a right to and an opportunity to be heard by the legislature upon the whole subject of the taxation, including the purpose of the tax, the needs of the public for the promotion of the object for which the taxes are to be imposed, the amount of taxation required for those needs, and the amount which can be properly and justly charged against the taxpayers.

Cooley, Const. Lim. 7th ed. pp. 497, 498; 2 Story, Const. § 1894; *United States* v. *Cruikshank*, 92 U. S. 542, 552, 23 L. ed. 588, 591; *Citizens' Bank* v. *Board of Assessors*, 54 Fed. 73.

The Constitution of Michigan grants to the taxpayers the absolute right to a hearing before the legislature upon the measures to be adopted for their taxation.

State Tax-Law Cases, 54 Mich. 350, 20 N. W. 493.

The determination of a district for taxation—that is, what property shall be subject to taxation—for local purposes, is legislative action; and when, instead of the legislature making that determination, it delegates to a board of commissioners the power to determine the taxing district, the taxpayers have a right to a hearing upon that subject before such board. The deprivation of the right to such hearing would be taking property by taxation without due process of law.

Paulsen v. *Portland*, 149 U. S. 30, 40, 37 L. ed. 637, 641, 13 Sup. Ct. Rep. 750; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 112, 170, 175, 41 L. ed. 369, 392, 17 Sup. Ct. Rep. 56; *Spencer* v. *Merchant*, 125 U. S. 345, 356, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 339–341, 45 L. ed. 879, 887, 888, 21 Sup. Ct. Rep. 625.

The determination of the rate of taxation in the manner provided by the act, and the deprivation of these taxpayers of the right of hearing, by the operation of said act, violates due process of law.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 110, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431.

The 14th Amendment to the Constitution of the United States, which forbids the state to deprive any person of property without due process of law, or to deny to any person within the jurisdiction of the state the equal protection of the laws, applies to all the means by which such a denial can be made.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 672, 29 L. ed. 516, 524, 6 Sup. Ct. Rep. 252; *Gunn* v. *Barry*, 15 Wall. 610, 623, 21 L. ed. 212, 215; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co. supra.*

Taxation imposed for a purpose which is not a public purpose is the taking of property without due process of law, and the courts may determine whether the purpose of the taxation is a public purpose.

Citizens' Sav. & L. Asso. v. *Topeka*, 20 Wall. 655, 663, 22 L. ed. 455, 461; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; *Dodge* v. *Mission Twp.* 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; *People ex rel. Detroit & H. R. Co.* v. *Salem*, 20 Mich. 452, 4 Am. Rep. 400; *People ex rel. Bay City* v. *State Treasurer*, 23 Mich. 499; *Anderson* v. *Hill*, 54 Mich. 477, 20 N. W. 549.

The state does not act on the legal presumption that assessments made by the local assessors are made in fact at cash value of the property as between the taxpayers, in respect to both natural persons and corporations, not taxed under this act.

Yelverton v. *Steele*, 36 Mich. 62; *Aplin* v. *Roberts*, 83 Mich. 471, 47 N. W. 442; *Auditor General* v. *Hill*, 97 Mich. 80, 56 N. W. 219; *Maxwell* v. *Paine*, 53 Mich. 30 18 N. W. 546.

For inequality in the assessments, arising from any cause whatever, equalization is the remedy provided by statute, and affords protection as complete as it is practicable for the law to provide.

Cooley, Taxn. 2d ed. pp. 748, 749; Judson, Taxn. §§ 464, 466; *Hazzard* v. *O'Bannon*, 36 Fed. 854; *State Railroad Tax Cases*, 92 U. S. 575, 615, 616, 23 L. ed. 663, 674; *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901; *German Nat. Bank* v. *Kimball*, 103 U. S. 732, 734, 26 L. ed. 469; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 710, 711, 28 L. ed. 569, 572, 573, 4 Sup. Ct. Rep. 663; *Pioneer Iron Co.* v. *Negaunce*, 116 Mich. 430, 74 N. W. 700; *Walsh* v. *King*, 74 Mich. 350, 41 N. W. 1080; *Merrill* v. *Humphrey*, 24 Mich. 170; *Porter* v. *Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Chicago, B. & Q. R. Co.* v. *Cole*, 75 Ill. 591.

The state denies to the companies taxed under act No. 173 the equal protection of the laws, by denying to them the protection of equalization of the assessment of their own property and the property of others by which the rate and amount of their taxation are determined, while it affords to all other taxpayers of the state (corporations and all persons against whom ad valorem taxes are assessed) the protection of the equalization of the assessment of their own property and the property of others, by which the rate and amount of their taxation are determined.

Railroad & Teleph. Cos. v. *Board of Equalizers*, 85 Fed. 302; *Nashville, C. & St. L. R. Co.* v. *Taylor*, 86 Fed. 168; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; *Railroad Tax Cases* and *Santa Clara County* v. *Southern P. R. Co. supra; Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 691, 698, 699, 43 L. ed. 858, 862, 864, 19 Sup. Ct. Rep. 565; *State ex rel. Poe* v. *Jones*, 51 Ohio St. 492, 37 N. E. 945; *Burrows* v. *Brooks*, 113 Mich. 307, 71 N. W. 460; *Stimson* v. *Muskegon Booming Co.* 100 Mich. 347, 59 N. W. 142; *Park* v. *Detroit Free*

Press Co. 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; *Kuhn* v. *Detroit*, 70 Mich. 534, 38 N. W. 470; *Brown* v. *Alabama G. S. R. Co.* 87 Ala. 370, 6 So. 295; *Pearson* v. *Portland*, 69 Me. 278, 31 Am. Dec. 276; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Yot Sang*, 75 Fed. 983; *Louisville Trust Co.* v. *Stone*, 46 C. C. A. 299, 107 Fed. 305.

The granting to natural persons, under the general statute, the right to have the cash value of their personal property which consists of credits determined by deducting from the amounts of the credits the amount of their indebtedness, and withholding that right from the companies, under said act No. 173, is a denial of the equal protection of the laws.

Santa Clara County v. *Southern P. R. Co.* and *Railroad Tax Cases, supra; Russell* v. *Croy*, 164 Mo. 69, 63 S. W. 853; *Detroit Citizens' Street R. Co.* v. *Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809.

Mr. **O. E. Butterfield** also argued the cause, and, with *Messrs. Henry Russell, Ashley Pond, Lloyd W. Bowers,* and *Benton Hanchett*, filed a brief for appellant on the question of undervaluation.

Messrs. **Charles A. Blair, Loyal E. Knappen,** and **Roger Irving Wykes** argued the cause, and, with *Messrs. John E. Bird* and *Charles E. Townsend*, filed a brief for appellee:

The taxing power of the state is one of its highest attributes of sovereignty, and essential to its continued existence.

Union P. R. Co. v. *Peniston*, 18 Wall. 5, 29, 30, 21 L. ed. 787, 791; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Picard* v. *East Tennessee, V. & G. R. Co.* 130 U. S. 641, 32 L. ed. 1052, 9 Sup. Ct. Rep. 640; *Weston* v. *Charleston*, 2 Pet. 466, 7 L. ed. 487; *Providence Bank* v. *Billings*, 4 Pet. 516, 7 L. ed. 940.

The 14th Amendment was not designed or intended to limit the taxing power of the states.

Slaughter-House Cases, 16 Wall. 36, 81, 21 L. ed. 394, 410; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888.

The presumption of constitutionality following taxing statutes is stronger than applies to laws generally, and only where a taxing system clearly and palpably violates the fundamental law will it be held invalid.

Henderson Bridge Co. v. *Henderson*, 173 U. S. 592, 614, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; *King* v. *Mullins*, 171 U. S. 404, 435, 436, 43 L. ed. 214, 226, 18 Sup. Ct. Rep. 925; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 562, 563, 46 L. ed. 679, 690, 691, 22 Sup. Ct. Rep. 431; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 754, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 479, 46 L. ed. 287, 22 Sup. Ct. Rep. 176; *Central P. R. Co.* v. *Evans*, 111 Fed. 76.

The 14th Amendment to the Federal Constitution was not designed or intended to prevent the state from adjusting its system of taxation in all proper and reasonable ways, nor intended to compel it to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation or the imposition of different rates upon different classes; but permits classification for purposes of taxation, the application of different rules of assessment, valuation, and review to different classes, and the imposition of different rates thereon; and it is sufficient that all persons within the same class are treated alike, and that there is no discrimination in favor of one as against another of the same class.

Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Giozza* v. *Tiernan*, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 228, 41 L. ed. 697, 17 Sup. Ct. Rep. 305; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Billings* v. *Illinois*, 188 U. S. 97, 102, 103, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272.

The state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion.

Merchants' & M. Nat. Bank v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Clark* v. *Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *New York* v. *Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; *Kidd* v. *Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Cook* v. *Marshall County*, 196 U. S. 269, 49 L. ed. 474, 25 Sup. Ct. Rep. 233; *Coulter* v. *Louisville & N. R. Co.* 196 U. S. 608, 609, 49 L. ed. 617, 618, 25 Sup. Ct. Rep. 342; *Field* v. *Barber Asphalt Paving Co.* 194 U. S. 621, 622, 48 L. ed. 1153, 24 Sup. Ct. Rep. 784.

The limitations upon this power require it to rest upon some difference, bearing a just and reasonable relation to the act in respect to which the classification is proposed, and it is enough that there is no discrimination in favor of one as against another of the same class.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Missouri* v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 22, 25 L. ed. 989; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Duncan* v. *Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Bell's Gap R. Co.* v. *Pennsylvania* and *Home Ins. Co.* v. *New York*, *supra*; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1036, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

Different rules apply to, and fix and limit the power of, classification in cases of taxation than in other cases.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 562, 563, 46 L. ed. 690, 691, 22 Sup. Ct. Rep. 431; *American Sugar Ref. Co.* v. *Louisiana* and *Magoun* v. *Illinois Trust & Sav. Bank*, *supra*; *Billings* v. *Illinois*, 188 U. S. 102, 47 L. ed. 403, 23 Sup. Ct. Rep. 272; *Cook* v. *Marshall County*, 196 U. S. 274, 49 L. ed. 476, 25 Sup. Ct. Rep. 233.

The 14th Amendment, as applied to railroad and other public service corporations, permits separate classification of those corporations and their property, for purposes of taxation, and the laws of the several states have uniformly provided separate and distinct systems and rules of taxation for railroad property, which have been generally sustained.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; *Kentucky Railroad Tax Cases*, *supra*; *Cincinnati, N. O. & T. P. R. Co.* v. *Com.* 81 Ky. 492; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396, 89 Ga. 574, 15 S. E. 293; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114, 133 Ind. 625, 33 N. E. 432; *Northern P. R. Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386; *McHenry* v. *Alford*, 168 U. S. 651, 665, 673, 42 L. ed. 614, 619, 622, 18 Sup. Ct. Rep. 242; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 480, 46 L. ed. 287, 22 Sup. Ct. Rep. 176; *Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 7 Kan. 210; *State Assessors* v. *Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; *Central Iowa R. Co.* v. *Wright County*, 67 Iowa, 199, 25 N. W. 128; *Dubuque* v. *Chicago, D. & M. R. Co.* 47 Iowa, 200; *Owensboro & N. R. Co.* v. *Daviess County*, 8 Ky. L. Rep. 773, 3 S. W. 164; *Ames* v. *People*, 26 Colo. 83, 56 Pac. 656; *Yazoo & M. Valley R. Co.* v. *Adams*, 77 Miss. 764, 25 So. 355; *Louisville & N. R. Co.* v. *Louisville*, 16 Ky. L. Rep. 796, 29 S. W. 865; *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 52 Ark. 529, 7 L.R.A. 374, 13 S. W. 254; *Chamberlain* v. *Walter*, 60 Fed. 788; *Sawyer* v. *Dooley*, 21 Nev. 390, 32 Pac. 437; *State ex rel. Kansas City, St. J. & C. B. R. Co.* v. *Severance*, 55 Mo. 378; 2 Elliott, Railroads, § 740; Cooley, Taxn. 3d ed. 72 *et seq.*; Guthrie, 14th Amendment, p. 113.

The railway corporation is engaged in rendering a public service in which the state itself might engage and to which it may attach such limitations as it chooses.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 93, 94, 46 L. ed. 102, 103, 22 Sup. Ct. Rep. 30.

The property of railroad corporations exists as a connected whole in a large number of municipalities, rendering it impossible to reach its actual value through assessment and taxation as other property is assessed and taxed.

Adams Exp. Co. v. *Ohio State Auditor*, 166 U. S. 219, 41 L. ed. 977, 17 Sup. Ct. Rep. 604; Rorer, Railroads, § 14, p. 1499; *Dubuque* v. *Chicago, D. & M. R. Co.* 47 Iowa, 202; *State Assessors* v. *Central R. Co.* 48 N. J. L. 322, 4 Atl. 578; *California* v. *Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Shenandoah Valley R. Co.* v. *Clarke County*, 78 Va. 279.

The right to alter, amend, or repeal is reserved in the charter under which Michigan railroad corporations do business; this permits different treatment for taxation purposes, as long as fundamental rights are not interfered with.

St. Louis, I. M. & S. R. Co. v. *Paul*, 173 U. S. 408, 409, 43 L. ed. 748, 19 Sup. Ct. Rep. 419.

The usage and practice in Michigan has always been to tax railroad corporations by a distinct rule or system. Such requirements as proceed within reasonable limits and general usage are within the discretion of the legislature.

American Sugar Ref. Co. v. *Louisiana*, 179 U. S. 94, 45 L. ed. 104, 21 Sup. Ct. Rep. 43; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 233, 33 L. ed. 894, 10 Sup. Ct. Rep. 533; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 294, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594.

The same principles which permit the taxation of a railroad corporation by a specific system allow its separate treatment for the purposes of an ad valorem system. The specific tax has been uniformly sustained.

Delaware Railroad Tax, 18 Wall. 206, 231,

21 L. ed. 888, 896; *McHenry* v. *Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; *Northern P. R. Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386.

The railroad property is made a separate class for the purpose of the imposition of a separate and distinct tax. This warrants its being made the subject of a separate system of taxation.

Travellers' Ins. Co. v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

Numerous statutes, limited in operation to railroad corporations, have been sustained.

Minneapolis & St. L. R. Co. v. *Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Louisville & N. R. Co.* v. *Railroad Commission*, 19 Fed. 679; *Com.* v. *Sharon Coal Co.* 164 Pa. 284, 30 Atl. 127, 128; *New York* v. *Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121.

Railroad companies have always been regarded as special subjects of classification for other purposes than taxation, notwithstanding the more stringent rule of classification for other purposes.

Minneapolis & St. L. R. Co. v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207: *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co.* v. *Herrick*, *supra*; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *St. Louis, I. M. & S. R. Co.* v. *Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 258, 41 L. ed. 994, 17 Sup. Ct. Rep. 992; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 103, 18 L.R.A. 440, 447, 16 S. E. 429; *Schoolcraft* v. *Louisville & N. R. Co.* (*Louisville Safety Vault & T. Co.* v. *Louisville & N. R. Co.*) 92 Ky. 233, 17 S. W. 567; *Georgia R. & Bkg. Co.* v. *Miller*, 90 Ga. 571, 16 S. E. 939; *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Clark* v. *Russell*, 38 C. C. A. 541, 97 Fed. 900; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 269, 48 L. ed. 972, 24 Sup. Ct. Rep. 638; *Central P. R. Co.* v. *Evans*, 111 Fed. 76.

The legislature by statute, and the people by constitutional provision, have the right to impose any tax rate they see fit. The rate imposed, the reasons for its imposition, and the basis of its measurement, are all matters of policy which do not concern the courts, and which are within the exclusive jurisdiction of the legislature and the people.

Spencer v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579, 606; *Providence Bank* v. *Billings*, 4 Pet. 563, 7 L. ed. 956; *Wharton* v. *School Directors*, 42 Pa. 358; Cooley, Taxn., 2d ed. 343; Guthrie, 14th Amendment, 95 *et seq.*

The validity of the tax can, in no way, be dependent upon the mode the state may see fit to adopt in fixing the amount for any year.

Home Ins. Co. v. *New York*, 134 U. S. 594, 600, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217, 228, 229, 35 L. ed. 994–996, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 387, 48 L. ed. 231, 24 Sup. Ct. Rep. 107; *Snyder* v. *Bettman*, 190 U. S. 254, 47 L. ed. 1037, 23 Sup. Ct. Rep. 803; *Plummer* v. *Coler*, 178 U. S. 115, 127, 134, 44 L. ed. 998, 1005, 1007, 20 Sup. Ct. Rep. 829; *Cumberland & P. R. Co.* v. *State*, 92 Md. 668, 52 L.R.A. 764, 48 Atl. 503; *Railroad Comrs.* v. *Wabash R. Co.* 126 Mich. 115, 85 N. W. 466; *Legal Tender Cases*, 12 Wall. 561, 20 L. ed. 315; *State ex rel. Terre Haute* v. *Kolsem*, 130 Ind. 443, 14 L.R.A. 566, 29 N. E. 595; *Society for Savings* v. *Coite*, 6 Wall. 594, 608, 18 L. ed. 897, 903; *State ex rel. Clark* v. *Haworth*, 122 Ind. 466, 7 L.R.A. 240, 23 N. E. 946.

The authority of a property owner to object, upon review, to irregularity of assessments, is not limited to those of his own property.

Avery v. *East Saginaw*, 44 Mich. 590, 7 N. W. 177; *Dundee Mortg. Trust Invest. Co.* v. *Charlton*, 32 Fed. 192; *State ex rel. Goff* v. *Dodge County*, 20 Neb. 600, 31 N. W. 117; *St. Louis Bridge Co.* v. *People*, 128 Ill. 428, 21 N. E. 428; *Detroit* v. *Board of Assessors* (*Detroit* v. *Rentz*) 91 Mich. 88, 16 L.R.A. 59, 51 N. W. 787.

The fact that the burdens of taxation, as compared with the benefits, are unequally shared, does not invalidate the taxes. If property receives any benefit from a disbursement, however small, it can be made to share equally in the taxation, and this, though its property is not in the municipality making the disbursement for which the tax is levied, and though some other property has been more directly benefited.

Foster v. *Pryor*, 189 U. S. 325, 331, 47 L. ed. 835, 837, 23 Sup. Ct. Rep. 549; *Wagoner* v. *Evans*, 170 U. S. 592, 42 L. ed 1156, 18 Sup. Ct. Rep. 730; *Thomas* v. *Gay* 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep

340; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.

The state has determined that the railroad corporations receive protection and benefits from its laws equal in amount to the expenditures and taxes of the several municipalities for state, county, township, school, and municipal purposes, and equal to that received by other property throughout the state. This is conclusive upon this court.

French v. *Barber Asphalt Paving Co.* 181 U. S. 341, 344, 45 L. ed. 888, 889, 21 Sup. Ct. Rep. 625; *Parsons* v. *District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Chadwick* v. *Kelley*, 187 U. S. 544, 47 L. ed. 294, 23 Sup. Ct. Rep. 175.

The function of the board of assessors in determining the tax rate was purely ministerial, for the purpose of reducing to a certainty the rate fixed in the Constitution and statutes.

Board of Education v. *State Assessors*, 133 Mich. 116, 94 N. W. 668.

In the performance of ministerial functions, there is no necessity for hearing, as a hearing could not affect the result. That result must, in all instances, be the same, where the method pointed out by the statute is carried out.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 708, 709, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *Amery* v. *Keokuk*, 72 Iowa, 704, 30 N. W. 780; *Gillette* v. *Denver*, 21 Fed. 824; *Lower Kings River Reclamation Dist. No. 531* v. *Phillips*, 108 Cal. 314, 39 Pac. 630, 41 Pac. 335; *Hodge* v. *Muscatine County*, 196 U. S. 280, 49 L. ed. 481, 25 Sup. Ct. Rep. 237.

The legislature designated the class and rate of taxation it shall bear; there is no apportionment among the members of the class, and no opportunity of hearing upon the rate is required to be given; full hearing has been accorded upon the assessments.

Spencer v. *Merchant*, 125 U. S. 353, 354, 31 L. ed. 766, 767, 8 Sup. Ct. Rep. 921; *Fallbrook Irrig. District* v. *Bradley*, 164 U. S. 174, 41 L. ed. 394, 17 Sup. Ct. Rep. 56; *Walston* v. *Nevin*, 128 U. S. 582, 32 L. ed. 546, 9 Sup. Ct. Rep. 192; *Paulsen* v. *Portland*, 149 U. S. 39, 40, 37 L. ed. 640, 641, 13 Sup. Ct. Rep. 750; *Nottage* v. *Portland*, 35 Or. 553, 76 Am. St. Rep. 513, 58 Pac. 883; Guthrie, 14th Amendment, 96.

If the state board of assessors, in reaching the rate, pursues a wrong method or assumes an excess of authority, the property owner affected by such erroneous procurement of the rate is entitled to redress his or its grievances in the courts. This satisfies all constitutional requirements.

McMillen v. *Anderson*, 95 U. S. 37, 24 L. ed. 335; *Glidden* v. *Harrington*, 189 U. S. 259, 260, 47 L. ed. 801, 802, 23 Sup. Ct. Rep. 574.

The system, under the statute in question, is capable of subjecting both classes to equality of taxation as fully as any that could be devised. Inequality resulting from a system reasonably designed to secure equality is without redress.

Travelers' Ins. Co. v. *Connecticut*, 185 U. S. 364, 371, 46 L. ed. 949, 954, 22 Sup. Ct. Rep. 673; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. ed. 189, 195; *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. ed. 663, 673; *Merchants' & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

If the statute makes a valid classification in selecting the railroad and other property subject thereto, for the purpose of applying to it a different rule of taxation than is applied to other property, there is no requirement that it impose the same rate on the property of both classes.

Magoun v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Clark* v. *Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 351, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Brannon, 14th Amendment, pp. 340, 352; Guthrie, 14th Amendment, pp. 128, 130, 131.

If, in the administration of the law, any inequality results, that defect of administration does not invalidate the act itself; it is only where officers charged with the administration of the law are moved by corrupt motives that courts give relief from illegal assessments.

Cummings v. *Merchants' Nat. Bank*, 101 U. S. 153, 161, 25 L. ed. 903, 906; *State, Central R. Co., Prosecutor*, v. *State Assessors*, 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789; *Dundee Mortg. & T. Invest. Co.* v. *School Dist. No. 1*, 21 Fed. 151; *Wagoner* v. *Loomis*, 37 Ohio St. 571; *Taylor* v. *Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Muskegon* v. *Boyce*, 123 Mich. 535, 82 N. W. 264.

The classification is proper and the difference in the rule of equalization applied to different classes is no greater than has been applied and sustained in many cases.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L.

ed. 1031, 14 Sup. Ct. Rep. 1114; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Florida, C. & P. R. Co.* v. *Reynolds*, 183 U. S. 480, 46 L. ed. 287, 22 Sup. Ct. Rep. 176; *Chamberlain* v. *Walter*, 60 Fed. 788; *Louisville & N. R. Co.* v. *Louisville*, 16 Ky. L. Rep. 796, 29 S. W. 865; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Northern P. R. Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386; *McHenry* v. *Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; *Central Iowa R. Co.* v. *Wright County*, 67 Iowa, 199, 25 N. W. 128; *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 52 Ark. 529, 7 L.R.A. 374, 13 S. W. 254; *New York* v. *Barker*, 179 U. S. 286, 45 L. ed. 194, 21 Sup. Ct. Rep. 121.

Where all classes of property are required to be assessed at cash value, it is not necessary that equalization be granted alike to all classes.

Cummings v. *Merchants' Nat. Bank*, 101 U. S. 153, 160, 161, 25 L. ed. 903, 905, 906; *Taylor* v. *Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Wagoner* v. *Loomis*, 37 Ohio St. 571.

Any system which gives to the party any means of questioning the validity or amount of the tax at some stage of the proceeding, either before it is determined and fixed, or to contest subsequent proceedings for collection, is due process.

Brannon, 14th Amendment, 349–351; *State Railroad Tax Cases*, 92 U. S. 575, 610, 23 L. ed. 663, 672; *McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335; *Kentucky Railroad Tax Cases, supra; Winona & St. P. Land Co.* v. *Minnesota*, 159 U. S. 537, 40 L. ed. 251, 16 Sup. Ct. Rep. 83; *Pittsburgh, C. C. & St. L. R. Co.* v. *Public Works*, 172 U. S. 45, 43 L. ed. 359, 19 Sup. Ct. Rep. 90; *Weyerhaeuser* v. *Minnesota*, 176 U. S. 556, 557, 44 L. ed. 586, 20 Sup. Ct. Rep. 485; *Voigt* v. *Detroit*, 184 U. S. 122, 46 L. ed. 462, 22 Sup. Ct. Rep. 337; *King* v. *Portland*, 184 U. S. 69, 70, 46 L. ed. 436, 22 Sup. Ct. Rep. 290; *Turpin* v. *Lemon*, 187 U. S. 58, 47 L. ed. 74, 23 Sup. Ct. Rep. 20; *Glidden* v. *Herrington*, 189 U. S. 259, 260, 47 L. ed. 801, 802, 23 Sup. Ct. Rep. 574; *Leigh* v. *Green*, 193 U. S. 88, 48 L. ed. 627, 24 Sup. Ct. Rep. 390; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 45 L. ed. 914, 24 Sup. Ct. Rep. 644; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Tonawanda* v. *Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Detroit* v. *Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624.

The rate is fixed by the Constitution, and complainant has had full representation. The right of suffrage is not essential to the validity of taxing statutes.

Cooley, Taxn. 3d ed. 96; *Thomas* v. *Gay*, 169 U. S. 264, 275, 42 L. ed. 740, 744, 18 Sup. Ct. Rep. 340; *Wheeler* v. *Wall*, 6 Allen, 558; *Smith* v. *Macon*, 20 Ark. 17.

The guaranty, to every state, of a republican form of government, was not a guaranty of any rigidly fixed form of government, but of one similar to that existing in the several states at the time of the adoption of the Constitution.

Story Const. 5th ed. § 1841; Cooley, Const. Lim. 7th ed. 238; *Minor* v. *Happersett*, 21 Wall. 162, 175, 22 L. ed. 627, 630.

The guaranty was not intended to guard individual rights and interests, but was to the states, as states.

Cooley, Const. Lim. 7th ed. 45; *Kadderly* v. *Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; Story, Const. 5th ed. § 1815; Tucker, Const. p. 638; *Texas* v. *White*, 7 Wall. 700, 720, 721, 19 L. ed. 227, 235, 236.

Questions of whether a government exists or is republican in form are not properly represented to the judiciary. The nature of the thing attempted to be secured, the means, methods, and action and judgment for securing it, are political in character, to be determined by Congress, and not the courts.

Luther v. *Borden*, 7 How. 39, 42, 47, 57, 12 L. ed. 597, 599, 601, 605; *Texas* v. *White*, 7 Wall. 700, 730. 19 L. ed. 227, 239; *White* v. *Hart*, 13 Wall. 649, 652, 20 L. ed. 686, 687; Tucker, Const. pp. 637, 638; Story, Const. Cooley's note, 5th ed. p. 593; Cooley. Const. Lim. 7th ed. pp. 237, 238.

No hearing on the rate of taxation is essential, as the rate is fixed in the Constitution and by the legislature in the exercise of governmental powers.

Spencer v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 341, 344, 45 L. ed. 888, 889, 21 Sup. Ct. Rep. 625; *Williams* v. *Eggleston*, 170 U. S. 311, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617; *Parsons* v. *District of Columbia*, 170 U. S. 45–50, 42 L. ed. 943–945, 18 Sup. Ct. Rep. 521; *Paulsen* v. *Portland*, 149 U. S. 39, 40, 37 L. ed. 640, 641, 13 Sup. Ct. Rep. 750: Judson, Taxn. §§ 377, *et seq.* p. 467.

Mr. John E. Bird filed a separate brief for appellee:

The character of the right of taxation, the necessity for its continued existence, and the effort on the part of the courts to limit its application as little as possible, have led to rules in the application of the 14th Amendment which are peculiar to it, and this court has, in a number of cases, sustained stat-

utes relating to taxation, which, had they related to police regulations or kindred subjects, would have been declared to violate the requirement of equal protection of laws.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 562, 563, 46 L. ed. 691, 22 Sup. Ct. Rep. 431; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Cook* v. *Marshall County*, 196 U. S. 269, 274, 49 L. ed. 474, 476, 25 Sup. Ct. Rep. 233.

In matters of taxation, the question of the propriety and necessity of classification is fully left to the legislative discretion. While the rule has never been expressed in this language, still, such is the necessary effect of *Billings* v. *Illinois*, 188 U. S. 102, 47 L. ed. 403, 23 Sup. Ct. Rep. 272.

Statutes making a separation of railroad from other property for the imposition of taxes thereon by a peculiar system have been universally sustained.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 480, 46 L. ed. 287, 22 Sup. Ct. Rep. 176; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

When property is adapted to selection, and is selected for the bearing of a tax of a particular character, that fact in itself constitutes a sufficient basis of distinction and classification separate from other property.

Travellers' Ins. Co. v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

A tax was sustained in *Trowbridge* v. *Detroit*, 99 Mich. 443, 58 N. W. 368, where the rate of taxation was made to depend upon the award of a jury.

The validity of taxation can in no way depend upon the mode of measurement.

Maine v. *Grand Trunk R. Co.* 142 U. S. 217, 228, 229, 35 L. ed. 994, 995, 996, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 163; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

The authority of the state to arrange taxing districts and to apportion the burden which shall be borne by property therein, without criticism on the ground that the burdens are unequally apportioned, is clearly sustained.

Williams v. *Eggleston*, 170 U. S. 310, 311, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617; *Forsyth* v. *Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.

It is no objection to a tax that the party required to pay it receives no benefit from the particular burden.

Thomas v. *Gay*, 169 U. S. 280, 42 L. ed. 746, 18 Sup. Ct. Rep. 340.

The only discretion reposed in any officer by that act is in the board of assessors in making the assessments. There a hearing is, by the statute, granted. In all other respects, including the action of the board in fixing the rate, the tax is fixed and levied by ministerial action; and, as a hearing would not change the result, the right of hearing is not essential.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 708, 709, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Where the legislature or the people, by Constitution, fix the rate, opportunity for hearing thereon is not essential. The power is governmental, and the subject is committed to the absolute discretion of the legislature.

Spencer v. *Merchant*, 125 U. S. 354, 31 L. ed. 767, 8 Sup. Ct. Rep. 921.

The question of equalization is ruled by the case of *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 160, 25 L. ed. 903, 905.

Mr. Loyal E. Knappen filed a separate brief for appellee on the question of undervaluation.

Mr. Justice **Brewer** delivered the opinion of the court:

The unconstitutionality of a statute may depend upon its conflict with the Constitution of the state or with that of the *United [291] States. If conflict with the state Constitution is the sole gound of attack, the supreme court of the state is the final authority (*Merchants' & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited in the opinion); while, in the other case, the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the Federal court and by this suit, and conflict with both Constitutions is alleged. Undoubtedly a Federal court has the jurisdiction, and, when the question is properly presented, it may often become its duty, to pass upon an alleged conflict between a statute and the state Constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination. At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the state Constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the state, and therefore of general public in-

terest. *Coulter* v. *Louisville & N. R. Co.* 196 U. S. 599-609, 49 L. ed. 615-618, 25 Sup. Ct. Rep. 342. And this reluctance becomes more imperative when the statute has been before the highest court of the state, and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined.

In the case at bar the rate of taxation imposed upon the railroad and other corporate property is the average rate of taxation upon other property subject to ad valorem taxes, and that average rate is ascertained by dividing the total tax levy on all such property by the value of the property. In *Board of Education* v. *State Assessors*, 133 Mich. 116, 94 N. W. 668, the following case arising under the statute was presented (p. 117, N. W. p. 668):

"This is an application for a mandamus. It sets out, in substance, that the state board of assessors, in levying the tax upon the railroad property of this state, has as-
[292] sumed to fix the rate *of taxation by dividing the total tax levy on all property other than railroad property by the value of such other property, as determined by the defendant board, by adding to the actual assessed value of such property as fixed by the local assessors and by the board of state tax commissioners, acting under the authority of the law relating to the assessment of taxes, the sum of $296,748,142, thus making the aggregate divisor in determining the rate of taxation that much in excess of the assessed valuation, thereby reducing the rate to be levied upon the railroad property of the state, and thus reducing the amount which the relator would receive as its portion of the tax assessed against railroad property by a very substantial sum."

This application was sustained, the court holding that the state board of assessors had no power to increase the value as returned to them by the local assessors and board of state tax commissioners, and saying (p. 119, N. W. p. 669):

"A fair reading of this language of the statute, we think, leads to the conclusion that the board of assessors has imposed upon it the duty, ministerial in character, of determining by a computation from *data*, which the law provides for placing in its hands, the rate of taxation which other property in the state is subjected to, as it appears by assessment rolls which are supposed to contain an accurate and true assessment of all property at its full cash value."

While this case did not directly determine the constitutionality of the statute, a fair implication is that it was not regarded as obviously in conflict with the state Constitution, for in that event the court would scarcely have taken time to consider the validity of proceedings under its authority.

We, therefore, proceed to inquire whether the provisions of this act and the method of taxation therein prescribed are open to any constitutional objection. We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision *on the part of the na- [293] tion over state taxation, and, in respect to the latter, the state has, speaking generally, the freedom of a sovereign, both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the circuit court in this case (p. 232):

"There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the 14th Amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Giozza* v. *Tiernan*, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 228, 41 L. ed. 683, 697, 17 Sup. Ct. Rep. 305; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Billings* v. *Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Merchants' & M. Nat. Bank* v. *Pennsylvania, supra; Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Clark* v. *Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *New York* v. *Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; *Kidd* v. *Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Turpin* v. *Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176."

The first and principal matter of attack is the "average rate." It is contended that the fixing of the rate of taxation is a legislative function; that in ascertaining the average rate by the method described there is no exercise of the legislative judgment, but that it is determined by the action of the various local assessing and taxing boards,
[294] who, though charged with no *duty of inquiry as to the necessities of the state or the proper rate of taxation of railroad property, are in fact the only officials exercising any discretion and judgment.

There might be a question whether, even if there were a clear delegation of legislative functions to other departments of the state government, it would be void under the Federal Constitution. Whatever, in view of the distinct grant in the Federal Constitution to the President, Congress, and the Judiciary of separately the executive, legislative, and judicial powers of the nation, may be the power of Congress in the delegation of legislative functions, a very different question is presented when the restrictions of the Federal Constitution are invoked to restrain like action in a state. Crimes against the nation must be prosecuted by indictment, yet a state may proceed by information. Suppose a state, by its Constitution, grants legislative functions to the executive, or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process, or equal protection?

But it is unnecessary to enter into a discussion of this question, for in the case at bar there is no abandonment by the legislature of its functions in respect to taxation. The statute prescribes, as the rate of taxation upon railroad property, the average rate of taxation on all other property subject to ad valorem taxes. It provides the most direct way for ascertaining such average rate,—deducing it from a consideration of all the other rates. No authority is given to the local assessors to apply their judgment to the question of the railroad rate. Their authority in respect to the matter of taxation is precisely the same as it was before and independently of this statute. Their duty is to act according to their judgments in respect to local taxes committed to their charge. When they have finished their action, taken, as it must be assumed to have been, in conscientious discharge of the duties assigned, from it, by a simple mathematical calculation, the average rate of taxation is determined. If the legislature should be
[295] convened after they *have finished their action and then prescribe the average rate thus mathematically deduced as the rate of railroad taxation, no question could be made of its validity. It would be obviously a legislative determination of the rate of taxation. Is it any the less a legislative determination that it assumes that the various local officials will discharge their duties honestly and fairly, with reference to local necessities, and independently of the effect upon the railroad rate, and directs that the mathematical computation be made by a board of ministerial officers, and, thus made, shall become the railroad rate of taxation? Why is it necessary that the legislature be convened to add its formal approval of the integrity of the action of the local officers? May it not intrust the mathematical computation to the state board of assessors, and if so, may it not likewise act upon the assumption that the local assessors will discharge their duties with an eye single to those duties, and irrespective of the effect upon the railroad rate? It is true there is a possibility that some local board may be actuated by other than a sense of duty to the community for which it is acting, and have a thought of the ultimate effect upon the railroad rate. There is always a possibility of misconduct on the part of officials, but legislation would be seriously hindered if it may not proceed upon the assumption of a proper discharge of their duties by the various officials. And it must be remembered that, in view of the vast multitude of local taxing boards (as stated in one of the briefs of counsel for appellant, there are about 1,300 local assessment districts), the action of any single board could have but little influence upon the railroad rate. Beyond the assumption that these local officers will act from a sense of duty is the further fact that their action affects directly and principally the special communities for which they act, and that, generally speaking, is a sufficient guaranty. As said by Mr. Chief Justice Marshall, in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579, 606:

"The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, *the
[296] legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."

And again, in *Providence Bank* v. *Billings*, 4 Pet. 514, 563, 7 L. ed. 939, 956:

"This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally."

Maine v. *Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, is worthy of consideration on this question of legislative determination. The legislature of Maine graded the rate of an excise tax imposed upon railroads by the amount of their gross transportation receipts, and provided that, when a railroad was partly within and partly without the state, the gross receipts chargeable to the road within the state should be ascertained on the mileage basis. The court below held that as the Grand Trunk Railroad was partly within and partly without the state of Maine, the imposition of the tax was a regulation of commerce, and therefore in conflict with the exclusive power of Congress over interstate and foreign commerce; and rendered judgment for the company.

But this court, reversing that judgment, held that the reference to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a reasonable conclusion as to the amount of tax which should be levied, saying (p. 229, L. ed. p. 996, Inters. Com. Rep. p. 809, Sup. Ct. Rep. p. 122):

"If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and
[297] if not, we do not see how *a reference to the results of any other year could affect its character."

See also *Home Ins. Co.* v. *New York*, *supra*, and cases cited in the opinion. Of course, a passenger on the Grand Trunk Railroad knew that the fare he was paying was increasing the gross receipts, and therefore indirectly affecting the amount of the tax collectible under the statute. But it was not to be assumed that he would travel and pay fare with that object in view. No more can it be assumed in the present case that the local taxing officers, although knowing that an increase in their local tax levy will increase the tax rate upon railroads, will be led by that knowledge to forget their single duty to the community for which they are acting. No one pays money for the mere sake of compelling others to pay. Some personal advantage must be intended. No more will local tax officers levy a tax upon their neighbors, those who have placed them in position, for the mere sake of increasing the tax burden upon railroads, especially when the local levy is not followed by an equal increase in the amount of the burden cast upon railroads, and but a trifling fraction of that increase inures, either directly or indirectly, to the benefit of the taxpayers of the locality. The total value of other property in Michigan subject to ad valorem taxes was, according to the record, in the neighborhood of $1,500,000,000. A tax levy in the city of Detroit for local purposes of $1,500,000 would, therefore, increase the rate of taxation on railroad property only one mill, and that increase would profit Detroit but little, as the railroad tax is appropriated for state purposes only.

It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate.

Again, it seems more reasonable that the average rate should *be fixed by this mathe- [298]
matical computation from the other rates already established than for the legislature to prescribe in advance that which it may hope will be such rate. In the one case the exact average is determined; in the other an estimate is made, which may turn out to be more or less than the average.

While the peculiar method of ascertaining the average rate prescribed by this statute may be new, yet the application of an average rate to the taxation of railroads is not new, nor confined to Michigan. See § 1, chap. 64, Public Statutes and Session Laws of New Hampshire of January 1, 1901, section first enacted in 1878; 1 Mass. Rev. Laws (1902) chap. 12, § 93, p. 227; chap. 14, §§ 37, 40, pp. 266, 268, incl., taken from laws of 1864, 1865, and 1880; 2 Mo. Rev. Stat. (1899) §§ 9363, 9364, pp. 2175, 2176; Wis. Laws (1903) chap. 315, §§ 7–14, incl. pp. 496–499; *Boston, C. & M. R. Co.* v. *State*, 60 N. H. 87; *State ex rel. Brown* v. *Missouri P. R. Co.* 92 Mo. 137, 6 S. W. 862; *Chicago & A. R. Co.* v. *Lamkin*, 97 Mo. 496, 10 S. W. 200; *State ex rel. Gottlieb* v. *Metropolitan Street R. Co.* 161 Mo. 189, 199, 61 S. W. 603.

We have thus far assumed that there was equity and justice in applying to railroad property the average rate of taxation imposed upon other property. But this assumption is challenged. For instance, the Chicago & Northwestern Railroad Company's property is situate in the upper peninsula of the state of Michigan—

"and yet the average rate of tax applied to its property depends upon, and increases with, the taxes raised on all the counties of the 'Lower Peninsula' of Michigan, and in all the cities, towns, villages, and school districts of those counties, for purely local

purposes. If Detroit spends $10,000,000 for local government, the Northwestern Railway Company has to pay proportionately more tax on its property in northern Michigan than if Detroit's tax for local government were $5,000,000; and, beyond that, if Detroit spends $1,000,000 or $5,000,000 for purely domestic or private enterprises, such
[299] as *gas works, waterworks, street railways, parks, baths, libraries, etc., the Northwestern Railway's tax on its property (though wholly outside of Detroit—in the 'Upper Peninsula') is proportionately larger on that account.

. . . . . .

"It may well be that (as respects the immediate point) the unity of railroad property would justify a statute requiring a railroad to pay taxes to the state at a rate derived by averaging the taxes, state and local, paid by others in the same taxing jurisdiction; but the question before the court is whether it can be made to pay a tax directly dependent upon, and measured by, the local taxes of counties, cities, towns, villages, and school districts where it has no part of its property and no office. Such a plan operates to tax the railroad because of the expenses (public and private) of local communities whose benefits it does not enjoy."

But these considerations appeal mainly to the discretion of the legislature, and do not make against its power. Unless there be some specific provisions in the state Constitution compelling other action, the state may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject to taxation accordingly. There is no magic in county organization, no inherent necessity of dividing the state into small taxing districts. Frequently railroads are separated from other property, assessed by a state board, and the taxes collected therefrom applied to the general purposes of the state. Sometimes, it is true, a portion of the taxes thus collected is distributed *pro rata* to the counties along the lines of the roads, but the power of the state to apply the taxes from railroad property to only state purposes cannot be doubted, and is often exercised. If it may take all the taxes received from railroad property and apply it to general state purposes, and, to that extent, relieve counties in which there is no railroad property from their contribution to the support of the state, it has equal power to say that the average rate of taxation shall be determined, not by the
[300] rates upon other *property in the immediate localities in which the railroads are located, but by those upon all property wherever situated in the state. We do not mean to hold that cases may not arise in which enforcing this method of taxation works such injustice to a railroad as to call for judicial interference. But we do hold that the mere fact that all the property in the state is taken into account in determining the average rate does not carry with it such proof of injustice and inequality as to compel the courts in all cases to strike the latter down. From the cases that are before us involving this statute it appears that there are many railroad companies in the state, and we may fairly take judicial notice of the fact that the state is traversed in almost every direction by railroads. And while it is possible that there may be a county or two without one, yet it is an exception, and to hold that for each railroad the average rate must be determined from the property in the localities immediately contiguous or through which its road passes might well introduce into the matter of taxation a confusion and inequality resulting in far greater injustice than the uniformity established by the present system.

Further, it must be borne in mind that the taxes collected from railroads in Michigan are, by § 16 of the act, applicable to state purposes, and while it is doubtless true that the appropriation of these taxes to state purposes diminishes the tax burden which will fall upon other property, yet the case presented is one in which the legislature, taking a class of property, imposes upon it through state authorities a state tax for strictly state purposes. That, so far as the restraints of the Federal Constitution are concerned, it is within the power of a state to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to state rather than to local purposes, is not open to question. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57, is directly in point. By the legislation of Kentucky railroad companies and their property were separated from other *property, subjected to
[301] different means and methods for purposes of taxation, and upon this the court said (p. 337, L. ed. p. 419, Sup. Ct. Rep. p. 63):

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied im-

partially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

See also *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Coulter* v. *Louisville & N. R. Co.* 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342.

That no provision is made for a general equalization of railroad with other property in the state does not vitiate the assessment. See *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903, in which the question was distinctly presented and determined, the court saying (p. 161, L. ed. p. 906):

"While it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid."

While there may be no provision for an equalization of railroad with other property, it will be perceived that the statute names the time and place for the sessions of the assessing board, gives to any person or com-
[302] pany interested the right *to be heard, and also authorizes the board to correct the valuation. So that it cannot be objected that the railroad companies are precluded from a full hearing on the matter of valuation; and, as has heretofore been said by this court, one hearing is sufficient to constitute due process.

Other questions are discussed by counsel in their briefs, but in view of the exhaustive and well-considered opinion of the trial judge, with the general trend of which we concur, it is unnecessary to further extend this discussion. It is sufficient to refer to that opinion for a consideration of those questions. We have noticed those which seem to us paramount and controlling.

It is charged in the bill that there was a systematic undervaluation of other property in the state, which resulted in denying to this plaintiff the equal protection of the law. The trial court found against this charge. It is enough to say that generally we accept the finding of a trial court upon a question of fact when the testimony respecting it is conflicting. It may also be said that a legislature is not bound to impose the same rate of tax upon one class of property that it does upon another. As it may exempt all of one class, so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administrated impartially upon them.

Affirmed.

Cases on the docket, numbered from 462 to 487, inclusive, are suits brought by different railroad companies against this appellee, and are submitted on the same record. The same decree will be entered in each of them.

Here follows a list of such cases, with docket numbers and titles:

No. 462, *Detroit & M. R. Co.* v. *Powers;* No. 463, *Chicago & N. W. R. Co.* v. *Powers;* No. 464, *Toledo, S. & M. R. Co.* v. *Powers;* No. 465, *St. Clair Tunnel Co.* v. *Powers;* No. 466, *Michigan Air Line R. Co.* v. *Powers;* No. 467, *Grand Trunk W. R. Co.* v. *Powers;* No. 468, *Ann Arbor R. Co.* v. *Powers;* No. 469, *Cincinnati, S. & M. R. Co.* v. *Powers;* No. 470, *Chicago, D. & C. G. T. Junction R. Co.* v. *Powers;* No. 471, *Munising R. Co.* v. *Powers;* No. 472, *Lake Superior & I. R. Co.* v. *Powers;* No. 473, *Marquette & S. E. R. Co.* v. *Powers;* No. 474, *Chicago, M. & St. P. R. Co.* v. *Powers;* No. 475, *Sault Ste. Marie Bridge Co.* v. *Powers;* No. 476, *Mineral Range R. Co.* v. *Powers;* No. 477, *Duluth, S. S. & A. R. Co.* v. *Powers;* No. 478, *Detroit, G. H. & M. R. Co.* v. *Powers;* No. 479, *Pontiac, O. & N. R. Co.* v. *Powers;* No. 480, *Minneapolis, St. P. & S. S. M. R. Co.* v. *Powers;* No. 481, *Copper Range R. Co.* v. *Powers;* No. 482, *Gogebic & M. River R. Co.* v. *Powers;* No. 483, *Manistee & N. E. R. Co.* v. *Powers;* No. 484, *Escanaba & L. S. R. Co.* v. *Powers;* No. 485, *Grand Rapids & I. R. Co.* v. *Powers;* No. 486, *Wisconsin & M. R. Co.* v. *Powers;* No. 487, *Lake Shore & M. S. R. Co.* v. *Powers.*

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*AGUEDA BENEDICTO DE LA RAMA, [303]
Appt.,
v.
ESTEBAN DE LA RAMA.

(See S. C. Reporter's ed. 303-319.)

1. Appeal—jurisdiction—review of decree of supreme court of Philippine Islands in divorce proceeding.—The general rule that the Federal courts have no jurisdiction of the subjects of divorce or ali-

mony does not preclude an appeal to the Supreme Court of the United States under the act of July 1, 1902 (32 Stat at L. 691–695. chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 154), § 10, allowing appeals to that court from the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings in which the value in controversy exceeds $25,000, to review a decree of that court reversing a decree of the court of first instance, granting a divorce to the wife, and awarding her a sum in excess of that amount as allmony *pendente lite*, and as her share of the conjugal property.

2. **Appeal—questions reviewable—sufficiency of evidence in divorce proceeding.**—The sufficiency of the evidence on which a divorce to the wife was refused is open for review in the Supreme Court of the United States on an appeal from the supreme court of the Philippine Islands, taken under the act of July 1, 1902, § 10, allowing such appeals, to be governed by the rules applicable to appeals from circuit courts, in all cases in which the jurisdictional amount is involved, where the correctness of the denial of allmony *pendente lite* and of a separation of the conjugal property cannot be determined without passing upon the weight of such evidence, and the appeal was taken from the whole decree.

3. **Evidence—sufficiency to sustain divorce.**—The evidence is sufficient to establish that the adultery of the husband was accompanied by public scandal and disgrace of the wife, as is required by the Spanish laws to sustain a divorce, by testimony that he abandoned his wife, excluded her from his house, and formed open and illicit relations with three other women, who bore him a family of children.

4. **Appeal—reversal of finding of fact.**—The finding of the court of first instance in a divorce proceeding that the wife had not committed adultery should not have been reversed by the supreme court of the Philippine Islands unless such finding was plainly and manifestly against the weight of the evidence, even where there was a literal compliance with the provision of § 497 of the Code of Civil Procedure, empowering such court to review the evidence in case the excepting party filed a motion in the court of first instance for a new trial on the ground that the findings of fact were plainly and manifestly against the weight of evidence, and such motion was overruled, and due exception was taken to the ruling.

[No. 102.]

Argued December 5, 6, 1905. Decided April 2, 1906.

APPEAL from the Supreme Court of the Philippine Islands to review a judgment which reversed a decree of divorce rendered by the Court of First Instance of the Province of Iloilo, and directed that the complaint be dismissed. *Reversed* and remanded for further proceedings.

Statement by Mr. Justice **Brown:**

This was a suit brought in the court of first instance of the province of Iloilo by the appellant, as plaintiff, against her husband, the defendant, for a judicial separation or divorce *a mensa et thoro*, an equal separation of the property of the conjugal partnership, for an allowance to the plaintiff for her support during the pendency of the action, and for counsel fees, costs, and general relief, upon the ground of the husband's adultery and the public scandal and disgrace thereby brought upon the plaintiff.

In his answer defendant alleged, by way of recrimination, adultery on the part of the wife, denied the existence of any community property, and prayed for a divorce without alimony.

Upon the trial, the court decreed a divorce to the plaintiff on account of her husband's adultery, as well as the payment *of $81,042.76, Mexican money, due her as [305] her unpaid share of the property belonging to the conjugal partnership, as well as the sum of $3,200, Mexican money, as an allowance for her support since the date upon which the action was instituted, being at the rate of 400 pesos a month for eight months, with costs.

After motion for a new trial had been made and overruled, defendant appealed to the supreme court, which reversed the decree of the court below, incorporated in its opinion certain findings of fact, and ordered judgment absolute that the complaint be dismissed.

Whereupon plaintiff appealed to this court under § 10 of the act of July 1, 1902, to provide a temporary civil government in the Philippine Islands (32 Stat. at L. 691–695, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 154), a copy of which section is given in the margin.†

†"Sec. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein, or hereafter determined thereby, in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

Mr. **Frederic R. Coudert** argued the cause, and, with *Mr. Howard Thayer Kingsbury*, filed a brief for appellant.

No counsel for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

An important question of jurisdiction is presented by the record in this case. It has been a long-established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of the fact that the husband and wife cannot usually be citizens of different states so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value. *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226, and the analogous cases of *Kurtz* v. *Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Durham* v. *Seymour*, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452; and *Perrine* v. *Slack*, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79.

[308] *But the general rule above stated has no application to the jurisdiction of the territorial courts, or of the appellate jurisdiction of this court over those courts. Hence, we held in *Simms* v. *Simms*, 175 U. S. 162, 44 L. ed. 115, 20 Sup. Ct. Rep. 58, that an appeal lies from a decree of the supreme court of a territory dismissing the suit of a husband for a divorce and awarding to a wife alimony and counsel fees, amounting in all to more than $5,000, so far as the decree fixes the alimony. This was an appeal from the supreme court of Arizona, and the court held that the above considerations expressed in *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226, had no application to the appellate jurisdiction of this court over the courts of a territory; that Congress, having entire dominion and sovereignty over territories, "has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may at its discretion intrust that power to the legislative assembly of a territory," citing *Cope* v. *Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222. It was further held that so far as the question of divorce was concerned, the decree could not be reviewed by this court, "both because that was a matter the value of which could not be estimated in money; and because the refusal of the divorce involved no matter of law, but mere questions of fact, depending on the evidence, and which this court is not authorized to re-examine." It was further said: "The decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal." The appeal in that case did not involve the merits.

The intimation that this court could not review the refusal of the divorce because it could not re-examine questions of fact was undoubtedly thrown out in view of the territorial practice act of April 7, 1874 (18 Stat. at L. 27, chap. 80, § 2), providing that "on appeal" (from a territorial court), "instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or *rejec- [309] tion of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Since that act was passed we have always held that the jurisdiction of this court on an appeal from the supreme court of a territory did not extend to a re-examination of the facts, but was limited to determining whether the findings of fact supported the judgment, and to reviewing errors in the admission or rejection of testimony, when exceptions have been duly taken to the action of the court in this particular. *Stringfellow* v. *Cain*, 99 U. S. 610, 25 L. ed. 421; *Eilers* v. *Boatman*, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432; *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Mammoth Min. Co.* v. *Salt Lake Foundry & Mach. Co.* 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384; *Young* v. *Amy*, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802.

This act, however, has no application to the Philippine Islands, appeals from the supreme court of which are regulated by § 10 of the act of July 1, 1902, wherein it is declared that appeals from the supreme court of the Philippine Islands shall extend to all actions, cases, causes, and proceedings "in which the value in controversy exceeds $25,000." These are reviewable on appeal or writ of error by the party aggrieved, in the same manner as the final judgments and decrees of the circuit courts of the United States. There is no requirement that the facts shall be found. Appeals from the final decrees in these (circuit) courts extend to an examination of the facts as well as the law. While, upon such review, this court will generally

accept the concurrent conclusions of the trial and appellate courts, yet, as was said by Mr. Justice Brewer in *Beyer* v. *Le Fevre*, 186 U. S. 114–119, 46 L. ed. 1080–1082, 22 Sup. Ct. Rep. 765: "There has always been recognized the right and the duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony, it will set the verdict or report aside and direct a re-examination."

In this case there was no finding of facts either by the court of first instance, or by the supreme court of the Islands, [310] except *as they appear in the opinion. It is doubtful whether this is a finding of facts within the statute (*Lehnen* v. *Dickson*, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *British Queen Min. Co.* v. *Baker Silver Min. Co.* 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523; *Dickinson* v. *Planters' Bank*, 16 Wall. 250, 21 L. ed. 278; *Saltonstall* v. *Birtwell*, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 169; *Stone* v. *United States*, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71), but, in any event, it is not binding upon us in the absence of an authority to make it.

While, as indicated in *Simms* v. *Simms*, the decree for alimony, although in one sense an incident to the suit for divorce, is a distinct and final judgment for a sum of money, and is therefore a good ground for appeal from that part of the decree, yet, where the appeal is from the whole decree (as in this case), or even from a part of the decree, and the denial of alimony or separation of the conjugal property depends upon the evidence which bears upon the right to a divorce, we cannot determine that question without passing upon the sufficiency of the testimony authorizing or refusing the divorce. An appeal from the decree for alimony or other property right would be of no value whatever unless the facts connected with the allowance or refusal of such right were open to review in the appellate court. Although an appeal from a part of a decree does not bring up the part not appealed from, yet, if the whole decree must be reviewed in order to decide the appeal, such appeal brings up the entire record. *Kelsey* v. *Western*, 2 N. Y. 500; *Union Trust Co.* v. *Trumbull*, 137 Ill. 159, 27 N. E. 24; *Walker* v. *Pritchard*, 121 Ill. 227, 12 N. E. 336. The case is even stronger where the appeal is taken from the whole decree.

The hardship of denying an appeal in this case, as well as review of the testimony upon the subject of divorce, is apparent when the peculiar provisions of the Philippine Code are considered.

By Article 1315: "Persons who may be joined in matrimony may, before celebrating it, execute contracts . . . In the absence of contracts relating to property, it shall be understood that the marriage has been contracted under the system of legal conjugal partnership."

*Article 1401: "To the conjugal partner- [311] ship belong:

"1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only.

"2. That obtained by the industry, salaries, or work of the spouses, or of either of them.

"3. The fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses."

Article 1392: "By virtue of the conjugal partnership the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and the wife, share and share alike, upon the dissolution of the marriage."

Article 1407: "All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife."

Article 73: "A decree of divorce shall produce the following effects: . . .

"3. The guilty spouse shall lose all that may have been given or promised him or her by the innocent one, or by any other person, in consideration for the latter; and the innocent spouse shall keep all that he or she has received from the guilty one, being permitted besides to claim forthwith all that may have been promised by the same."

In the opinion of the court of first instance it is stated that the plaintiff received from her mother 2,000 pesos, which, with interest amounting to 345 pesos, must be regarded as the portion contributed by the wife to the conjugal partnership. For the purposes of jurisdiction it makes no difference whether the amount claimed be termed alimony or the wife's share of the community property. It is sufficient that she claimed to be entitled to an amount exceeding $25,000, and that the claim was not baseless is shown by the decree of the court of first instance *allowing it. By [312] the decree of the supreme court she was denied all recovery of any description, upon the ground of her adultery. If, upon a review of the testimony, it were found that

she was not guilty of adultery, she would unquestionably be entitled to one half of the conjugal property.

As § 10 of the Philippine statute above cited allows an appeal to this court from "judgments and decrees of the supreme court of the Philippine Islands in *all* actions, cases, causes, and proceedings . . . in which the value in controversy exceeds twenty-five thousand dollars," we know of no power in this court to create an exception where the statute has made none. Such a decision would be a plain case of judicial legislation.

Our conclusion upon this branch of the case is that the appeal was properly taken, and that it calls for a re-examination of the grounds upon which the petition for a separation of the conjugal property and alimony *pendente lite* was denied.

2. In her complaint the plaintiff charges abandonment by her husband without cause, and also adultery with three women, by each of whom he had children, and which resulted in public scandal and the disgrace of the plaintiff. In his answer defendant denies that he abandoned the plaintiff without sufficient cause, and avers that "he ejected her from his house on account of indignation," created by her adultery with a Spanish corporal; he denies the various allegations of adultery charged against him, and says that even if they are true, they are nothing more than the "necessary consequences of the indescribable conduct of the plaintiff."

The parties were married in July, 1891, she being then fourteen years of age and he twenty-three, and lived happily together for about thirteen months, when in August, 1892, a separation ensued.

Upon the trial the defendant made no denial of his adulteries, but simply declined to answer any questions on the subject. His adulteries, however, with three separate women and the birth of a child by each was proven to the satisfaction of [313] both *courts below, and was not attempted to be disproved by evidence on the part of the defendant. Under the Spanish law the adultery of the husband, to be a good ground for separation, must be accompanied by public scandal and disgrace of the wife. Although there is no evidence that the husband "ejected her from his house on account of indignation," as set up in his answer, the fact that he abandoned his wife, excluded her from his house, and formed open and illicit relations with three other women, who bore him a family of children, is quite sufficient evidence that his adultery was accompanied by public scandal and disgrace to the wife.

There was a difference of opinion between the trial court and the supreme court as to the adultery of the plaintiff. This is the principal contested fact in the case. The question really is whether the finding of the court of first instance, that the plaintiff had not committed adultery, was so manifestly against the weight of evidence that the supreme court was justified in reversing it.

By § 497 of the Code of Civil Procedure it is enacted that "the supreme court shall not review the evidence taken in the court below, nor retry the question of fact, except, . . . 3. If the excepting party filed a motion in the court of first instance for a new trial, upon the ground that the *findings of fact were plainly and manifestly against the weight of evidence*, and the judge overruled said motion, and due exception was taken to his overruling the same, the supreme court may review the evidence," etc.

The defendant did move for a new trial in the court of first instance, on the ground that the "conclusions which in said decision have been deducted from the facts are contradictory to what the evidence filed in this case have shown."

This is not a literal compliance with § 497, above cited, as it is not stated that the findings of fact are plainly and manifestly against the weight of the evidence. It seems rather to fall within the terms of § 145 of the Code of Civil Procedure, by the terms of which the court of first instance may, at *any time during the term [314] at which the action has been tried, set aside the judgment and grant a new trial on the ground that "the evidence was insufficient to justify the decision, or that it is against the law." But in this connection it is also provided by § 146 that the "overruling or granting of a motion for a new trial shall not be a ground of exception, but shall be deemed to have been an act of discretion on the part of the judge."

Defendant also prepared a bill of exceptions containing the evidence upon which the hearing was had in the supreme court.

Under the circumstances, and waiving the question whether there was such a motion for a new trial as is contemplated by § 497, we are of the opinion that the judgment of the court of first instance should not have been reversed, unless the findings of that court were plainly and manifestly against the weight of the evidence.

The adultery charged upon the plaintiff is said to have been committed with one Corporal Zabal of the civil guard at Talisay, where the parties then lived. The principal testimony establishing that fact is that of Apolonia Aurelio, a confidential

servant, who swears she entered the services of the plaintiff in *1891*, that the corporal used to frequent the plaintiff's house during the absence of the husband, who was wont to leave home to inspect his haciendas; that plaintiff habitually visited the quarters of the civil guard for the purpose of meeting Zabal, and that Zabal was also in the habit of going to the plaintiff's house at ten o'clock at night and remaining until morning; that defendant became acquainted with these facts from a letter written by plaintiff to be sent to Zabal at the quarters of the civil guard, but purloined by the witness and given to defendant. This letter, which, upon the theory of the defendant, would have furnished conclusive evidence of the plaintiff's adultery, was destroyed. The letter, if written at all, was written in May, yet her husband continued to live with her until August, when he carried her to her parents in the town of Valladolid, apparently for
[315] a visit, cohabited with her there, *and then abandoned her. His version is that he took her to her mother on the same or the next day after he discovered the letter, and that he did not cohabit with her there, although he occupied the same room, in which there was but one bed. Little reliance was placed upon the testimony of Apolonia by either of the courts below, as it appeared that she did not enter the service of the plaintiff until the year *1893*, after the couple had separated, and that she was then sent by the husband to the wife as a servant. She also told a most improbable story of always sleeping in the room of the plaintiff during her husband's absence, and even while the corporal was there. The court of first instance found that the attitude of the witness was apparently hostile to the plaintiff by reason of the fact that Apolonia was about to marry a man whom the plaintiff disliked, and the plaintiff had punished her.

Upon the other hand, the court of first instance did not hesitate to say that the attitude of the plaintiff during the trial of the case was such as to impress the court very favorably in her behalf. "Her entire bearing was that of a modest, retiring, self-respecting, and conscientious woman." There was testimony tending to show that Apolonia did not want to testify, but was given two packages of paper money in order to induce her to do so, and that another witness was also paid for his testimony. The testimony of Apolonia is to a certain extent bolstered up by that of three or four men, whose intelligence was evidently of such a low order that they can scarcely deserve to be called corroborating witnesses. The judge of the court came to the conclusion that "the testimony of this woman is too uncertain and too suspicious to justify any court in declaring the plaintiff guilty of adultery, especially when the worthlessness and the dubious character of the testimony of the other witnesses for the defendant on this subject increase the probability of the existence of something in the nature of a conspiracy to destroy the case of the plaintiff, and to support that of the defendant in the present action."

As already stated, these parties were married in July, 1891, *the plaintiff then [316] being but fourteen years of age. The intrigue with Zabal, if it occurred at all, took place within thirteen months thereafter, as the parties separated in August, 1892. The story that a bride of fourteen, happily married, and living in comfort, if not in luxury, should immediately after her marriage enter into liaison with a common soldier, should receive him at her house in the presence of her servants, without an attempt at concealment, spend the night with him with her confidential maid apparently sleeping in the same room, should openly visit his quarters at night, taking her maid with her, is so improbable that it should only be accepted upon evidence leaving no other legitimate conclusion to be drawn from it except that of adultery. The inference that this testimony was fabricated was so strong that the courts below were fully justified in disregarding it. The court of first instance discarded it entirely. The supreme court evidently placed no reliance upon it, but found conclusive evidence of adultery in a letter written in March, 1899, by the plaintiff to her husband.

This letter, which was written seven years after their separation, is printed in the margin.† We do not regard it as by any *means [317] conclusive. While it is perhaps susceptible of the construction put upon it by the hus-

†The letter of March 6, 1899, addressed by the plaintiff to the defendant reads as follows:

"My respected and unforgetable Estebau:

"Pardon that I disturb your tranquillity E., that in the midst of a profound sentiment that afflicts me I find consolation for my profound grief in addressing the man who loved me in the time of my good fortune, and who led me to the altar before the eyes of the being whom we most love, God. Remember me; let fall a drop of compassion from your soul; look at me back again with your cheerful eyes at the woman who is watching for you. I know well that you are very disgusted with me, and for just reason,—for having claimed my pension. Be calm, quiet yourself, reflect a moment for my situation, which I will explain to you.

When you went to Europe, mother went to see you to explain our situation to you, and

band, it is entirely consistent with the theory that she had been abandoned by her husband without cause, was left in a desperate state of mind, was anxious to regain his favor, and to make any sacrifice to induce him to take her back and resume their former relations. She hints at no misconduct of her own, but intimates that he is disgusted with her, and for just reason,—for having claimed her pension. She says that when he went to Spain her pain was unbearable, that she had become completely desperate, and was advised to demand her pension because of the fact that he was going to reside abroad permanently, and she finally commenced proceedings in view of her desperate situation. So far from confessing adultery, she says that if those who wished her ill "have told you more, they have made a mistake, for the truth about my comportment is that it cannot be complained of." There is nothing indicating that after their separation her conduct had not been irreproachable.

The paragraph much relied upon is as follows: "I keep yet on my face the shame of what has happened, notwithstanding that it has been already many years since we [318] parted. *Therefore, my husband, forgive me; erase what has happened; remember me for God's love; behold our dark fate. In you I trust my future." This is by no means necessarily a confession of guilt.

The letter is that of a broken-hearted woman, who is willing to make any sacrifice necessary to be restored to her husband's favor, and to submit to any humiliation necessary to regain his affection. She makes no confession of adultery, points to her "comportment" since their separation as showing nothing that could be complained of, but in her frequent repetition of the claim she had made for her pension points to that as the source of her husband's disgust. Bearing in mind that her husband had seduced her when she was only thirteen years of age, and that since their separation, and for nearly a decade, he had not only repudiated her, but had maintained unlawful relations with at least three other women, all of whom had borne him children, we think that, even if two constructions were possible, the court of first instance was right in putting that construction upon the letter which was most favorable to the plaintiff.

We have reached the conclusion that there is no such preponderance of evidence in favor of the theory of plaintiff's guilt as authorized the supreme court to set aside the conclusions of the court below upon the ground that these findings were plainly and manifestly against the weight of the evidence. In this connection it is proper to bear in mind that the trial judge had all these witnesses before him, and doubtless formed his conclusions largely from their appearance on the stand, their manner of giving testimony and their apparent credibility. Under the circumstances we think the supreme court should have affirmed, rather than reversed, the action of the lower court.

While the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit, and to other allowances claimed, is the basis of our jurisdiction, the decree of the supreme court in dismissing plaintiff's petition renders it unnecessary to review the action of the court of first instance in fixing the amount that it held plaintiff was entitled to recover. *We are therefore of opinion that [319] the decree of the supreme court dismissing the petition must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **White**, Mr. Justice **Peckham**, Mr. Justice **Holmes**, and Mr. Justice **Day** dissented upon the question of jurisdiction.

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you answered that it had nothing to do with you. She insulted you, Estehan; you had reason to he offeuded.

"Now, regarding my having demanded my pension, you are also in the right, but pardon my impudence in stating what I have to say:

"I swear to you, E., and call God to witness that when you went to Spain, my pain was unbearahle thinking of my fatal misfortune. I had become completely desperate, and Orozco wrote and advised me to demand my pension in view of the fact that you were going to reside permanently in Spain; then I finally did commence proceedings in view of my desperate situation, and nothing further came of the matter during your absence.

"If the Lacsons, who wish me ill, have told you more, they have made a mistake, for the truth about my comportment is that it cannot be complained of; you can secure information regarding my conduct during our separation here in Valladolid.

"I keep yet on my face the shame of what has happened, notwithstanding that it has been already many years since we parted. Therefore, my husband, forgive me; erase what has happened, remember me for God's love; behold our dark fate. In you I trust my future.

"E., I have heard that you have had some misfortunes. I send my sympathy, although I am unworthy of your presence.

"I also learn from Modesto that you do not wish to have my pension sent. Do as you wish.

"Good-by, E., take good care of yourself, and command,

"Your faithful servant Q. B. S. P.,

March 6, 1899. Agueda Benedicto.

ELLIS KEEN, *Plff. in Err.*,
v.
SOPHRONIA K. KEEN.

(See S. C. Reporter's ed. 319-321.)

Error to state court—Federal question—question of local law.—What facts constitute a common-law marriage is purely a local, and not a Federal, question, and will not sustain a writ of error from the Supreme Court of the United States to a state court.

[No. 188.]

Argued and submitted March 7, 8, 1906. Decided April 2, 1906.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of St. Charles County, in that state, in favor of plaintiff in an action of ejectment. *Dismissed* for want of jurisdiction.

See same case below, 184 Mo. 358, 83 S. W. 526.

Statement by Mr. Justice **Brown:**

This was an action of ejectment begun by Sophronia K. Keen in the circuit court of St. Charles county against Ellis Keen, to recover a tract of land in that county to which plaintiff averred she was lawfully entitled. The petition was in the usual form of a declaration in ejectment, and the answer a general denial.

Eli Keen was the common source of title, plaintiff claiming one half of the land, subject to the payment of debts, under § 2939 of the Revised Statutes of Missouri, upon the ground that she was the widow
[320] of Eli Keen, who died in 1901, *leaving, as plaintiff alleged, no children capable of inheriting.

Defendant claimed to be the legitimate child of an alleged common-law marriage between Eli Keen, a white man, and Phœbe, a negro woman.

There was judgment below for the plaintiff, which was affirmed by the supreme court. 184 Mo. 358, 83 S. W. 526.

Mr. **David P. Dyer** argued the cause and filed a brief for plaintiff in error.

Mr. **Charles W. Bates** submitted the cause for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The court deduced, as a conclusion of law from certain facts found, that no marriage at common-law had ever existed between Eli Keen and Phœbe, a former slave of Eli's father, and that the former died without leaving any child or children or other descendants capable of inheriting from him, and hence that plaintiff was entitled to recover possession of an undivided half of the lands as his wife. No ceremonial marriage was claimed.

It is difficult to see any facts upon which to found our jurisdiction of the case. No Federal question appears in the pleadings or in the testimony, a transcript of which is contained in the record. The first glimmer of one appears in the motion for a new trial in the circuit court, in which it is charged that the judgment deprived the defendant of his property without due process of law, and also denied him the equal protection of the laws, contrary to the 14th Amendment to the Constitution. But no allegation is made as to why the judgment had this effect. No notice was taken of the constitutional point in the opinion of the supreme court, although the writ of error from this court was allowed by the presiding *judge. In the assignment of [321] errors filed in this court the only error charged is that, although the court below found there was no common-law marriage between Eli Keen and Phœbe, yet, in its special findings, it found all the facts required to establish such common-law marriage between them, and that from the facts so found the law presumed a null and void marriage between said Eli Keen and Phœbe Keen, the issue of which was capable of inheriting, under the statutes of Missouri. Rev. Stat. § 2918. No reference is made to the Constitution of the United States in this connection. In addition to this, the question what facts constitute a common-law marriage is purely a local one. We have searched the record for a Federal question, but have found none. *The writ of error is, therefore, dismissed.*

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *et al., Plffs. in Err.*,
v.
JOHN A. MAYES.

(See S. C. Reporter's ed. 321-331.)

Interstate commerce—state regulation—

NOTE.—*On the general subject of writs of error from United States Supreme Court to state courts*—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C.C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

carrier's duty to furnish cars.—When applied to interstate shipments, the provision of Tex. Rev. Stat. arts. 4497–4500, as amended by Acts 1899, p. 67, which penalizes the failure of a railway company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing in the sum of $25 per day for each car not so furnished, and admits of no excuse except such as arises from "strikes or other public calamity," is an unconstitutional regulation of interstate commerce.

[No. 198.]

Argued and submitted March 8, 1906. Decided April 2, 1906.

IN ERROR to the Court of Civil Appeals in and for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Llano County in that state, enforcing the statutory penalty for a carrier's failure to furnish cars to a shipper within the time limited after the latter's requisition in writing. *Reversed* and remanded for further proceedings.

See same case below, 36 Tex. Civ. App. 606, 83 S. W. 53; on rehearing, 36 Tex. Civ. App. 609, 83 S. W. 55.

Statement by Mr. Justice **Brown:**

This was an action begun by Mayes in the district court of Llano county, Texas, against the Houston & Texas Central Railroad Company to recover a penalty of $475, by reason of defendant's failure to furnish
[322] seventeen stock cars, applied for in *writing by the plaintiff under the provisions of certain statutes of Texas hereinafter referred to, for the purpose of shipping plaintiff's cattle from Llano, Texas, to Red Rock, Oklahoma, and for damages occasioned by defendant's negligence.

The petitioner alleged that the defendant company formed with two other railroad companies a continuous line from Llano to Red Rock, and were engaged as common carriers in the business of shipping live stock and other freight; that on April 9, 1903, plaintiff, being the owner of six hundred and twenty-five head of cattle, made application in writing to the local agent of the road for seventeen stock cars, to be delivered on April 20, and deposited with the agent one fourth of the freight on the same, namely, $268.82, promising to pay the remainder on demand, and that he afterwards paid the same; that upon the day named, April 20, he had cattle sufficient to load the cars, delivered them to the defendant at its stock pens at Llano for shipment, but the defendant failed to furnish the cars, and did not furnish the same until the afternoon of the 21st April, 1903.

The trial resulted in a judgment in favor of the plaintiff for $425 penalty for delay, and $500 damages to the stock while in the pens at Llano. This judgment was affirmed by the court of civil appeals, and an application for a writ of error to the supreme court of the state was overruled.

Mr. **Maxwell Evarts** argued the cause, and, with *Messrs. Robert S. Lovett, James A. Baker,* and *Gordon M. Buck,* filed a brief for plaintiffs in error:

A state cannot, under the guise of exercising its police power, enact legislation that is in effect a regulation of interstate commerce.

Hannibal & St. J. R. Co. v. *Husen,* 95 U. S. 465, 24 L. ed. 527; *License Cases,* 5 How. 504, 12 L. ed. 256; *Chy Lung* v. *Freeman,* 92 U. S. 275, 23 L. ed. 550; *Robbins* v. *Taxing District,* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Central Stock Yards Co.* v. *Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113.

The very recent case of the *Central R. Co.* v. *Murphey,* 196 U. S. 194, 202, 49 L. ed. 444, 447, 25 Sup. Ct. Rep. 218, is closely in point, and in fact decisive of the present case.

It has been held that a state tax upon tolls received from interstate shipments is void, as an interference with interstate commerce.

Philadelphia & S. Mail S. S. Co. v. *Pennsylvania,* 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

So, a state statute simply requiring vessels engaged in the coasting trade to file certain information with designated officials was held void, as an interference with interstate commerce.

Sinnot v. *Davenport,* 22 How. 227, 16 L. ed. 243.

It has also been held that a state statute providing that all trains should be required to stop at county seats was void so far as it affected interstate trains.

Illinois C. R. Co. v. *Illinois,* 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Cleveland, C. C. & St. L. R. Co.* v. *Illinois,* 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

It has also been held that a state law imposing a tax upon messages sent by telegraph companies is invalid as applied to interstate messages.

Western U. Teleg. Co. v. *Texas,* 105 U. S. 460, 26 L. ed. 1067.

In *Western U. Teleg. Co.* v. *Pendleton,* 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, it is held that the statute of Indiana, requiring every

telegraph company to receive and transmit messages with impartiality and good faith, and in the order in which they are received, and deliver all despatches by messenger to the persons to whom same are addressed or to their agents, on payment of any charges due for the same, provided such persons or their agents reside within one mile of the telegraph stations or within the city or town in which said station is, is void as applied to interstate business.

If a state, in the exercise of an otherwise admitted police power, enacts a statute which has the effect of regulating interstate commerce, it is void, even though Congress may not have elected to act in reference to the subject.

Hannibal & St. J. R. Co. v. *Husen*, 95 U. S. 465, 470, 471, 24 L. ed. 527, 529, 530.

It is evident, on account of the elaborate regulations which have been prescribed by Congress for the government of railroad companies engaged in interstate transportation, that the subject is already so far covered by congressional regulation as to indicate the will of Congress that interstate transportation by railroads should be free as to all matters not so regulated by Congress.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 465, 480, 31 L. ed. 700, 705, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Sinnot* v. *Davenport*, 22 How. 227, 238, 16 L. ed. 243, 246.

Mr. **T. W. Gregory** submitted the cause for defendant in error:

The cattle in this case did not become the subject of interstate commerce until they were delivered to and received by the carrier for transportation on the journey.

Coe v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *The Daniel Ball* (*The Daniel Ball* v. *United States*) 10 Wall. 557, 19 L. ed. 999; *Ex parte Koehler*, 1 Inters. Com. Rep. 28, 30 Fed. 867; *Re Greene*, 52 Fed. 113; *Missouri P. R. Co.* v. *Sherwood*, 84 Tex. 125, 17 L.R.A. 643, 4 Inters. Com. Rep. 240, 19 S. W. 455.

A train consisting of empty freight cars, being prepared and taken to a point without the state for the purpose of transporting coal within the state, is not engaged in interstate commerce.

Norfolk & W. R. Co. v. *Com.* 93 Va. 757, 34 L.R.A. 105, 57 Am. St. Rep. 827, 24 S. E. 837.

The regulation proposed by the state statutes is not inconsistent with the interstate commerce clause of the Constitution of the United States, and the interstate commerce acts of Congress,

Wisconsin, M. & P. R. Co. v. *Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Western U. Teleg. Co.* v. *James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 628, 17 Sup. Ct. Rep. 418; *Richmond & A. R. Co.* v. *R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Missouri, K. & T. R. Co.* v. *McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Armstrong* v. *Galveston, H. & S. A. R. Co.* 92 Tex. 117, 46 S. W. 33.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the constitutionality of certain articles of the Revised Statutes of Texas, set forth in the margin,† the *ma-[327] terial requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one fourth of the freight with the agent of the company, the company failing to furnish them shall forfeit $25 per day for each car failed to be furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity."

The defense was that this statute was not applicable to demands made for cars to be

†"Art. 4497. When the owner, manager, or shipper of any freight of any kind shall make application in writing to any superintendent, agent, or person in charge of transportation, to any railway company, receiver, or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee, or other person in charge thereof to supply the number of cars so required, at the point indicated in the application, within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person; provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars. (As amended by the act of 1899, page 67.)

"Art. 4498. Said application shall state the number of cars desired, the place at which they are desired, and the time they are desired; provided, that the place designated shall be at some station or switch on the railroad.

"Art. 4499. When cars are applied for under the provisions of this chapter, if they are

sent out of the state and to be used in interstate commerce; and as the shipment was intended for Oklahoma, the act did not apply, and the defendant was not liable. The question is whether the statute, ap-
[328] plied, as it is, *by the Texas court, to interstate shipments, is an infringement upon the power of Congress to regulate interstate commerce.

That, notwithstanding the exclusive nature of this power, the states may, in the exercise of their police power, make reasonable rules with regard to the methods of carrying on interstate business, the precautions that shall be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carried, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the legislatures may annex such conditions as they please with regard to *intra*state transportation, and such other rules regarding *inter*state commerce as are not inconsistent with the general right of such commerce to be free and unobstructed.

The exact limit of lawful legislation upon this subject cannot, in the nature of things, be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether, in the particular case, the rule be reasonable or otherwise.

That states may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the state of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authorities is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employees, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. An analysis of all the prior important cases upon this point will be found in the opinion of the court in *Cleveland, C. C. & St. L. R. Co.* v. **Illinois*, 177 U. S. 514, 44 L. ed. 868, [329]
20 Sup. Ct. Rep. 722, wherein a requirement that express trains intended only for through passengers should stop at every county seat, when ample accommodations were provided by local trains, was held to be an unreasonable burden. Other similar cases regulating the stoppage of trains are *Illinois C. R. Co.* v. *Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Gladson* v. *Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465. In the same line is the more recent case of *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate

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not furnished, the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of $25 per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages such applicant may sustain.

"Art. 4500. Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same, and upon failure to do so he shall forfeit and pay to the company the sum of $25 for each car not used; provided, that where applications are made on several days, all of which are filed upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall notify the said company or its agent, he shall forfeit and pay to said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars." (As amended by the act of 1899, page 67.)

Act 4502 contains the following proviso: "That the provisions of this law shall not apply in cases of strikes or other public calamity."

commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather.

A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but, in addition thereto, by an arbitrary penalty of $25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might, in another case, amount to far more.

[330] *While perhaps the road may have no right to complain of that portion of the statute which assumes to provide for its own protection, it is illustrative of its general spirit that, if the shipper does not fully load his cars within forty-eight hours after their arrival, he shall forfeit $25 for each car, or if the consignee shall fail to unload them within forty-eight hours after their delivery, at the place of consignment, which, in the case of interstate shipments, would be in another state, he shall also forfeit $25 per day for each car unloaded.

In this connection the recent case of *Central R. Co.* v. *Murphy*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, is instructive. In that case we held that the imposition by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, or how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and an act of the legislature of Georgia imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other states.

Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the state, and may have been intended merely to secure promptness on the part of the railroad companies in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional, and accidental violations of its provisions, when no damages could actually have resulted to the shippers.

It should be borne in mind that the act does not apply to cattle alone, but to all cases "when the owner, manager, or shipper *of any freight of any kind* shall make application in writing," etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of *no excuses, except such as arise from [331] strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railways company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature.

The judgment of the Court of Civil Appeals is, therefore, reversed, and the cause remanded to that court for further proceedings.

Mr. Justice **White**, not having heard the argument, took no part in the decision of this case.

The CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **McKenna** dissented.

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*WILFORD P. JOY, *Plff. in Err.*, [332]

v.

CITY OF ST. LOUIS and Hafner-Lotnman Manufacturing Company.

(See S. C. Reporter's ed. 332–343.)

Courts—jurisdiction of Federal circuit court—case arising under Federal laws.—The petition in an action of eject-

ment does not present a case arising under the laws of the United States of which a Federal circuit court has jurisdiction without diversity of citizenship because it states that there is a dispute between the parties over the construction of the patent from the United States and several acts of Congress set out as the source of plaintiff's title, where its averments show that the real controversy is over the claim of plaintiff that he is entitled to the land formed by accretion, since the patent was issued, and after the statutes were passed.

[No. 204.]

Argued March 9, 1906. Decided April 2, 1906.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment dismissing, for want of jurisdiction, the petition in an action of ejectment. *Affirmed.*

Statement by Mr. Justice **Peckham:**

This is an action of ejectment to recover certain lands in the city of St. Louis, state of Missouri, described in the petition, which was filed in the circuit court of the United States for the eastern district of Missouri.
[333] The petition was dismissed by *the court solely upon the ground that the court was without jurisdiction, and the trial judge so certified the fact. The plaintiff sued out a writ of error and brought the case directly here for review under the 5th section of the act of 1891. 26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.

The petition sets forth in detail the title of the plaintiff in error to the premises which he seeks to recover in this action. It is therein stated that a confirmation of a concession was made by the commissioners appointed pursuant to an act of Congress approved March 2, 1805 [2 Stat. at L. 324, chap. 26], entitled "An Act for Ascertaining and Adjusting the Titles and Claims to Land within the Territory of Orleans and the District of Louisiana," such concession having been made to one Louis Labeaume, of 360 arpents of land, by the lieutenant governor of the Spanish province of Upper Louisiana, on February 15, 1799, and it was duly surveyed and certified April 10, 1799. The land remained an outlot, adjoining and belonging to the former town or village (now city) of St. Louis, and said outlot was owned, claimed, inhabited, cultivated, and possessed by Labeaume prior to the 20th day of December, 1803. By virtue of the 1st section of an act of Congress, approved June 13, 1812 [2 Stat. at L. 748, chap. 99], entitled "An Act Making Further Provision for Settling the Claims to Land in the Territory of Missouri," the title in fee simple to said concession, survey, confirmation, and outlot was confirmed and granted to Labeaume.

Pursuant to an act of Congress approved March 3, 1807 [2 Stat. at L. 445, chap. 36], letters patent of the United States were issued to Labeaume, bearing date the 25th day of March, 1852, which letters purported and were sufficient to grant to Labeaume, or his legal representatives, the premises mentioned in the patent. On the 6th day of June, 1874, those from and under whom plaintiff derives title to the real estate sued for were the owners of the concession, and by an act of Congress, entitled "An Act Obviating the Necessity of Issuing Patents for Certain Private Land Claims in the State of Missouri, and for Other Purposes" [18 Stat. at L. 62, chap. 223, U. S. Comp. Stat. 1901, p. 1512], approved June 6, 1874, it is provided that the right, title, and *interest of the United [334] States in and to all of the lands in the state of Missouri, which had been confirmed by Congress, or officers acting under and by authority of Congress, were granted, released, and relinquished by the United States, in fee simple, to the respective owners of the equitable titles thereto, their heirs and assigns, forever, as fully and completely in every respect whatever as could be done by patents issued therefor according to law.

By virtue of these matters and by mesne conveyances from Labeaume it was averred that plaintiff became the owner of the land in question, and that a controversy had arisen between the plaintiff and the defendants herein as to the proper construction and legal effect of the letters patent and the acts of Congress approved June 13, 1812, and June 6, 1874, and the plaintiff herein averred in his petition—

"that under and by virtue of said confirmation, act of Congress approved June 13th, 1812, letters patent, and act of Congress approved June 6th, 1874, said river (Mississippi) is the western boundary of said outlot, confirmation to Louis Labeaume, and said Soulard survey and survey number 3333, and that the said Louis Labeaume or his legal representatives were thereby granted all of the land lying on said west bank of said river, between the northern and southern boundary lines of said outlot, confirmation, Soulard's survey, and United States survey number 3333, to said river, and that they were thereby constituted riparian proprietors and owners of all the

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; and Bailey v. Mosher, 11 C. C. A. 308.

land along said river bank between said north and south lines of said outlot, confirmation, and surveys, and were thereby vested with the title to, and ownership of, all land thereafter formed by accretions or gradual deposits from the said river along said west bank thereof, between said north and south lines of said outlot, confirmation, and surveys, where a large body of land was formed by accretions to said outlot, confirmation, and surveys.

"That said claim of plaintiff as to the proper construction and legal effect of said confirmation, acts of Congress approved
[335] *June 13th, 1812, and June 6th, 1874, respectively, and patent, is disputed by defendants, and contested by them in regard to the title of the land hereinafter described, and which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation, and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13th, 1812, and June 6th, 1874, respectively, and is the land herein sued for."

It is then averred that the proper construction and legal effect of the confirmation, acts of Congress, and letters patent constitute the controlling question in the case, upon the correct decision of which plaintiff's title to the premises sought to be recovered herein depends, and he "therefore avers that this suit arises under the law of the United States, and said confirmation made and letters patent issued in pursuance thereof, and said acts of Congress approved June 13, 1812, and June 6, 1874, respectively."

"He further states that as such legal owner of the premises he was entitled to the possession of the same under and by virtue of said confirmation, letters patent, and acts of Congress approved June 13, 1812, and June 6, 1874, respectively, on the 16th day of June 1896, which are described as follows:" The plaintiff then gives a description of the land in controversy, which he alleges to be a portion of the accretions of the outlot, confirmation, and surveys, already mentioned.

It was also alleged that the defendants entered upon the premises on the 16th of June, 1896, claiming to own the same as a wharf, under and by virtue of § 9 of an act of Congress approved June 12, 1866, entitled "An Act Authorizing Documentary Evidence of Titles to be Furnished to the Owners of Certain Lands in the City of St. Louis." [14 Stat. at L. 63, chap. 96.]

Plaintiff then demanded judgment for the recovery of the premises, and $5,000 for the unlawful withholding the same, and $100 for monthly rents and *profits, from the ren-[336] dition of judgment until the possession of the premises is delivered to plaintiff.

The manufacturing company defendant filed an answer, denying each and every allegation of the petition. It also set up that it held the premises under the city of St Louis and that the city (and the defendant holding under it) has had open, continuous, notorious, and adverse possession of the premises, under claim and color of title for more than ten years next before the filing of said petition.

The city of St. Louis filed a separate plea to the jurisdiction of the court, and asserted that it had no jurisdiction to try and determine the cause, because no Federal question or question of any kind giving jurisdiction to the court under the statutes and laws of the United States is involved in the issues in this cause. It further set up the facts in relation to the case of *Sweringen* v. *St. Louis*, in which the plaintiff therein claimed title to and possession of the property next immediately north of the premises herein claimed by plaintiff, under the same patent of the United States as that under which the plaintiff herein claims, and the history of the litigation is given, and the decision of the case in this court is referred to, which is to be found reported in 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

Mr. **E. P. Johnson** argued the cause and filed a brief for plaintiff in error:

The petition sufficiently states a Federal question.

Cooke v. *Avery*, 147 U. S. 375, 376, 378, 37 L. ed. 209, 210, 13 Sup. Ct. Rep. 340; *Carondelet* v. *St. Louis*, 1 Black, 180, 187, 17 L. ed. 102, 105; *Lake Superior Ship Canal, R. & Iron Co.* v. *Cunningham*, 155 U. S. 354, 356, 39 L. ed. 183, 184, 15 Sup. Ct. Rep. 103; *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46, 47, 53, 40 L. ed. 71, 73, 15 Sup. Ct. Rep. 1020; *Spokane Falls & N. R. Co.* v. *Ziegler*, 167 U. S. 65, 66, 72, 42 L. ed. 79–81, 17 Sup. Ct. Rep. 728; *Northern P. R. Co.* v. *Soderberg*, 188 U. S. 526–528, 47 L. ed. 576, 580, 23 Sup. Ct. Rep. 365; *Doolan* v. *Carr*, 125 U. S. 618, 620, 31 L. ed. 844, 845, 8 Sup. Ct. Rep. 1228.

Without a conflicting grant there is a sufficient statement to show that the construction and legal effect of the acts of Congress and patent as to the right to alluvion and the extent to which land was, or might have been, conveyed by them, was required, and therefore presented a Federal question.

Security Land & Exploration Co. v. *Burns*, 193 U. S. 167, 171, 48 L. ed. 662,

664; 24 Sup. Ct. Rep. 425; *Jefferis* v. *East Omaha Land Co.* 134 U. S. 178, 182, 33 L. ed. 872, 875, 10 Sup. Ct. Rep. 518; *Packer* v. *Bird*, 137 U. S. 661, 662, 34 L. ed. 819, 11 Sup. Ct. Rep. 210.

On the question of a conflict of grants by acts of Congress, presenting a Federal question, see:

Ross v. *Doe*, 1 Pet. 655, 664, 7 L. ed. 302, 306; *Baldwin* v. *Stark*, 107 U. S. 463, 464, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Shively* v. *Bowlby*, 152 U. S. 1, 9, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548; *Hussman* v. *Durham*, 165 U. S. 144, 147, 41 L. ed. 664, 665, 17 Sup. Ct. Rep. 253; *Pickering* v. *Lomax*, 145 U. S. 310, 313, 36 L. ed. 716, 718, 12 Sup. Ct. Rep. 860; *Glasgow* v. *Baker*, 128 U. S. 560, 571, 32 L. ed. 513, 517, 9 Sup. Ct. Rep. 154; *Wallace* v. *Parker*, 6 Pet. 680, 686, 8 L. ed. 543, 545; *Neilson* v. *Lagow*, 7 How. 772, 775, 12 L. ed. 908, 909; *Bell* v. *Hearne*, 19 How. 252, 263, 15 L. ed. 614, 618; *Cousin* v. *Labatut*, 19 How. 202, 207, 15 L. ed. 601, 604; *Berthold* v. *McDonald*, 22 How. 334, 338, 16 L. ed. 318, 320; *Lytle* v. *Arkansas*, 22 How. 193, 202, 16 L. ed. 306, 309; *Magwire* v. *Tyler*, 1 Black, 195, 202, 17 L. ed. 137, 141; *Reichart* v. *Felps*, 6 Wall. 160, 165, 18 L. ed. 849, 850; *Silver* v. *Ladd*, 6 Wall. 440, 18 L. ed. 828; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54, 46 L. ed. 800, 803, 22 Sup. Ct. Rep. 563; *Mobile Transp. Co.* v. *Mobile*, 187 U. S. 479, 482, 47 L. ed. 266, 269, 23 Sup. Ct. Rep. 170; *Kean* v. *Calumet Canal & Improv. Co.* 190 U. S. 452, 458, 47 L. ed. 1134, 1136, 23 Sup. Ct. Rep. 651; *Lavagnino* v. *Uhlig*, 198 U. S. 443, 450, 49 L. ed. 1119, 1122, 25 Sup. Ct. Rep. 716; *Gleason* v. *White*, 199 U. S. 54, *ante*, 87, 25 Sup. Ct. Rep. 782.

If plaintiff in error on a trial in the court below should fail to produce sufficient evidence to vest a legal title in Labeaume, under act of Congress of June 13, 1812, then the only question would be whether the patent or the 1st section of the act of Congress of June 6, 1874, vested it in him, and, in the event of a contest between them in regard to the title, it would present a Federal question.

Campbell v. *Laclede Gaslight Co.* 119 U. S. 445, 446, 30 L. ed. 459, 7 Sup. Ct. Rep. 278.

The court below was in error in intimating that the petition merely stated an anticipated defense. There is no such intimation in the petition and no such inference can reasonably be drawn from it, and the petition is to be liberally construed.

Oglesby v. *Missouri P. R. Co.* 150 Mo. 137, 51 S. W. 758.

It sets out with great particularity the title of plaintiff under the acts of Congress, under a proper construction of them, and their legal effect, to wit: That they conveyed all land lying on the west bank of and to the river, and that it was bounded by the river, the question being the extent to which the grants conveyed title, this being a Federal question.

Sweringen v. *St. Louis*, 185 U. S. 38, 41, 46 L. ed. 795, 797, 22 Sup. Ct. Rep. 569.

The claim of the city of St. Louis, defendant in error, under the act of Congress attempting to grant the premises sued for to it, is set out, not as a defense, but as a conflicting claim, just as the conflicting claim was set out in the petition in *Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340, and brings this case within the decision in *Shively* v. *Bowlby* and *Sweringen* v. *St. Louis*, *supra*.

The denial that a claim is made under the conflicting grant would be futile, as it includes other land, and is made directly to the city of St. Louis by an act of Congress disposing of the public lands, which is a public act of which the courts must take judicial notice, and, if it conveys said premises, enforce as an outstanding title.

McGuire v. *Blount*, 199 U. S. 142, *ante*, 125, 26 Sup. Ct. Rep. 1; *Papin* v. *Ryan*, 32 Mo. 21; *Wood* v. *Nortman*, 85 Mo. 298.

Mr. **Charles Claflin Allen** argued the cause, and, with *Messrs. Henry W. Allen* and *Charles W. Bates*, filed a brief for defendants in error:

In order to give the lower court jurisdiction, the necessary facts to confer jurisdiction must be stated in the petition itself, and, unless the jurisdictional facts affirmatively appear from the record, the presumption, upon writ of error or appeal, is that the court below was without jurisdiction.

King Iron Bridge & Mfg. Co. v. *Otoe County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Minnesota* v. *Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598.

A suit cannot be said to be one arising under the Constitution or laws of the United States, until it has in some way been made to appear on the face of the record that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction.

Starin v. *New York*, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Cooke* v.

Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

Jurisdiction cannot be conferred by alleging that defendant intends to dispute the validity of some law of the United States, or to assert a defense based on some such law.

Tennessee v. *Union & Planter's Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; *Florida C. & P. R. Co.* v. *Bell*, *supra*; *Chappell* v. *Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Walker* v. *Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Sawyer* v. *Kochersperger*, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 946; *Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Little York Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 24 L. ed. 656.

In an action of ejectment, the plaintiff must recover, if at all, upon the strength of his own title. The weakness of his adversary's cannot avail him.

McNitt v. *Turner*, 16 Wall. 352, 21 L. ed. 341.

The plaintiff cannot confer Federal jurisdiction by anticipating the defendant's claims of title, which the court may never be called upon to consider, or by raising fictitious disputes with himself.

McGuire v. *Blount*, 199 U. S. 142, *ante*, 125, 26 Sup. Ct. Rep. 1; *Watts* v. *Lindsey*, 7 Wheat. 158, 5 L. ed. 423.

The law concerning ejectment is the same in Missouri as in the United States courts.

Hunt v. *Searcy*, 167 Mo. 158, 67 S. W. 206.

Cases in which the Supreme Court has jurisdiction on writ of error to a state supreme court are not authorities on the questions of jurisdiction here involved.

Carson v. *Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

The fact that one of the parties has derived his title directly under an act of Congress does not, for that reason alone, present a Federal question.

Blackburn v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *DeLamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

The fact that the language of a grant from the United States may have to be construed in the usual and ordinary way applicable to instruments conveying title, in order to determine the correct measurements of the land conveyed, does not raise a Federal question.

Sweringen v. *St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

Cases in which this court passed the question of jurisdiction *sub silentio* are no authority in the case at bar.

New v. *Oklahoma*, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68; *United States* v. *More*, 3 Cranch, 159, 2 L. ed. 397.

All plaintiff needs to show is one title, good in him, to make out a prima facie case; and he cannot rely upon possible defects in that title in order to raise a Federal question.

Langdeau v. *Hanes*, 21 Wall. 521, 22 L. ed. 606; *Morrow* v. *Whitney*, 95 U. S. 551, 24 L. ed. 456; *Wright* v. *Roseberry*, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

There is no diversity of citizenship in this case, and the only ground of jurisdiction claimed is that the action arises under the laws of the United States. The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a claim that the title comes from the United States does not, for that reason merely, raise a Federal question.

It is a long-settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the Constitution or the laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action. In *Little York Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199-203, 24 L. ed. 656-658, it was said that before the circuit court can be required to retain a cause under its jurisdiction, under § 5, act of 1875 [18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 511], it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United

States. That was a case of a petition for a removal of a suit from the state to the Federal court. But it has been held that whether there is a right of removal in such cases depends upon whether the circuit court could have exercised original jurisdiction. *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Arkansas* v. *Kansas* [341] *& T. Coal Co.* *183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co.* 188 U. S. 632-640, 47 L. ed. 626-632, 23 Sup. Ct. Rep. 434. This original jurisdiction, it has been frequently held, must appear by the plaintiff's statement of his own claim, and it cannot be made to appear by the assertion in the plaintiff's pleading that the defense raises or will raise a Federal question. As has been stated, the rule is a reasonable and just one that the complainant, in the first instance, shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense. This principle was given effect to in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Muse* v. *Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Third Street & Suburban R. Co.* v. *Lewis* and *Arkansas* v. *Kansas & T. Coal Co. supra; Filhiol* v. *Maurice*, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co. supra.*

The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises. It was said in *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, that "this court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly from an act of Congress, for that reason alone presented a Federal question." The same principle was held in *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726, and also in *DeLamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

To say that there is a dispute between the parties as to the construction of the patent or of the several acts of Congress referred to does not raise a Federal question, because a statement that there is such dispute is entirely unnecessary in averring or proving plaintiff's cause of action. His source of title, as set forth in the petition, might not be disputed, and the defense might rest upon the defense of adverse possession, as set up in the answer. If defendants contented themselves on the trial with proof of such defense, then no question of a Federal nature would have been tried or decided.

*In those cases where the dispute neces- [342] sarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different. In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed. There is no dispute as to the terms of the patent or of the acts of Congress. The language of the averment in the petition (which is set out in full in the foregoing statement of facts) shows that the controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, "which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation, and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13th, 1812, and June 6th, 1874, respectively."

Now, whether the land contained in the original patent reached to the Mississippi river as its eastern boundary, under the distances called for by the patent, would be a question of fact, as was stated in *Sweringen* v. *St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569, and whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349-359, 42 L. ed. 497-501, 18 Sup. Ct. Rep. 157, and cases cited. In *Packer* v. *Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210, it was held that while the Federal court would construe grants of the general government without reference to the rules of construction adopted by the states for grants by them, *yet whatever incidents or rights attached to the ownership of the property conveyed by the United States bordering on a navigable stream*, would be determined by the states in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. To the same effect is *Shively* [343] v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14

Sup. Ct. Rep. 548. In the opinion in that case, at page 57, L. ed. p. 352, Sup. Ct. Rep. p. 567, it is said: "By the law of the state of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States.

The question before us is wholly different from the case of a writ of error to a state court founded upon § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). A Federal question may appear in the course of the trial, and some right specially claimed or set up under a Federal statute may have been denied, and the party against whom the decision was made can have the question reviewed by this court under that section.

In *Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340, this question was not decided. It was not referred to in the course of the opinion, and it is no authority for the plaintiff's contention herein. It was simply held that there was an issue between the parties which depended upon the laws of the United States and the rules of the circuit court, and their construction and application were directly involved

In any aspect in which this case may be viewed, we think *it was not one over which the Circuit Court had jurisdiction, and for that reason its order dismissing the petition is affirmed.*

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[344]*YORK MANUFACTURING COMPANY, *Appt.*,

v.

ARTHUR CASSELL *et al.*; Orrin Poppleton, Trustee; J. B. Waight and Ben Ames.

(See S. C. Reporter's ed. 344–353.)

Conditional sale—filing—necessity as against trustee in bankruptcy.—An adjudication in bankruptcy is not the equivalent of a judgment or attachment, so as to operate as a lien in favor of the trustee as against the conditional vendor of property sold to the bankrupt, because of noncompliance with the requirement as to filing made by Ohio Rev. Stat. § 4155, which, if given the construction placed by the highest state court upon a similar provision respecting chattel mortgages, renders an unfiled contract of conditional sale void only as to those creditors who have fastened upon the property by some specific lien.

[No. 208.]

Argued March 14, 1906. Decided April 2, 1906.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Ohio, giving a lien in favor of the trustee in bankruptcy as against the conditional vendor of property sold to the bankrupt, because of a failure to file the contract of sale. *Reversed* and remanded to the District Court for the entry of a decree in conformity with the opinion.

See same case below, 67 C. C. A. 526, 135 Fed. 52.

Statement by Mr. Justice **Peckham:**

The York Manufacturing Company has appealed from a judgment of the circuit court of appeals, which held that the company had no lien upon or right to remove certain machinery, as against creditors of the Mount Vernon Ice, Coal, & Milling Company, a bankrupt corporation. The facts upon which the question arises are as follows:

The corporation above named was organized under the laws of the state of Ohio, and was doing business at Mount Vernon, in that state. The company desired to enlarge its plant for the purpose of making ice, and to that end it was necessary to secure the proper machinery. It therefore entered into a contract, which was concluded October 27, 1902, with the appellant, the York Manufacturing Company, to supply that machinery for the sum of $7,375, to be paid in instalments, as stated in the contract. The contract also contained a stipulation "that the title to the ownership of the machinery, apparatus, or plant herein contracted for, shall remain in the York Manufacturing Company until the entire purchase price herein agreed to be paid . . . shall be actually paid in cash." The vendor *was given the right to enter[345] the premises of vendee and remove the property in case of default. Twenty-five per cent only of the price of the machinery was ever paid. This contract was never filed, as required by the statute of Ohio relat-

ing to conditional sales. Section 4155, which is set forth in the margin.†

The corporation, being short of funds for the purpose of building, desired to obtain them by the execution of a mortgage on the lot on which the building was to be erected. One William Mild was the president of the corporation and was the owner of and had the legal title to the real estate upon which its plant was being constructed. Mild applied to Messrs. Waight & Ames to assist in raising money, by lending their credit as sureties on notes to be given for loans to the corporation up to the sum of $10,000, by such persons or banks as loans could be [346]*obtained from. Waight & Ames agreed to become such sureties, and the parties then entered into an agreement for that purpose, the particulars of which it is not necessary here to deal with.

At the date of the Waight & Ames agreement,—November 1, 1902,—no part of the machinery had come to the possession of the company, but it began to arrive in January, 1903, and was finally installed in the plant three or four months later.

On the same date that the agreement was executed, a mortgage, without date, was also executed by William Mild, in whom the title was, to Waight & Ames, conditioned for their indemnification for becoming sureties, as contemplated by their agreement. This mortgage was not recorded until July 16, 1903, and on the next day the corporation made a general assignment for the benefit of its creditors. On July 22, 1903, a petition by creditors of the corporation was filed for an adjudication of bankruptcy against it, and on December 11, 1903, the adjudication was made.

Soon after the adjudication the York Manufacturing Company filed an intervening petition, which set forth the contract under which they sold the machinery to the bankrupt, and alleged default in payment, and prayed that the company might be allowed to enter the premises and remove the machinery therefrom. This petition was resisted by the creditors.

A short time thereafter Waight & Ames filed their intervening petition, setting up their mortgage, and alleging that they had no knowledge of the contract with the York Manufacturing Company at the time of taking their mortgage, and prayed that they might be given precedence over that company. It appears they did raise for Mild the sum of $10,000, by indorsing for him to that extent, and a portion of it they have since been compelled to pay, and they are liable for the balance.

The referee in bankruptcy, before whom the question came, held that the mortgage of Waight & Ames was a valid lien on all the bankrupt's property, including the machinery furnished by the York Manufacturing Company, subject, however, to a *purchase-money mortgage on the lot for [347]$1,000. He also held that the York Manufacturing Company had no lien on the machinery, but was a general creditor only.

The district court, on a petition for review, reversed this ruling, and held that the mortgage of Waight & Ames did not cover the machinery supplied by the York Manufacturing Company, but that the latter had no lien thereon as against general creditors; that the mortgage of Waight & Ames was a valid lien on the rest of the property, subject to the purchase-money mortgage on the lot; that they were not creditors of the bankrupt corporation, except as to the sum of $1,500 they had charged for becoming sureties under the contract above mentioned, but the court held that they might prove the debts of the creditors who held the notes on which they were sureties, if the creditors failed to do

†Section 4155, Revised Statutes of Ohio, provides as follows:

"In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in instalments, or shall be leased, rented, hired, or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer, or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such condition shall be evidenced by writing signed by the purchasers, lessor, renter, hirer, or receiver of the same, and also a statement thereon, under oath, made by the person so selling, leasing, or delivering any property as herein provided, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that the same is a copy, deposited with the clerk of the township where the person signing the instrument resides at the time of the execution thereof, if a resident of the state, and if not such resident, then with the clerk of the township in which such property is sold, leased, rented, hired, or delivered is situated at the time of the execution of the instrument; but when the person executing the instrument is a resident of a township in which the office of county recorder is kept, or when he is a nonresident of the state, and the property is within such township, the instrument shall be filed with the county recorder; and the officer receiving any such instrument shall proceed with the same in all respects as he is required to do by § 4152 of the Revised Statutes of Ohio, and shall receive the same fees as are allowed by law for similar services in other cases."

so, and that they might be subrogated to the rights of the creditors to the extent they had paid or might pay any balance due on said notes remaining after applying thereon the surplus of the proceeds of the sale of the real estate, after the purchase-money mortgage had been paid, and that the entire $10,000 of the notes, which were mentioned in the contract between Waight & Ames and the company, and for which they were to be sureties, might be included in this right of subrogation. This, of course, did not include a note for $1,000, which had been paid five months before the proceedings in bankruptcy. The district court held that the mortgage of Waight & Ames was subordinate to the lien of the York Manufacturing Company, because no part of it had been placed on the ground of the bankrupt until two months after the making of the mortgage to Waight & Ames. The court, however, held that the general creditors were entitled to have the plant of the York Manufacturing Company sold for the payment of their claims because of the failure of that company to file the conditional sale contract, as required by the Ohio statute, and such failure rendered the contract void as to the creditors. Waight & Ames did not appeal from the district court's decree.

348] *The circuit court of appeals, upon appeal by the York Manufacturing Company, affirmed the district court (67 C. C. A. 526, 135 Fed. 52), and that company has appealed here.

Mr. **Constant Southworth** argued the cause, and, with *Messrs. John L. Lott* and *Louis J. Dolle,* filed a brief for appellant:

The word "creditors" in the conditional sales law includes only judgment creditors.

Martin v. *Bowen,* 51 N. J. Eq. 452, 28 Atl. 823; Jones, Chat. Mortg. 4th ed. § 245; *Re Chadwick,* 50 Ohio L. J. 413; *Jones* v. *Graham,* 77 N. Y. 628; *Sheldon* v. *Wickham,* 161 N. Y. 500, 55 N. E. 1045; *Stephens* v. *Meriden Britannia Co.* 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781; *Overstreet* v. *Manning,* 67 Tex. 657, 4 S. W. 248; *Meyer Bros. Drug Co.* v. *Pipkin Drug Co.* 136 Fed. 396; *Stewart* v. *Beale,* 7 Hun, 405; *Hall* v. *Keating Implement & Mach. Co.* 33 Tex. Civ. App. 526, 77 S. W. 1054; *Bowen* v. *Lansing Wagon Works,* 91 Tex. 385, 43 S. W. 872; Isaac, Conditional Sales in Bankruptcy, § 9, p. 3.

The trustee in bankruptcy takes no greater title than the bankrupt, and the bankruptcy proceedings do not operate as a judicial seizure, conferring new and greater rights on the creditors of the bankrupt.

Thompson v. *Fairbanks,* 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Hewit* v. *Berlin Mach. Works,* 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Sheldon* v. *Wickham, supra;* Collier, Bankruptcy, 5th ed. p. 553; *Gibson* v. *Warden,* 14 Wall. 244, 20 L. ed. 797; *Douglas* v. *Vogeler,* 6 Fed. 53; *Stewart* v. *Platt,* 101 U. S. 731, 25 L. ed. 816; *Ycatman* v. *New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Donaldson* v. *Farwell,* 93 U. S. 631, 23 L. ed. 993; *Winsor* v. *McLellan,* 2 Story, 492, Fed. Cas. No. 17,887; *Laughlin* v. *Calumet & C. Canal & Dock Co.* 13 C. C. A. 1, 24 U. S. App. 573, 65 Fed. 441; *Re Sewell,* 111 Fed. 791; *Mannix* v. *Purcell,* 46 Ohio St. 102, 2 L.R.A. 753, 19 N. E. 572; *Re Hinsdale,* 7 Am. Bankr. Rep. 85; *Chattanooga Nat. Bank* v. *Rome Iron Co.* 4 Am. Bankr. Rep. 441; *Shaw* v. *Glen,* 37 N. J. Eq. 32; *Martin* v. *Bowen, supra; Van Heusen* v. *Radcliff,* 17 N. Y. 580, 72 Am. Dec. 480; *Nebraska Moline Plow Co.* v. *Blackburn* (Neb.) 104 N. W. 178; *Cincinnati Leaf Tobacco Warehouse Co.* v. *Combs,* 109 Ky. 21, 58 S. W. 420; *Re Wise,* 121 Iowa, 359, 96 N. W. 872; *Reber* v. *Gundy,* 13 Fed. 53; *Ryder* v. *Ryder,* 19 R. I. 188, 32 Atl. 919.

No counsel for appellees.

Mr. Justice **Peckham,** after making the foregoing statement, delivered the opinion of the court:

The question is simply whether the York Manufacturing Company has a right, under its conditional sale of the machinery to the bankrupt corporation, to take the machinery out of the premises where it was placed, as against all except judgment or other creditors by some specific lien. There are no judgment creditors in the case and no attachment has been levied, and the question is simply whether the adjudication in bankruptcy is equivalent to a judgment or an attachment *on the property, so as to[351] prevent the York Manufacturing Company from asserting its right to remove the machinery by virtue of the reservation of title contained in its contract.

In *Wilson* v. *Leslie,* 20 Ohio, 161, the court was construing the language of the statute relating to chattel mortgages, which declared a mortgage absolutely void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof should be deposited forthwith, as directed in the act. The court held that the mortgage was not void for lack of filing, as between the parties thereto, but that the statute only avoided the instrument as to those creditors who, between the time of the execution of the mortgage and the filing thereof, had taken steps

to "fasten upon the property for the payment of their debts." As against such as had in the interim secured liens by attachment, execution, or otherwise, the mortgage would be void. When filed with the recorder the instrument became valid as against all persons except those whose rights have attached upon the property before the recording of the instrument. See to the same effect *Re Shirley*, 50 C. C. A. 252, 112 Fed. 301.

We have not been referred to any decision of the supreme court of Ohio as to the meaning of the statute requiring the filing of contracts of conditional sales, but we concur with the circuit court of appeals in this case, that the statute would render the unfiled contract void as to the same class of creditors mentioned in the chattel mortgage statute. Therefore the contract would be void as to creditors who, before its filing, had "fastened upon the property" by some specific liens. As to creditors who had no such lien, being general creditors only, the statute does not avoid the sale, which is good between the parties to the contract.

The mortgage of Waight & Ames cannot be a lien on the machinery sold by the York Manufacturing Company, because the mortgage was prior to the time when any portion of such machinery was placed upon
[352] the land. There was no clause in *the mortgage covering after-acquired property, and, in any event, the mortgage would not cover property so acquired, the title to which, as in this case, was reserved to the vendor. This was the ruling of the district court, and no appeal was taken therefrom by the mortgagees. There are no creditors with any specific liens, nor is there any other mortgage, and there is no attachment.

We come, then, to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon the machinery. The circuit court of appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee, under such circumstances, stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt. This is held in *Hewit* v. *Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. The same view was taken in *Thompson* v. *Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. It was there stated that "under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt." See *Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Stewart* v. *Platt*, 101 U. S. 731, 25 L. ed. 816; *Hauselt* v. *Harrison*, 105 U. S. 401, 26 L. ed. 1075. The same doctrine was reaffirmed in *Humphrey* v. *Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such
a *case the trustee in bankruptcy takes only [353]
the rights of the bankrupt, where there are no specific liens, as already stated.

The remark made in *Mueller* v. *Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, "that the filing of the petition [in bankruptcy] is a *caveat* to all the world, and in effect an attachment and injunction," was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt, under such facts as are above stated. The dispute in the *Mueller Case* was whether the court in bankruptcy had power to compel, in a summary way, the surrender of money or other property of the bankrupt, in the possession of the bankrupt, or of someone for him, without resorting to a suit for that purpose. This court held, as stated by the chief justice in delivering its opinion: "The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense intended to be avoided by the simpler methods of the bankrupt law." It was held that the trustee was not thus bound, but had the right, under the facts in that case, to proceed under the bankrupt law itself and take the property out of the hands of the bankrupt or anyone holding it for him.

In this case, under the authorities already cited, the York Manufacturing Com-

pany had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company.

The decree of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to enter a decree in conformity with this opinion.

Reversed.

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[354] *UNITED STATES, *Petitioner,*

v.

R. F. DOWNING & CO.

(See S. C. Reporter's ed. 354–359.)

Duties—on carbon sticks.—Carbon sticks which must undergo a slight process of manufacture to be fit for use in electric lamps, not being dutiable under the tariff act of 1897, ¶ 98 (U. S. Comp Stat. 1901, p. 1633), as "carbons for electric lighting," because unfinished, nor under ¶ 97, as articles composed of carbon, not specially provided for, decorated or undecorated, because not susceptible of decoration, are dutiable under the similitude clause of § 7 (U. S. Comp. Stat. 1901, p. 1693), at the rate levied by ¶ 98 on the finished product.

[No. 104.]

Argued March 2, 1906. Decided April 2, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment affirming the judgment of the Circuit Court for the Southern District of New York, which had reversed the ruling of the board of general appraisers, that carbon sticks which must undergo a slight process of manufacture in order to be fit for use in electric lamps are dutiable under the similitude clause of the tariff act, at the rate imposed on the finished product. Judgments of the two lower courts *reversed* and the cause remanded to the Circuit Court with directions to sustain the decision of the board of general appraisers.

See same case below, 63 C. C. A. 532, 129 Fed. 90.

The facts are stated in the opinion.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for petitioner:

The imports were "carbons for electric lighting" within the manifest meaning of those words, and, as they were in such condition that no further manipulation could adapt them to any other useful purpose, a different classification would violate the plain purpose of the act.

Magone v. *Heller,* 150 U. S. 70, 74, 75, 37 L. ed. 1001–1003, 14 Sup. Ct. Rep. 18; *Elgin Nat. Watch Co.* v. *Spaulding,* 19 Fed. 411; *Worthington* v. *Robbins,* 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 581; *Hartranft* v. *Meyer,* 149 U. S. 544, 37 L. ed. 841, 13 Sup. Ct. Rep. 982, 983; *Robinson* v. *United States,* 122 Fed. 970.

Similarity in one of the particulars mentioned is sufficient to subject an unenumerated article to the duty levied on an enumerated one.

Pickhardt v. *Merritt,* 132 U. S. 252, 258, 33 L. ed. 353, 356, 10 Sup. Ct. Rep. 80.

Mr. **J. Stuart Tompkins** argued the cause, and, with *Messrs. Comstock & Washburn,* filed a brief for respondents:

The unfinished carbon sticks in question are not dutiable directly under paragraph 98 at 90 cents per hundred, as carbons for electric lighting.

United States v. *Nichols,* 186 U. S. 298, 46 L. ed. 1173, 22 Sup. Ct. Rep. 918; *United States* v. *Austin,* 58 C. C. A. 149, 121 Fed. 729; *Re Blumenthal,* 51 Fed. 76, Affirmed in 4 C. C. A. 680, 1 U. S. App. 680; *United States* v. *Simon,* 84 Fed. 154; *Hunter* v. *United States,* 126 Fed. 894, Affirmed in 67 C. C. A. 343, 134 Fed. 361; *United States* v. *Merck,* 13 C. C. A. 432, 26 U. S. App. 541, 66 Fed. 251; *Cowl* v. *United States,* 124 Fed. 475; *Re Maltby Lumber Co.* T. D. 25, 407, G. A. 715; *Vanacker* v. *Spalding,* 24 Fed. 88; *Vanacker* v. *Seeberger,* 40 Fed. 57.

The term "carbons for electric lighting" is the one generally used in trade as well as in common speech to designate finished articles of commerce used in arc lamps.

Jehl, Manufacture of Carbons for Electric Lighting, ed. 1899; Standard Dict. *carbon;* Century Dict. *carbon.*

This court has sanctioned reference to dictionary definitions as an aid to the memory and understanding of the court in determining the usual and ordinary meaning of words in tariff laws.

Nix v. *Hedden,* 149 U. S. 304, 37 L. ed. 745, 13 Sup. Ct. Rep. 881; *Marvel* v. *Merritt,* 116 U. S. 11, 12, 29 L. ed. 550, 6 Sup. Ct. Rep. 207.

In the present case, there being no evidence that the word "carbons" has a special meaning in trade and commerce different from its common and ordinary signification, it would seem that the latter or common meaning, as understood in everyday speech, must be taken as the criterion

NOTE.—*On the interpretation of commercial and trade names in tariff laws*—see note to Dennison Mfg. Co. v. United States, 18 C.C.A. 545.

in determining whether or not these imported sticks are "carbons" for electric lighting within the purview of that term as used in paragraph 98.

Sonn v. *Magone*, 159 U. S. 417, 40 L. ed. 203, 16 Sup. Ct. Rep. 67.

The dutiable classification of this merchandise must be determined according to the condition in which it was imported, not according to its condition when further manipulated or manufactured, after arrival.

United States v. *Schoverling*, 146 U. S. 76, 82, 36 L. ed. 893, 895, 13 Sup. Ct. Rep. 24.

That the defendants imported their merchandise in its unfinished condition "for tariff purposes" is in no way prejudicial to them.

Merritt v. *Welsh*, 104 U. S. 694, 26 L. ed. 896; *Magone* v. *Luckemeyer*, 139 U. S. 612, 35 L. ed. 298, 11 Sup. Ct. Rep. 651; *United States* v. *Schoverling*, 146 U. S. 81, 36 L. ed. 895, 13 Sup. Ct. Rep. 24.

Mr. Justice **McKenna** delivered the opinion of the court:

This case involves the rate of duty under the tariff act of 1897 (30 Stat. at L. 156, 205, chap. 11, U. S. Comp. Stat. 1901, pp. 1633, 1693) upon certain sticks of carbon used for electric lighting. The collector of customs of the port of New York held them to be dutiable at 90 cents per one hundred sticks, under paragraph 98 of the act of 1897, which provides as follows:

"Gas retorts, three dollars each; lava tips for burners, ten cents per gross and fifteen per centum ad valorem; carbons for electric lighting, ninety cents per hundred; filter tubes, *forty-five per centum ad valorem; [357] porous carbon pots for electric batteries without metallic connections, twenty per centum ad valorem."

On protest and review by the board of appraisers the decision of the collector was affirmed. The board of appraisers, however, held that the sticks were not within the terms of paragraph 98, basing the ruling on *United States* v. *Reisinger*, 36 C. C. A. 626, 94 Fed. 1002, nor within paragraph 97, under the rule in *United States* v. *Gabriel*, 99 Fed. 716. And held further, that while the articles in question were not enumerated in the act of 1897, they were "similar in material, texture, and use to carbons for electric lighting," and dutiable under paragraph 98 by virtue of the similitude clause (§ 7) of the act of 1897. The circuit court for the southern district of New York held that the articles were dutiable under paragraph 97, and reversed the ruling of the board of appraisers upon the authority of *United States* v. *Reisinger*, *supra*, and the circuit court of appeals affirmed the circuit court.

It appears from the evidence that the carbon sticks are from 12½ to 20 inches in length, and to render them ready for use ½ inch must be cut off from the shorter ones and their ends burnished or smoothed, the process costing about 1-10 of 1 per cent. The longer sticks must be cut in two, and sharpened at both ends, and it is stipulated that those steps for their completion being done the only use for the sticks "is as carbons for electric lighting." They are undoubtedly "carbons" and their use is "for electric lighting." In a general sense they come within the description of paragraph 98. It is contended, however, that they are not covered by that paragraph, because they must undergo a process of manufacture, though slight that process need be. The contention virtually is that the articles imported are not "carbons," either in the trade or popular sense, and do not become such until fit for use in lamps. In other words, it is the finished stick that constitutes the entity contemplated and made dutiable at 90 per cent under paragraph 98, *and that the articles imported are ac- [358] curately described and enumerated only in paragraph 97, as articles composed of carbon, not specially provided for. Paragraph 97 is as follows:

"Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

There is much to justify the contention of respondents as to paragraph 98. The act of 1897 recognizes in many places the difference between finished and unfinished articles of manufacture, but it also recognizes in many places use as determining the duty. The words "electric lighting" are very general, and it is the effect of the stipulation of the parties that the imported articles have no useful purpose except for electric lighting, though something further may be required for exact adaptation. However, we may put our decision on another ground, which will be best developed in considering the contention of respondents under paragraph 97.

The contention encounters a serious difficulty. As was decided in *Dingelstedt* v. *United States*, 33 C. C. A. 395, 62 U. S. App. 306, 91 Fed. 112, the paragraph covers articles which are susceptible of decoration, and not, as contended by respondents, articles decorated or not decorated, irrespective of their capability of being decorated. If

the articles in question do not fall within paragraph 98, because not finished, and do not fall within paragraph 97, because not susceptible of decoration, where do they fall? They would seem necessarily to fall under that part of § 6 which provides that "on all articles manufactured, in whole or in part, not provided for," and subject to a duty of 20 per cent ad valorem. But there is a circumstance to be considered that arrests this effect. Section 7 provides "that each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty
[359] which *is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

The imported merchandise are undoubtedly manufactured articles and do not miss by a great deal being identical with "carbons for electric lighting" in the most restricted sense of that description. They have, therefore, similarity in all the particulars mentioned in § 7 to such carbons.

The judgments of the Circuit Court of Appeals and of the Circuit Court are reversed, and the case remanded to the Circuit Court with directions to sustain the decision of the board of general appraisers.

LUTHER H. SOPER, *Plff. in Err.,*
v.
LAWRENCE BROTHERS COMPANY.

(See S. C. Reporter's ed. 359-371.)

1. **Constitutional law—due process of law—title by adverse possession.**—There is no denial of the due process of law guaranteed by U. S. Const., 14th Amend., in so much of Me. Pub. Laws 1895, chap. 162, as in effect enacts that a doing of such overt acts of ownership as are possible on wild land, under a recorded deed showing a claim of title, coupled with the payment of the taxes, the owner meantime not paying such taxes, and doing no act indicative of ownership, shall constitute a disseisin, and that such disseisin, if continued for twenty years, shall bar an action for the land.

2. **Adverse possession — time.**—Twenty years' adverse possession of wild land before the passage of Me. Pub. Laws 1895, chap. 162, would not bar a suit by the former owner to recover possession, under the provision of that act barring such actions "unless brought within said twenty years, or before January 1, 1900," if such adverse possession did not continue for the five years following the passage of that act.

3. **Constitutional law—due process of law—title by adverse possession—retrospective legislation.**—Property is not taken without due process of law, in violation of U. S. Const., 14th Amend., by construing the provisions of Me. Pub. Laws 1895, chap. 162, barring actions by the former owner to recover wild land adversely held unless commenced within twenty years or before January 1, 1900, as defeating an action begun after that date, when defendant had held the statutory possession for the five years following the act, and for fifteen years before.

[No. 206.]

Argued March 9, 12, 13. Decided April 2, 1906.

IN ERROR to the Supreme Judicial Court of the State of Maine to review a judgment overruling exceptions and a motion for a new trial in an action of trover, in which a verdict was found in favor of the defendant. *Affirmed.*

See same case below, 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908.

The facts are stated in the opinion.

Mr. **William Frye White** argued the cause, and, with *Messrs. Taber D. Bailey* and *John B. Cotton,* filed a brief for plaintiff in error:

A state statute which obliges a person in the constructive possession of land which, from its nature and character, is capable of no other possession, to bring suit to recover said land, thereby compelling a resort to legal proceedings by one who is in the complete enjoyment of all he claims, takes property without due process of law.

28 Am. & Eng. Enc. Law, p. 239; *Chandler* v. *Wilson,* 77 Me. 76; *Hudson* v. *Coe,* 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249; *Fleming* v. *Katahdin Pulp & Paper Co.* 93 Me. 110, 44 Atl. 378; *Millett* v. *Mullen,* 95 Me. 421, 49 Atl. 871; *Slater* v. *Jepherson,* 6 Cush. 129; *Cook* v. *Babcock,* 11 Cush. 206; *Little* v. *Megquier,* 2 Me. 176; *Bates* v. *Norcross,* 14 Pick. 224; Cooley, Const. Lim. 6th ed. p. 449; *Groesbeck* v. *Seeley,* 13 Mich. 329; *Case* v. *Dean,* 16 Mich. 12; *Dingey* v. *Paxton,* 60 Miss. 1038; *Baker* v. *Kelley,* 11 Minn. 480, Gil. 358; *Eldridge* v. *Kuchl,* 27 Iowa, 160; *Monk* v. *Corbin,* 58 Iowa, 503, 12 N. W. 571; *Moingona Coal Co.* v. *Blair,* 51 Iowa, 447, 1 N. W. 768; *Waln* v. *Shearman,* 8 Serg. & R. 357, 11 Am. Dec. 624; *Farrar* v. *Clark,* 85 Ind. 449;

NOTE.—*As to what constitutes due process of law*—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

Hill v. *Kricke*, 11 Wis. 442; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Marshall* v. *Walker*, 93 Me. 539, 45 Atl. 497; *Slater* v. *Manchester*, 160 Mass. 473, 39 Am. St. Rep. 514, 36 N. E. 310.

A state statute which changes the law of disseisin in respect to titles existing when it was passed, and, on account of such retroactive legislation, creates new obligations and imposes new duties, by converting an estate in possession into a mere right of action, takes property without due process of law.

Proprietors of Kennebec Purchase v. *Laboree*, 2 Me. 286, 11 Am. Dec. 79; *Coffin* v. *Rich*, 45 Me. 515, 71 Am. Dec. 559; *Sturges* v. *Carter*, 114 U. S. 512, 29 L. ed. 241, 5 Sup. Ct. Rep. 1014; *Satterlee* v. *Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Watson* v. *Mercer*, 8 Pet. 88, 8 L. ed. 876; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 404, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Webster* v. *Cooper*, 14 How. 488, 14 L. ed. 510; *Lewis* v. *Webb*, 3 Me. 335; *Austin* v. *Stevens*, 24 Me. 520; *Given* v. *Marr*, 27 Me. 220; *Atkinson* v. *Dunlap*, 50 Me. 117; *Thistle* v. *Frostburg Coal Co.* 10 Md. 147; *Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209.

A state statute which expressly takes away the right of entry and seisin in land from the owner, and transfers these vested property rights to another, takes property without due process of law.

Arrowsmith v. *Burlingim*, 4 McLean, 489, Fed. Cas. No. 563; *Gillan* v. *Hutchinson*, 16 Cal. 153.

So also does a state statute which takes away vested rights of action.

Cooley, Const. Lim. 6th ed. p. 444; *Larrabee* v. *Lumbert*, 36 Me. 444.

The same is true of a state statute which makes certain past transactions conclusive evidence to take away property from the owner in possession of the same, unless he incurs the expense and risk of a suit at law.

Taylor v. *Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Bennett* v. *Davis*, 90 Me. 102, 37 Atl. 864; *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; *Dunn* v. *Snell*, 74 Me. 27.

Is this court bound to follow the decision of a state court when a right is claimed under the Federal Constitution, and it has jurisdiction of the case?

Louisville & N. R. Co. v. *Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 77, 44 L. ed. 680, 20 Sup. Ct. Rep. 545; *McCullough* v. *Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Stearns* v. *Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

The power of the judiciary is limited to construction of statutes. It cannot disregard the plain and express language denoting the legislative will, and re-enact the statute to make it conform to constitutional requirements. No statute could be held unconstitutional if the judiciary were allowed to ignore vital and essential parts of a statute, and then construe the remainder to read opposite to its plain language.

Settle v. *Van Evrea*, 49 N. Y. 280; *State ex rel. Wall* v. *Blasdel*, 4 Nev. 241.

Mr. **Orville Dewey Baker** argued the cause, and, with *Mr. Amos K. Butler*, filed a brief for defendant in error:

A construction given to a statute by the highest court of a state must be accepted by this court in judging whether the statute conforms to the Constitution of the United States.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Illinois C. R. Co.* v. *Illinois*, 163 U. S. 142, 152, 41 L. ed. 107, 110, 16 Sup. Ct. Rep. 1096; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 353, 44 L. ed. 194, 20 Sup. Ct. Rep. 136; *Forsyth* v. *Hammond*, 166 U. S. 518, 41 L. ed. 1101, 17 Sup. Ct. Rep. 665.

The deprivation of property in issue must be confined to this particular plaintiff, and to the facts of this particular case.

Cooley, Const. Lim. pp. 180, 181.

If this act operates to change or to modify the common law as to disseisin of wild lands, this is quite unobjectionable, so long as it operates prospectively, and not retrospectively or instanter. Such is the frequent, and even usual, purpose and operation of statutes, and especially of statutes of limitation. They affect and change existing rights and remedies, to real as well as personal property; but this does not make them obnoxious to our constitutions, state or national, so long as they operate prospectively, and provide a reasonable time within which the essential rights previously existing, and the existing remedies, or some proper equivalent remedy, may be enforced.

Proprietors of Kennebec Purchase v. *Laboree*, 2 Me. 275, 11 Am. Dec. 79.

The principle upon which the act of 1895 is based is not novel. It has been repeatedly passed upon in other states, in many of them under statutes which would give much more color than the Maine statute to the contentions which the defendant here sets up.

Newland v. *Marsh*, 19 Ill. 376; *Stearns*

v. *Gittings*, 23 Ill. 387; *Lawrence* v. *Kenney*, 32 Wis. 293; *Knox* v. *Cleveland*, 13 Wis. 245; *Hill* v. *Kricke*, 11 Wis. 442; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Waln* v. *Shearman*, 8 Serg. & R. 357, 11 Am. Dec. 624; *Eldridge* v. *Keuhl*, 27 Iowa, 175; *Farrar* v. *Clark*, 85 Ind. 453.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action of trover for logs, brought by the plaintiff in error in the supreme judicial court of Maine. The defendant admitted carrying off the logs, but set up title to the land on which they were cut, one half in itself and one half in its licensors. At the trial the plaintiff proved a prima facie title to an undivided interest in the land. The defendant relied upon the Maine Public Laws of 1895, chap. 162, § 1. With regard to that, the chief justice, presiding, instructed the jury that if the defendant and its licensors, respectively, had satisfied the conditions of § 1, it was entitled to a verdict. A verdict was found for the defendant on that ground. The ruling was taken to the full court on exceptions and a motion for a new trial. At the argument there it was urged that the statute, if applicable to the plaintiff, was contrary to the 14th Amendment, and void. But the court, adverting to the question, decided the contrary, and the defendant had
[366]*judgment. 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908. The case then was brought to this court.

The material sections of the act of 1895 are as follows:

"Sec. 1. When the state has taxed wild land, and the state treasurer has deeded it, or part of it, for nonpayment of tax, by deed purporting to convey the interest of the state by forfeiture for such nonpayment, and his records show that the grantee, his heirs or assigns, has paid the state and county taxes thereon, or on his acres or interest therein, as stated in the deed, continuously for the twenty years subsequent to such deed; and when a person claims under a recorded deed describing wild lands taxed by the state, and the state treasurer's record shows that he has, by himself or by his predecessors under such deed, paid the state and county taxes thereon, or on his acres or interest therein, as stated in the deed, continuously for twenty years subsequent to recording such deed; and whenever, in either case, it appears that the person claiming under such a deed, and those under whom he claims, have, during such period, held such exclusive, peaceable, continuous, and adverse possession thereof as comports with the ordinary management of wild lands in Maine, and it further appears that during such period no former owner, or person claiming under him, has paid any such tax, or any assessment by the county commissioners, or done any other act indicative of ownership, no action shall be maintained by a former owner, or those claiming under him, to recover such land, or to avoid such deed, unless commenced within said twenty years, or before January 1, 1900. Such payment shall give such grantee or person claiming as aforesaid, his heirs or assigns, a right of entry and seisin in the whole, or such part, in common and undivided, of the whole tract, as the deed states, or as the number of acres in the deed is to the number of acres assessed.

"Sec. 4: This act shall not apply to actions between cotenants, nor to actions now pending in court, nor to those commenced before January 1, 1900."

*The defendant and his licensors claimed [367] under the second branch of the statute. They held under recorded warranty deeds describing wild lands taxed by the state, running back for more than twenty years, and, although it must be taken that the first deed of the series was executed by owners of a part interest only, that deed naturally was held by the state courts to be a repudiation of the tenancy in common and to lay a foundation for the working of the act. With that question we have nothing to do. The state treasurer's record showed that the defendant, its licensors, and those under whom they claim had paid the taxes thereon continuously down to the bringing of this suit. The same persons had held such exclusive, peaceable, continuous, and adverse possession of the land as comports with the ordinary management of wild lands in Maine, and during the same period no former owner had paid any tax or done any other act indicative of ownership. These facts are admitted or must be assumed to be established by the verdict. This action was brought in 1902 for acts done from 1900 to 1902, after the time allowed by § 4 had run. The question is whether the statute is constitutional as applied to such a case.

Before considering the construction of the statute we will deal with an objection which seems to be made to it, even if solely prospective, as we subsequently shall explain. Suppose that the law gives no effect whatever to acts done before its passage, still it is suggested that when it went into operation the plaintiff, but for its provision, would have been in constructive possession, and the statute purported at once to disseise him and to put him to an action to recover the land. But so far as the

statute is prospective it merely enacts, subject to the qualification in § 4, of which we shall speak in a moment, that certain acts, if done in the future, shall constitute a disseisin, and that the disseisin, if continued for the due time, shall ripen into title. The distinction between trespass and disseisin may be modified by statute as properly as it may be established by com-
[368] mon law. Also statutes of limitation *may be passed where formerly there were none. So far as the 14th Amendment is concerned, there is nothing to hinder a state from enacting that in future the doing of such overt acts of ownership as are possible on wild land, under a recorded deed which shows that the actor claims title, coupled with payment of the taxes, the owner meantime not paying them, and doing no act indicative of ownership, shall constitute a disseisin, or that such disseisin, if continued long enough, shall bar an action for the land. We think it unnecessary to cite the state decisions on similar statutes, or to argue that proposition at greater length. See *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261.

The main argument for the plaintiff is that if, as was the fact, the defendant had maintained the statutory occupation for the twenty years before the passage of the act, the statute purported retrospectively to give it the title, or, if the statute did not go to that length, that at least it counted the fifteen years preceding the enactment with the five following it to January 1, 1900, in order to make up the twenty years required by § 1, in any suit brought after that date. The former, more extreme suggestion, is answered by § 4. By the words of that section the statute did not apply to actions brought before January 1, 1900. Therefore, if, but for the statute, the plaintiff would have had a constructive seisin and might have declared in trespass, he still had it during five years and might have declared in the same way.

The only matter requiring analysis is the question of the former owner's position after January 1, 1900, when the act applied. The action then required to be brought by the former owner is an action "to recover such land, or to avoid such deed." An action to recover the land presupposes that the former owner still is out by a continuance, up to the time when the suit is brought, of the acts and omissions of the parties concerned respectively which are made to constitute a disseisin. The requirement that the statutory disseisin should continue until the
[369] action was brought is further shown by *the word "said" in the phrase "unless commenced within said twenty years," to which "or before January 1, 1900," is the alternative. Said twenty years are the years during which the disseisor has been paying taxes and holding possession. If between 1895 and 1900 the former owner had been paying the taxes and doing acts indicative of ownership, he would be seised by the very terms of the statute. He would have no occasion to sue, and we hardly understand it to be suggested that he could be sued on the strength of a disseisin satisfying the statute during the twenty years before it was passed, but ending in 1895. If such a suggestion should be made, it would be disposed of by recalling again that for five years after the enactment, for purposes of suit, at least, he stood constructively seised by force of § 4, whenever apart from the statute he would not have been disseised. Of course, therefore, he was not disseised retrospectively before the date of the act. It is still more absurd to suppose that the act meant that if he had paid the taxes and done acts of ownership, so that he was not merely constructively, but actually, seised during the five years, his title was to vanish when that time had elapsed.

The discussion is narrowed, then, to the consideration of an action begun, as this was, after January 1, 1900, when the defendant has held that statutory possession for the five years following the act and for fifteen years before. If the plaintiff had brought a real action instead of the present suit, he would have been barred if the statute is good. The plaintiff says that the counting of the fifteen years before the enactment makes the statute bad. But suppose that the statute had enacted simply that if the conditions of § 1 should be maintained from the date of the act until January 1, 1900, and no action brought, the former owner should be barred, there can be no question that it would have been valid. It was not and could not be argued that a statute of limitations allowing nearly five years would be unreasonably short. *Turner* v. *New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Terry* v. *Anderson*, 95 U. S. 628, 24 L. ed. 365. *But,
[370] if such a statute would be constitutional, the requirement of a continuance of similar conditions for a time before the statute long enough to make twenty continuous years when taken with the five years following it was a pure advantage to the plaintiff, a further condition which did him only good. It was not argued that the statute was invalid because a less time was allowed to persons in the plaintiff's position than to those whose twenty years should begin to run after the statute went into effect. Similar provisions are common and seem to have been before the court in *Terry* v. *An-*

derson and *Turner* v. *New York*, *supra*, and in *Koshkonong* v. *Burton*, 104 U. S. 668, 26 L. ed. 886.

Some objection was made to the effect given to a tax deed in the first part of the section. But that is not before us. We see nothing to indicate an intent to go beyond the law. *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508. As to the possibility that the taxes may have been assessed unlawfully or the recorded deed under which the defendant claims forged, it is admitted that such matters might be proved. As they are public facts, give color to the overt acts done upon the land, and must be accompanied by a necessarily conscious omission of the plaintiff to pay taxes or do any acts of ownership, we see nothing to hinder the legislature making them sufficient, prima facie, at least, to set the statute running and to put the former owners to a suit.

The act, as we construe it, does not infringe the 14th Amendment. We understand our construction to agree with that adopted by the supreme judicial court of the state. That court says of the statute: "It is not only not retrospective, but it is distinctly made prospective only in its operation, and the reasonable period of five years after the date of the enactment is allowed, during which all controversies respecting such titles might be adjusted according to 'the principles and the nature of those facts by means of which those titles had existed' before the passage of the act." [98 Me. 282, 99 Am. St. Rep. 407, 56 Atl. 912.] Of course, if the statute, as construed by the state court, is constitu-
[371] tional, we follow its *construction. *Tampa Waterworks Co.* v. *Tampa*, 199 U. S. 241, 243, *ante*, 170, 26 Sup. Ct. Rep. 23. We have made some little analysis of the words simply because the state court went into no detail.

Judgment affirmed.

MARIA EUSTAQUIA ORTIZ DE RODRIGUEZ, by her Husband, Juan Bautista Rodriguez, *Appt.*,

v.

JOSÉ ANTONIO VIVONI, Concepción Ramirez, Angela Ramirez, *et al.*

(See S. C. Reporter's ed. 371-377.)

1. Wills—construction.—"Issue," and not "lawful heirs," was meant by the words *sucesión legitima* in a devise of the residue of the testator's estate "in the character of fidei-commissum, and that the other [shares] may [profit by] accretion, in case of death without *sucesión legitima*," in equal parts to his nieces and a foster child, who was to adopt his surname, coupled with a provision for the education of such foster child, and a request that when her education was finished she should return to live with the said nieces.

2. Appeal—questions reviewable.—Questions not presented by the pleadings nor raised in the lower court will not be considered on appeal.

[No. 209.]

Argued and submitted March 14, 1906. Decided April 2, 1906.

APPEAL from the District Court of the United States for the District of Porto Rico to review a decree dismissing a bill for the partition of real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. **Fritz von Briesen** argued the cause, and, with *Messrs. Charles M. Boerman* and *Stephen M. Hoye*, filed a brief for appellant:

As used in the Spanish codes and law dictionaries the words *sucesión legitima* have a meaning which may be most nearly expressed by the English words "intestate succession."

Escriche, Diccionario Razonado de Legislación y Jurisprudencia, Paris, 1852, title, *Sucesión Legitima;* Pothier, Traité des Successions, Paris, 1890, p. 1; Porto Rico Code Civ. Proc. 1889, arts. 912, 981; Porto Rico, Civ. Code 1902, §§ 664–666, 866; La Code 1861, arts. 871–875.

The words *sucesión legitima* are used to designate those of the nearest relatives who take the inheritance.

Alcubilla, Diccionario de la Administración Española, Madrid, 1895, Appx. p. 795; 3 Scaevola, Jurisprudencia del Codigo Civil, Madrid, 1901, p. 213.

It is the same in our language.

Century Dict. *Succession.*

If a grantor or testator uses the word "heirs," and there are children, he usually means children. But the word "heirs" is construed to mean heirs unless the context shows that the meaning of the grantor or testator was otherwise.

Ide v. *Ide*, 5 Mass. 500; *Gifford* v. *Choate*, 100 Mass. 345; *Heath* v. *Hewitt*, 127 N. Y. 166, 13 L.R.A. 46, 24 Am. St. Rep. 438, 27 N. E. 959.

NOTE.—*As to how far the intention of a testator is to govern in the construction of a will*—see notes to Pray v. Belt, 7 L. ed. U. S. 309; Dougherty v. Rogers, 3 L.R.A. 847; Boston Safe Deposit & T. Co. v. Coffin, 8 L.R.A. 740; Davidson v. Coon, 9 L.R.A. 587; and Masterson v. Townshend, 10 L.R.A. 816.

As to when objections must be made in the court below—see notes to O'Neill v. New York, O. & W. R. Co. 5 L.R.A. 591; and State v. Holt, 8 L.R.A. 608.

It is the general rule of the Spanish law that wills are to be construed exactly as they read, unless such construction be a ridiculous one.

7 Jurisprudencia Civil, No. 315, p. 787; 12 Jurisprudencia Civil, No. 439, p. 461; 26 Jurisprudencia Civil, No. 204, pp. 15, 16; 27 Jurisprudencia Civil, No. 108, pp. 395, 396; 27 Jurisprudencia Civil, p. 166; 33 Jurisprudencia Civil, No. 49, p. 191; Pothier, Traité des Donations Testamentaires, Paris, 1890, p. 330, chap. 7, § 1.

The same provisions are found in our law of the construction of wills. The plain meaning of the words used in a will is always presumed to be their meaning, and the burden of proof that they are used in another sense is upon the party claiming so.

See *Aspden's Estate*, 2 Wall. Jr. 368, Fed. Cas. No. 589; *Daly* v. *James*, 8 Wheat. 534, 5 L. ed. 679; *Osborne* v. *Shrieve*, 3 Mason, 391, Fed. Cas. No. 10,598.

It is also invariably so held in the states where the civil law similar to that of Porto Rico is in force; as, for example, in Louisiana and California.

Norris v. *Hensley*, 27 Cal. 439; *Sharp* v. *Klienpeter*, 7 La. Ann. 264.

In construing a will, the words are to be construed according to their natural import, unless the context evidently points out that in the particular instance there should be some other construction.

Sheriff v. *Brown*, 5 Mackey, 172; *Re Hallet*, 8 Paige, 378; *Puryear* v. *Edmondson*, 4 Heisk. 51.

A testator must be presumed to have used words in their ordinary, primary sense or meaning.

Re Woodward, 117 N. Y. 522, 7 L.R.A. 367, 23 N. E. 120.

All doubts are to be resolved in favor of the testator's having said exactly what he meant.

Cody v. *Bunn*, 46 N. J. Eq. 131, 18 Atl. 857.

Where the provisions of the will are clear and simple, no reason exists for taking the testator's words in any other than their natural sense.

Wylie v. *Lockwood*, 86 N. Y. 301; *Lovett* v. *Buloid*, 3 Barb. Ch. 137.

The question in expounding a will is not what the testator meant, but what is the meaning of the words used by him.

Barry's Appeal, 6 Sadler (Pa.) 132, 20 W. N. C. 26, 10 Atl. 126; *Bates* v. *Woodruff*, 123 Ill. 205, 13 N. E. 845.

Only when technical words are employed in a will in such a manner that to give them their strict meaning would defeat the intention of the testator, apparent from the will, a more liberal or popular interpretation will be given to them, in order to carry such intention into effect.

De Kay v. *Irving*, 5 Denio, 646.

Provisions relating to fidei-commissary substitutions are to be liberally construed, so as to prevent the taking place of substitution.

Pothier, Traité des Substitutions, Paris, 1890, p. 477.

Mr. **N. B. K. Pettingill** submitted the cause for appellees:

The courts will so construe wills, irrespective of the technical meanings of the words used, as to determine and carry out the real intention of a testator.

Robison v. *Female Orphan Asylum*, 123 U. S. 707, 31 L. ed. 295, 8 Sup. Ct. Rep. 327; *Kenaday* v. *Sinnott*, 179 U. S. 616, 45 L. ed. 345, 21 Sup. Ct. Rep. 233; *Codina* v. *Codina*, 14 Jurisprudencia Civil, p. 237; *Romero* v. *Romero*, 14 Jurisprudencia Civil, p. 793.

The accustomed legal use of the term *sucesión* is to denote "issue," and not "heirs."

Dictionary Spanish Royal Academy, p. 932, *sucesión;* Lopez, Spanish-English Dictionary, p. 577, *sucesión;* 61 Jurisprudencia Civil, pp. 10, 488; 51 Jurisprudencia Civil, p. 422.

Where the word "heirs" is used by a testator, it often is shown by the context to mean "issue" or "descendants."

Randolph v. *Randolph*, 40 N. J. Eq. 77; *Canfield* v. *Canfield*, 55 C. C. A. 169, 118 Fed. 1; *Abbott* v. *Essex Co.* 18 How. 202, 15 L. ed. 352; *Barber* v. *Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 488.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill for the partition of real estate, in which the female plaintiff claims one undivided eighth as heir to her daughter, Felipa Benicia, who died an infant, without issue. This daughter got her title under the will of Thomas José Ramirez, and the question is whether, in the event which happened, her share went to her mother by descent or to her fellow devisees by the terms of the will. The other devisees all were living at her death. The case was heard upon a plea setting up the foregoing facts, together with the will, and the bill was dismissed. Thereupon the plaintiffs appealed to this court.

*The material clause of the will is as [376]
follows: "Trece.—El remanente de mis bienes, dercchos, y acciones, lo lego con calidad de fideicomiso, y que acrezcan las demas, caso de fallecimiento sin sucesión legitima, por iguales partes, á mis sobrinas Doña Cornelia y Doña Antonia Martinez,

Doña Monserrate, Doña Obdulia, Doña Encarnación, Doña Angela, y Doña Concesión Ramirez de Arellano y Felipa Benicia, mi hija de crianza," etc. We vary slightly the translation in the record. "The remainder of my goods, rights, and actions I bequeath in the character of fidei-commissum and that the other [shares] may [profit by] accretion, in case of death without *succsión legitima*, by equal parts to my nieces [named] and Felipa Benicia, my foster child, who shall adopt my surname," with appointment of a guardian for the last, a provision for her education, and a request that when that is finished she return to live with the said nieces.

It is agreed that it is possible for *sucesión legitima* to mean either issue or lawful heirs. If it means the latter, the mother inherited, as she was the lawful heir. If it means the former, then, by the terms of the will, Felipa Benicia's share went to the testator's nieces when she died. It seems to us too plain to need extended elucidation that *sucesión legitima* here means issue. The argument on the other side, that the purpose is merely to prevent an escheat by making the nieces and Felipa Benicia reciprocal successors, to impose a fetter on free alienation, and to enhance the dowry of the nieces, strikes us as fanciful. The natural object of this fidei-commissary substitution is that which is said to be its object,— to secure accretion among the shares. But that purpose would pretty nearly vanish into thin air if death without heirs were the event in view. For each of the nieces being heir to all the others, accretion among them would be excluded. It is argued, to be sure, that they might repudiate the inheritance and then claim under the will, if any of the nieces died heavily in debt. Whether this would be true by Spanish law we need not inquire. For such remote explanations must be rejected when
[377] *the will offers a different and more obvious one upon its face. And while it is pressed that substitutions are strictly construed in favor of the first taker, we do not understand that or any other rule of construction to require a perversion of language, or to govern a case where the second taker stands on an equal footing with the first in the testator's mind, with equal mutual chances, and when the plainly expressed purpose is to create an artificial class, with cross limitations in case of death without a child.

A suggestion is made by an afterthought, in a brief filed since the argument, that the testator could not exclude the mother of Felipa from her right, as necessary or forced heir, to two thirds of Felipa's share. The suggestion comes too late. No such claim was set up in the bill, or, so far as appears, in the court below. Therefore, we shall not consider at length whether, in case of a pure gratuity to one to whom the testator was under no legal obligation, the Spanish law entitled a forced heir to claim against the words of a gift like this. The texts cited are not sufficient to establish the proposition, and the contrary seems to be shown by Ley 10, titulo 4, part. 6, and note 13, Madrid ed. 1848. See also 4 Escriche, 1051, 1052, sub. v. *Substitución Fideicomisaria, ad fin.* On the whole case the plaintiffs must abide by the construction and the law, in which, it would seem from the bill, they have acquiesced for thirty years.

Decree affirmed.

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*W. J. McCAHAN SUGAR REFINING COMPANY, *Petitioner*, [378]

v.

THE STEAMSHIP WILDCROFT, James Cassap, *Master and Claimant.*†

(See S. C. Reporter's ed. 378–390.)

1. **Appeal—concurrent findings of fact.**—The concurrent findings of the two lower courts that a vessel was inspected at the beginning of the voyage, and found to be seaworthy and fit to carry the cargo which she had undertaken to transport, will ordinarily not be disturbed by the Federal Supreme Court on appeal.

2. **Evidence—burden of proof—seaworthiness.**—The burden of proving that a vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so, rests upon the shipowner claiming the benefit of the exemption provided in the Harter act of February 13, 1893 (27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946), § 3, against errors of management or navigation, whether or not there is any evidence to the contrary.

[No. 127.]

Argued December 12, 13, 1905. Decided April 2, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree affirming a decree of the District Court for the Eastern District of Pennsylvania dismissing a

†This case is reported by the Official Reporter under the title of "The Wildcroft."

NOTE.—*As to presumption and burden of proof respecting cause of loss or injury to goods shipped by vessel, and diligence or negligence of carrier*—see note to The Patria, 68 C. C. A. 398.

libel to recover damages to a cargo of sugar. *Affirmed.*

See same case below, 65 C. C. A. 145, 130 Fed. 521.

The facts are stated in the opinion.

Mr. **Horace L. Cheyney** argued the cause, and, with *Mr. John F. Lewis,* filed a brief for petitioner:

Prior to the passage of the Harter act, the burden was upon the carrier to show affirmatively that the damage was occasioned by one of the perils from which he was validly exempted by the bill of lading.

Clark v. *Barnwell,* 12 How. 272, 13 L. ed. 985; Hutchinson, Carr. 2d ed. § 765.

The Harter act has made no change in this rule.

The Southwark (*Martin* v. *The Southwark*) 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1; *International Nav. Co.* v. *Farr & B. Mfg. Co.* 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591; *The Manitou,* 116 Fed. 60, 63 C. C. A. 109, 127 Fed. 554.

The indirect testimony of the ship's witnesses is not circumstantial evidence.

Clifton v. *United States,* 4 How. 242, 11 L. ed. 957; *Kirby* v. *Tallmadge,* 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349; *Graves* v. *United States,* 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40.

Mr. **J. Parker Kirlin** argued the cause, and, with *Mr. Charles R. Hickox,* filed a brief for respondent:

The damage was due to a fault in the management of the vessel.

The Silvia, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7; *The Mexican Prince,* 82 Fed. 484, 34 C. C. A. 168, 63 U. S. App. 782, 91 Fed. 1003, 174 U. S. 801, 43 L. ed. 1187, 19 Sup. Ct. Rep. 887; *The Southgate* [1893] P. 329; *Good* v. *London S. S. Owners' Mut. Protecting Asso.* L. R. 6 C. P. 563; *The Warkworth,* L. R. 9 Prob. Div. 20; *Carmichael* v. *Liverpool Sailing Ship Owners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *Canada Shipping Co.* v. *British Ship Owners' Mut. Protecting Asso.* L. R. 23 Q. B. Div. 342; *The Glenochil* [1896] P. 10; *Adams* v. *Morris,* 18 Sess. Cas. 4th Series, 153; *The Carron Park* [1890] P. 203; *The Rodney* [1900] P. 112; *Rowson* v. *Atlantic Transport Co.* [1903] 2 K. B. 666; *The British King,* 89 Fed. 872, 35 C. C. A. 159, 92 Fed. 1018; *The Sandfield,* 79 Fed. 371, 34 C. C. A. 612, 61 U. S. App. 385, 92 Fed. 663; *The Ontario,* 106 Fed. 324, 53 C. C. A. 199, 115 Fed. 769; *The Cressington* [1891] P. 152.

In the absence of proof to the contrary, a vessel will be presumed to be seaworthy.

The Chattahoochee, 173 U. S. 540, 550, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491; *Pyman* v. *Von Singen,* 5 Hughes, 196, 3 Fed. 802; *Bullard* v. *Roger Williams Ins. Co.* 1 Curt. C. C. 148, Fed. Cas. No. 2,122; *Lunt* v. *Boston M. Ins. Co.* 19 Blatchf. 151, 6 Fed. 562; *Pickup* v. *Thames & M. M. Ins. Co.* L. R. 3 Q. B. Div. 594; *Guy* v. *Citizens' Mut. Ins. Co.* 30 Fed. 695; *Baltimore & P. R. Co.* v. *Landrigan,* 191 U. S. 461, 471, 472, 48 L. ed. 262, 266, 24 Sup. Ct. Rep. 137.

The existence of the presumption of seaworthiness does not shift the burden of proof on that issue from the shipowner to the libellant, but it does shift the duty of going forward with evidence from the shipowner, who advances the proposition, to the libellant, who opposes it.

Thayer, Preliminary Treatise, Evidence, pp. 336, 365; *Kidder* v. *Stevens,* 60 Cal. 414; *Keely* v. *Moore,* 196 U. S. 38, 46, 47, 49 L. ed. 376, 380, 25 Sup. Ct. Rep. 169; *Hickory* v. *United States,* 160 U. S. 408, 421, 40 L. ed. 474, 478, 16 Sup. Ct. Rep. 327.

The loss was not caused by unseaworthiness.

The Mexican Prince, 82 Fed. 484, 34 C. C. A. 168, 63 U. S. App. 782, 91 Fed. 1003; *The Silvia,* 64 Fed. 607, 68 Fed. 230, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

Mr. Justice **Day** delivered the opinion of the court:

The original action was begun by the filing of a libel in the district court of the United States for the eastern district of Pennsylvania, to recover damages alleged to have been sustained by the petitioner, with respect to a cargo of sugar of which it was the consignee, shipped upon the steamship Wildcroft from ports in Cuba to Philadelphia. The evidence showed that in the month of April, 1901, the Wildcroft, having discharged a cargo of coal at the port of Havana, proceeded to Cardenas and Matanzas, where she took on the load of sugar, to be delivered to the petitioner in Philadelphia. This sugar was stored in bags in holds Nos. 1, 2, 3, and 4 of the ship. On the voyage a severe storm was encountered and some damage was done by salt water finding its way into hold No. 3 because of the tearing away of the tarpaulins over the hatches and the washing off of the starboard ventilator cover. At the *hearing in the district court the [385] claim for damage, because of injury alleged to have been caused to the sugar in holds Nos. 1 and 2, was held to be waived by the libellant, who disclaimed damage on that account. And the district judge added, we think correctly, as to the surface damage in hold No. 3, "This damage was concededly caused by a peril of the seas."

There is nothing in the testimony to show that the injury to the cargo of sugar in holds Nos. 3 and 4 of the vessel by means of fresh water was occasioned until the ship arrived at Philadelphia.

A more distinct understanding of the construction of the vessel and the manner in which fresh water could be communicated to hold No. 3, and from thence into hold No. 4, may be had by a perusal of the full finding of the facts made in the case in the district court (124 Fed. 631, 126 Fed. 229), approved by the circuit court of appeals (65 C. C. A. 145, 130 Fed. 521), which findings fully explain the situation and the method by which the injury was inflicted. It is enough for us to say that both courts unite in the conclusion that the cargo was injured on Monday, April 29, after the ship arrived at the dock in Philadelphia, when, because of the letting in of fresh water for the purpose of filling the engine-room tank, which was accomplished by opening a valve on the ship's side which admits water from the river, and because of an open cock to a valve in the connection from the tank-filling pipe to the service or feed donkey, connecting with the distribution box, water was permitted to flow from the tank-filling pipe through this open cock to the distribution chest and down a pipe and through a valve, which must have also been held open in some way so that water flowed into this suction pipe leading into No. 3 hold, and flowing thence into No. 4 hold, damaged the cargo of sugar therein contained. It is evident from the testimony that if these cocks, and more particularly the one marked "D," had been properly closed, the water could not have found its way into the holds and inflicted the damage.

[386] Of these findings the circuit court of *appeals, adopting the conclusions of the court below, said: "All of the testimony in this respect is uncontradicted, and no facts are shown from which any other conclusion can be drawn, than that the water which came into the bottom of these holds, to the depth of several feet, doing the damage in question, came in after the early morning of the 29th of April, and before the close of that day, while the cargo was being discharged at the wharf in Philadelphia. It is not disputed that the water was fresh water, such as was the water in the Delaware river, in which she was lying. In connection with these facts, it was shown by the testimony that the sea cock for filling the engine-room tank was open at 10 o'clock that morning, and kept open for a period of three hours, and that if two certain cocks, fully described in the evidence and pointed out by the learned judge of the court below, were left open by accident or design, there would be a free flow of water from the open sea cock into the bilges of hold No. 3. Directly after the filling of the tank and the closing of the sea cock, water to a considerable depth was reported in holds No. 3 and No. 4. This sea cock had not been open from the time the cargo was put on board in Cuba until, as just stated, on the morning of the 29th of April, at Philadelphia. We think the court below was fully justified in its finding, that the damage here in question was due to 'the water that flowed into the hold through the pipe line on April 29th, in the manner just described,' and that 'it is impossible that the damage could have occurred in any other way.'"

In order to have the benefit of the exemptions provided in the Harter act (27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946) against errors of management or navigation, by reason of the 3d section, which was relied upon in the case, it was incumbent upon the shipowner to prove that the vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so. *International Nav. Co.* v. *Farr & B. Mfg. Co.* 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591; *The Southwark* (*Martin* v. *The Southwark*) 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1. *It, therefore, be- [387] came incumbent upon the shipowner to show that a due and proper inspection had been had and the vessel ascertained to be in all respects seaworthy and fit to carry the cargo which she had undertaken to transport, or that due diligence to that end had been used. As we understand the findings of both the district court and the court of appeals, the testimony in this regard introduced by the shipowner was sufficient in the judgment of those courts, to establish that the vessel was seaworthy in the respects involved, and that an inspection had been had, and the valves and connections, the negligent use of which was productive of this injury, found in due order at the beginning of the voyage. This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive. *The Carib Prince* (*Wupperman* v. *The Carib Prince*) 170 U. S. 655, 658, 42 L. ed. 1181, 1185, 18 Sup. Ct. Rep. 753. The only testimony directly upon the subject at the hearing was that of the master and the engineer, taken upon deposition in England, upon interrogatories filed. The charge in the libel was very broad and general, and the interrogatories were not as specific as they might have been, and no cross interrogatories were filed. While the testimony is

not as specific as it might be, we still think it was sufficient to show that an inspection was had, and everything found in order at the beginning as well as during the voyage, and from the record we reach the conclusion, sustained by the findings of the courts below, that the ship was seaworthy in all respects at the beginning of the voyage, and it was a careless and recent opening of the valve or valves, shortly before the fresh water was let in, which resulted in the damage complained of. We are very clear that this is not a case where the findings of the court below can be disturbed, as was our conclusion in the case of *The Southwark*, *supra*, relied upon by the petitioner, where it was shown that the damage inflicted was the result of unseaworthiness in respect to a condition which a proper inspection of the vessel at the beginning of the voyage would have discovered and remedied. We, therefore, reach the con-
[388] clusion that the decree of the *circuit court of appeals should be affirmed, and but for its construction of the rule of evidence in cases of this kind this opinion might well end here. But we are unable to agree with the views expressed in the opinion of the learned circuit court of appeals to the effect that where a shipowner seeks the protection of the immunity afforded by the Harter act under § 3, reliance may be had upon the presumption of law that the vessel was seaworthy at the beginning of the voyage, and that it is only in cases of conflicting proof that the burden is imposed upon the shipowner of establishing by testimony the seaworthiness of the vessel, or due diligence in that behalf, in order to have the benefit of the act. We think this construction of the law is opposed to the terms and policy of the act, and contrary to the decisions of this court heretofore announced, from which we see no occasion to depart. The relief afforded by the 3d section of the Harter act to the owner of a vessel transporting property is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act. To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner; and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter *peculiarly within his own [389] knowledge. The inspection which he can give, but which the shipper cannot give, for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner. The law says, in substance, that when the owner can show that he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control. It is not a case where there is either the necessity or propriety of resorting to presumptions. It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur. This construction of the statute has been more than once announced in the decisions of this court; recently in *International Nav. Co.* v. *Farr & B. Mfg. Co.* 181 U. S. 218, 226, 45 L. ed. 830, 833, 21 Sup. Ct. Rep. 591, in which this court, speaking through Mr. Chief Justice Fuller, said: "We repeat, that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions." This case was quoted and followed in the still later case of *The Southwark*, *supra*, in which it was reiterated that the burden was upon the vessel owner to show by reasonable and proper tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and that if, by failure to adopt such tests and furnish the required proof, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel.

While we, therefore, accept the decision of the learned circuit court of appeals as to the facts in this case, we do not *wish [390]

to be regarded as sanctioning any relaxation of the rule above stated, already laid down in the prior decisions of this court.

Decree affirmed.

Mr. Justice **Brown** concurs in the result.

UNITED STATES, *Appt.*,
v.
JAMES H. WICKERSHAM, Jr.

(See S. C. Reporter's ed. 390–400.)

1. Civil service—positions included.—The protection of the President's order of July 27, 1897, against removals from the civil service except upon written charges, with opportunity for defense, extends to an employee in the office of the United States surveyor general for the state of Idaho, certified by the Secretary of the Interior as within the terms of the act of January 16, 1883 (22 Stat. at L. 406, chap. 27, U. S. Comp. Stat. 1901, p. 1222), § 6, and the executive order of May 6, 1896, made in pursuance thereof, extending the departmental service classified under that act so as to include all executive officers and employees outside of the District of Columbia, whether compensated by a fixed salary or otherwise, who are serving in a clerical capacity, or whose duties are, in whole or in part, of a clerical nature.

2. Civil service—compensation during suspension.—A regular and duly qualified employee in the classified civil service of the United States is entitled to the compensation attached by law to his position during the period of his wrongful suspension by a subordinate officer.

[No. 185.]

Argued February 28, 1906. Decided April 2, 1906.

APPEAL from the Court of Claims to review a judgment awarding compensation to an employee in the office of the United States surveyor general for the state of Idaho during the period of his suspension by that officer. *Affirmed.*

The facts are stated in the opinion.

Assistant Attorney General **Pradt** and *Mr.* **Felix Brannigan** argued the cause and filed a brief for appellant.

Messrs. **William R. Andrews** and **Samuel D. Luckett** argued the cause and filed a brief for appellee.

Mr. Justice **Day** delivered the opinion of the court:

The appellee brought suit in the court of claims to recover upon an alleged claim for compensation at the rate of $1,100 per annum, from November 1, 1897, to July 1, 1902, and averred that he was a clerk in the office of the United States *surveyor [393] general in Boisé, Idaho, in the classified civil service, from which employment, on said first-mentioned date, he was suspended without fault of his own or just cause. He stated his readiness to discharge the duties of the office, and set forth in detail what he claimed amounted to a wrongful suspension therefrom by the United States surveyor general of the state of Idaho. The finding of facts is quite voluminous, and it is unnecessary to set it all out in detail. The facts pertinent to the decision of this case may be summarized as follows: Several years prior to May 6, 1896, claimant was employed as a clerk, stenographer, and typewriter in the office of the surveyor general of the United States for the state of Idaho, at a salary of $1,100 per annum. On that date the President of the United States made and promulgated an order relating to the civil service, which provided, among other things:

"Rule III.

"1. All that part of the executive civil service of the United States which has been, or may hereafter be, classified under the civil service act, shall be arranged as follows: The Departmental Service. . . .

"2. The Departmental Service shall include officers and employees as follows:

. . . . . .

"(*b*) All executive officers and employees outside of the District of Columbia not covered in (*a*), of whatever designation, whether compensated by fixed salary or otherwise—

"Who are serving in a clerical capacity, or whose duties are in whole or in part of a clerical nature."

On June 9, 1896, the Secretary of the Interior issued the following order:

Civil Service Classification of Officers and Employees.

Department of the Interior,
Washington, June 9, 1896.

By direction of the President of the United States, and in accordance with the third clause of § 6 of the act entitled "*An Act to [394] Regulate and Improve the Civil Service of the United States," approved January 16, 1883 [22 Stat. at L. 406, chap. 27, U. S. Comp. Stat. 1901, p. 1222]:

It is ordered, That the officers and employees in or under this Department included within the provisions of the civil service law and rules be, and they are hereby, arranged in the following classes:

Class E, all persons receiving an annual salary of $1,000 or more, or a compensa-

tion at the rate of $1,000 or more, but less than $1,200 per annum. . . .

On September 22, 1896, the Acting Secretary of the Interior communicated to the Civil Service Commission the names of the incumbents, with their legal residences and the dates of appointment, added to the classified departmental service by the extension of May 6, 1896, also inclosing a similar list of such positions and employees in the offices of the surveyor general, which contained the name of the appellee, with his title, "stenographer and typewriter," date of appointment, salary, residence, and class. The appellee was verbally informed by the surveyor general of his selection, and, after executing the prescribed oath, entered upon his duties. At the time of his employment the custom was to allow the surveyor general to select the clerical force of his office. Appellee was continuously employed as such stenographer and typewriter until November 1, 1897, on which date he was suspended from service by the surveyor general. No charges in writing or orally were preferred against him, the surveyor general basing the suspension on the ground that appellee's services were not needed on account of lack of work to be done. On November 15, 1897, the surveyor general reported to the Commissioner of the General Land Office an accumulation of mineral work, the employment of certain clerks by himself, with the request for additional clerical force. On November 22, 1897, the Commissioner of the General Land Office advised the surveyor general that the ground taken that certain persons were dismissed because there was no further occasion for their services, and the appointment of other persons in
[395] their places, could not *be sustained. On February 24, 1898, the Commissioner of the General Land Office, in reply to a letter from the surveyor general under date of February 21, 1898, in which he had asked authority to employ two additional draftsmen and four transcribing clerks, to be paid from the funds reported as available, said: "No authority can be given you to employ the additional force desired, except as provided under the civil service rules. I am constrained to say that but for your summary action in dispensing with so many of your employees, in violation of the law governing such matters, the difficulties in despatching the work of your office would not have prevailed to such an extent." On May 14, 1898, the Commissioner advised the Civil Service Commission as follows: "Referring to my request of the 20th ult., for a certificate of a list of eligibles for appointment as stenographer and typewriter, at $900, in the office of the surveyor general of Idaho, I have been informed that an examination was recently held by your Commission in said state for persons possessing the required qualifications, and it is urgently requested that as soon as possible this office may be furnished with a certificate from those citizens of Idaho who are eligible for the place desired to be filled under my call of the 20th ult., as the surveyor general reports that his work is much impeded and embarrassed for the lack of a competent stenographer." On June 15, 1898, the president of the Civil Service Commission addressed a communication to the Secretary of the Interior, in which he said: "In this connection the Commission invites your attention to the fact that although Surveyor General Perrault suspended the above-named employees (Lellman and Wickersham) and three others (D. J. Cohen, Joseph P. Chinn, and Alice S. Howey) over seven months ago, on the alleged ground of lack of work (which has been effectually disproved), these persons still remain, separated from the service, while others occupy the positions to which they are properly entitled." Since November 1, 1897, claimant has not been permitted to perform the duties of stenographer and typewriter in said office, although after *said date he stood ready and
[396] willing to discharge the duties thereof, and he has received no compensation from the United States since October 31, 1897. On November 5, 1897, he protested against his suspension, and on December 28, 1897, he demanded his salary. On January 1, 1899, he assumed office as district clerk of Ada county, Idaho, and served for one year. On April 9, 1898, the Commissioner of the General Land Office directed the reinstatement of the clerks whose places had not been permanently filled, among others naming the appellee, and directed the surveyor general to prefer formal charges against such persons as he had reported for inefficiency, etc., and to hand a copy of the charges and a copy of the order to each of the clerks and give them three days within which to make a response. In pursuance of this instruction the surveyor general, on April 16, 1898, preferred charges against the appellee, and on the same day reinstated him. On May 10, 1898, the Commissioner of the General Land Office advised the surveyor general that the appellee would be reinstated in the service of the bureau, as his continuance in the surveyor general's office would not be harmonious and in the best interests of the public service. On the same day he was offered a position in Washington at $1,000 per annum, without transportation, which he declined.

He was offered the alternative of accepting a position in the General Land Office in Washington at a reduced salary, or to await the occurrence of a vacancy elsewhere; but he has not since been offered a position elsewhere in the service. On August 8, 1898, the Commissioner of the General Land Office made appellee's suspension permanent. The court of claims rendered a judgment in favor of the appellee for the amount of his compensation from the 1st of November 1897, from which date, it was found, he was wrongfully suspended, until May 10, 1898, when his services in the office of the surveyor general were discontinued and he was offered a position in the bureau at Washington, which he declined.

It is the contention of the government that Wickersham was not an official ap-
[397] pointee of the President or the head of *a department, but was merely an appointee of the surveyor general, without definite employment, and subject to removal at the will of that officer. The employment of the appellee is alleged to be no different than the ordinary engagement of master and servant, and it is urged that the attempted suspension by the surveyor general was tantamount to dismissal by an employer of one who was engaged without definite term and subject to dismissal at any time.

The provisions of the act of Congress of January 16, 1883, to regulate and improve the civil service of the United States (1 Rev. Stat. Supp. 392), are broad and comprehensive. By § 6 of the act the power is conferred upon the President of the United States to require the heads of executive departments to classify for the purposes of the act and the examination therein provided for, and to include in one or more of said classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments, not before classified for examination. The order of the President of May 6, 1896, Rule III., provides that the departmental service classified under the act should include officers and employees, among others, "All executive officers and employees outside the District of Columbia . . . of whatever designation, whether compensated by fixed salary or otherwise, who are serving in a clerical capacity, or whose duties are, in whole or in part, of a clerical nature." In accordance with the statute, and under the provisions of this order, the Secretary of the Interior, on June 9, 1896, made an order classifying the officers and employees of his department, Class E including persons receiving $1,000 or more salary, or compensation at the rate of $1,000 or more, but less than $1,200 per annum. On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the Acting Secretary of the Interior filed a list of positions and employees with the Civil Service Commission, which among others, in the list of employees in the offices of surveyors general, contained the name of the appellee as a stenographer *and typewriter, the date of his [398] appointment, salary, and residence, as stated in the findings of fact. By the action recited on the part of the President and the head of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified civil service. While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the "employees outside the District of Columbia," covered by the President's order of May 6, 1896. That order expressly included officers and employees, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Service Commission as an employee in the office of the surveyor general within the terms of the statute and the Executive order. He was, therefore, entitled to the protection of the President's order of July 27, 1897 (14 Am. Rep. Civ. Serv. Comm. 133): "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense." If the contention of the government be correct, and the attempted suspension by the surveyor general was equivalent to a dismissal from office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; nor can we find any authority, statutory or otherwise, authorizing the suspension in the manner undertaken in this case. The attempted

[399] *suspension was held to be without authority by the Commissioner of the General Land Office, and the surveyor general was directed to reinstate the claimant and to proceed by regular charges against him. In the meantime the record shows that the claimant was ready and willing to discharge the duties of his position, and had received no compensation therefor during the time of his wrongful suspension. Whether he could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employee, during his wrongful suspension by a subordinate officer, is entitled to the compensation provided by law. We see no reason, in such an attitude of the case, where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employee in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority. Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be and is entitled to the compensation provided by law during such suspension. Throop, Pub. Off. § 407; *Emmitt* v. *New York*, 128 N. Y. 117, 28 N. E. 19. This was the view entertained by the court of claims in deciding *Lellmann* v. *United States*, 37 Ct. Cl. 128, on the authority of which the case at bar was decided by that court. We think the ruling was correct.

The case comes to this: The appellee, by his appointment, practically made by the Secretary of the Interior in entering his name in the classified list and designating him for the service required, was entitled to the privileges and emoluments of his position until he was legally disqualified by his own action or that of some duly author-

[400] ized public authority. The attempted *suspension without authority of law, he remaining ready and willing to discharge the duties of the place, could not, during the period of such wrongful suspension, have the effect to deprive him of the compensation legally belonging to one entitled to hold the position.

Judgment affirmed.

HENRY A. BLAIR and Marshall E. Sampsell, as Receivers of the North Chicago Street Railroad Company, and James H. Eckels and Marshall E. Sampsell, as Receivers of the Chicago Union Traction Company, *Appts.*,

v.

CITY OF CHICAGO *et al.* (No. 331.)

NORTH CHICAGO CITY RAILWAY COMPANY, *Appt.*,

v.

HENRY A. BLAIR *et al.*, etc. (No. 332.)

CITY OF CHICAGO, *Appt.*,

v.

JOHN C. FETZER *et al.*, etc. (No. 333.)

HENRY A. BLAIR and Marshall E. Sampsell, as Receivers of the West Chicago Street Railroad Company, and James H. Eckels and Marshall E. Sampsell, as Receivers of the Chicago Union Traction Company, *Appts.*,

v.

CITY OF CHICAGO *et al.* (No. 334.)

CHICAGO WEST DIVISION RAILWAY COMPANY, *Appt.*,

v.

HENRY A. BLAIR *et al.*, etc. (No. 335.)

CITY OF CHICAGO, *Appt.*,

v.

JOHN C. FETZER *et al.*, etc. (No. 336.)

(See S. C. Reporter's ed. 400–506.)

1. Courts—jurisdiction of Federal circuit court — diverse citizenship — suit by assignee.—A New York corporation may bring suit in a Federal circuit court on the notes of an Illinois corporation, although the treasurer of the latter corporation, to whose order the notes were made payable,

NOTE.—*As to diverse citizenship as ground of Federal jurisdiction*—see notes to Shipp v. Williams, 10 C. C. A. 247; Mason v. Dullagham, 27 C. C. A. 296; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; and M'Donald v. Smalley, 7 L. ed. U. S. 287.

On suits in Fedcral courts by assignee of chose in action—see notes to Goldsmith v. Holmes, 1 L.R.A. 817; Republic Iron Min. Co. v. Jones, 2 L.R.A. 746; and American Freehoid Land & Mortg. Co. v. Thomas, 12 L.R.A. 681.

On the ancillary jurisdiction of Federal courts—see note to Rosenbaum Bros. v. Council Bluffs Ins. Co. 3 L.R.A. 190.

On the expression of the subject of a statute

and by whom they were, before delivery, indorsed to the New York corporation, which loaned the money for which they were given, may be a citizen of Illinois.

2. Courts—jurisdiction of Federal circuit court—diverse citizenship.—The motive with which a creditor invokes the jurisdiction of a Federal circuit court is immaterial if he has a justiciable demand and the requisite diversity of citizenship exists.

3. Courts—jurisdiction of Federal circuit court—ancillary action.—Receivers in possession of street railway property under a decree of a Federal circuit court may, with the authority of that court, maintain an ancillary bill to remove a cloud cast upon the title to such property by the claim of the municipality that the rights and franchises of the street railway companies would expire on a specified date, and by its asserted purpose to resume possession of the streets on that date, and to resort to all legal means to protect its rights against what it deemed the unfounded claims of the railway companies as to the duration of their franchises.

4. Corporations—ultra vires—who may raise question.—The want of corporate power to make or accept certain leases of street railway property cannot be raised by the municipality in a suit to which all the corporations are parties, brought by the receivers, in whom are vested, under the authority of the court, all the rights and franchises of the lessor corporations which the latter undertook to transfer to the lessees.

5. Statutes—validity—expression of subject in title.—The requirement of the Illinois Constitution of 1848 that no private or local law shall embrace more than one subject, which shall be expressed in the title, is satisfied if the title is not made to cover legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection with such title.

6. Street railways — franchise — term.—The authority of the city of Chicago under Ill. acts of February 14, 1859, and February 21, 1861, to fix the terms and conditions upon which the street railway companies chartered by those acts with a corporate life of twenty-five years should occupy its streets, includes the power to fix the term of such occupation.

7. Street railways — franchise — term.—The right to use the Chicago streets for street railway purposes was not extended to ninety-nine years, without reference to any limitation as to time fixed by the municipality, by the Illinois amendatory act of February 6, 1865, which extends from twenty-five to ninety-nine years the corporate life of the street railway companies created by the acts of February 14, 1859, and February 21, 1861, to construct and maintain street railways on streets designated by the common council, upon terms and conditions prescribed by such council, and provides that any transfer of "rights, privileges, or franchises between the corporations" and all "contracts, stipulations, leases, and undertakings" as made and amended between the companies and the city, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force "during the life hereof" as if incorporated in the earlier statutes.

8. Statutes — construction — legislative grant.—A legislative grant of special and exclusive privileges must be made in plain terms in order to convey private rights in respect to public property, and to prevent the future control of such privileges in the public interest.

9. Statutes — amendment — effect. — The extended corporate life given by the Illinois amendatory act of February 6, 1865, to the street railway corporation created by the act of February 14, 1859, § 1, must be read into the charter of the street railway company created by § 10 of the same act, and invested by that section with all the grants, powers, privileges, immunities, and franchises conferred upon the corporation by the 1st section as fully and effectually as if incorporated by a separate act.

10. Street railways — franchise — term.—The right to operate street railways in Chicago under the municipal ordinance confirmed by Ill. acts of February 14, 1859, and February 6, 1865, until the city should exercise its reserved right to purchase, is confined to the streets designated in the original ordinance and in such other later ordinances as indicate a purpose to preserve the permission of the original ordinance, and does not, by reason of the unity of the street railway system, extend to the rights of occupancy acquired in other streets, so as to continue such right until purchase is made of the entire system.

11. Street railways — franchise — term.—No intention to confer a right in perpetuity to the occupancy of certain streets on the west side for street railway purposes authorized by the Chicago ordinance of August 17, 1864, can be inferred from the silence of such ordinance respecting the term of the grant, in view of the other ordinances limiting grants for the west side system to twenty-five years and thereafter until the municipality should exercise its right of purchase,—especially since twenty-five years was the limit of the corporate life of the grantee.

12. Street railways — franchise — term —acceptance of new privileges.—Whatever rights and privileges the street railway companies had in the Chicago streets under the compromise ordinance of July 10, 1883, as amended August 6, 1883, after the expira-

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in its title—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 362; People *ex rel.* Hart v. McElroy, 2 L.R.A. 609; Astor v. New York Arcade R. Co. 2 L.R.A. 789; and Evansville v. State, 4 L.R.A. 93.

On the effect of an amendment to a statute—see note to State v. Massey, 4 L.R.A. 308.

On curative and confirmatory statutes—see note to Barnitz v. Beverly, 41 L. ed. U. S. 94; and Steele County v. Erskine, 39 C. C. A. 180.

On municipal power over street railways generally—see note to Detroit Citizens' Street R. Co. v. Detroit R. Co. 43 L. ed. U. S. 67.

On municipal power to impose conditions when giving consent to a railway in the streets—see note to Galveston & W. R. Co. v. Galveston, 36 L.R.A. 33.

tion of the time limitation in the "power ordinances" of June 7, 1886, and March 30, 1888, were not lost by the acceptance of the privileges conferred by these ordinances, which provided that privileges as to time, after the expiration of the term fixed therein, were to be governed by prior ordinances.

13. Statutes—expression of subject in title.—The declaration in the title of the various acts constituting the charters of the Chicago street railway companies, that they concern "horse railways," does not, because of the provision of the Illinois Constitution of 1848, that no private or local law shall embrace more than one subject, which shall be expressed in the title, prevent the exercise of the power to amend, modify, or annul any contracts, stipulations, licenses, or undertakings, conferred by the amendatory act of February 6, 1865, upon the city and the companies, in such manner as to authorize the use of electricity or cable as the motive power.

14. Statutes—curative act—effect of repeal.—The effect of Ill. act of June 9, 1897, ratifying the grants to street railway companies by the proper public officers or authorities of permission to use cable, electric, or other motive power, cannot, as to contracts in existence when enacted, be destroyed by subsequent repeal.

15. Street railways—extension of route—official consent.—The abolition, during the life of the street railway corporation created by the Illinois act of February 14, 1859, of the office of supervisor in a township in Cook county, whose consent, under § 6 of that act, was essential to the extension of the street railway over and along the highways of the township, did not authorize such extension without official consent.

16. Street railways—extension of franchise—consent.—Consent of the board of trustees for the town of Lake View, in Cook county, which, under Ill. act of February 16, 1865, was to consist of the supervisors, assessors, and commissioners of highways, and their successors in office, and was empowered by the act of March 5, 1867, § 7, to control and supervise streets and highways, satisfies the provision of the act of February 14, 1859, § 6, requiring the consent of the supervisor to the extension of the Chicago street railway system into townships of Cook county.

17. Municipal corporations—power to grant street railway franchise.—The power to control streets and highways, conferred upon the board of trustees for the town of Lake View, in Cook county, by Ill. act of March 5, 1867, § 7, includes the right to authorize the use of such streets and highways for street railway purposes.

18. Street railways — franchise — term.—The consent to the extension of the Chicago street railway system into the town of Lake View, in Cook county, given by a supervisor acting under the authority of the act of February 14, 1859, § 6, or by the board of trustees created by the act of February 16, 1865, was not given in perpetuity, although no time was specifically mentioned, but must be deemed to cover only the same term as the city of Chicago had granted to the main system.

19. Street railway — franchise — term.—A grant of a street railway franchise does not, in Illinois, extend beyond the life of the municipality conferring it, where there was no attempt to make a grant of a definite term.

[Nos. 331, 332, 333, 334, 335, 336.]

Argued January 11, 12, 15, 1906. Decided March 12, 1906, and Opinion Filed April 2, 1906.

CROSS APPEALS from the Circuit Court of the United States for the Northern District of Illinois to review a decree granting in part the relief sought by two ancillary bills filed by the receivers of the Chicago Union Traction Company to remove a cloud cast upon the title to street railway property by the attitude and claims of the city of Chicago with reference to the duration of the street railway franchises. *Reversed* and remanded for further proceedings in accordance with this opinion.

See same case below, 132 Fed. 848.

Statement by Mr. Justice **Day:**

These are appeals from the decree of the circuit court of the United States for the northern district of Illinois. The origin of the cases dates from April 22, 1903, when the Guaranty Trust Company of New York, a corporation and citizen of that state, filed three suits in the circuit court of the United States for the northern district of Illinois against the Chicago Union Traction Company, the North Chicago Street Railroad Company, and the West Chicago Street Railroad Company, corporations and citizens of the state of Illinois. On the day the declaration was filed the general issue was joined, the jury waived, and, upon trial, judgment was rendered against the respective defendants for $318,690.66, $565,052.66, and $270,440. Executions having been awarded and returned "no property found," bills were filed by the Guaranty Trust Company, and receivers appointed for the property of each and all of those companies. Under the order of the court of July 18, 1903, the receivers filed two ancillary bills, one against the city of Chicago, the Chicago West Division Railway Company, the Chicago Union Traction Company, and the West Chicago Street Railroad Company; the other against the city of Chicago, the Chicago Union Traction Company, the North Chicago Street Railroad Company, and the North Chicago City Railway Company. They were afterwards amended by leave of the court. These bills state, among other things (having reference now to the west side case), that, as receivers, and under the order of the court, the complainants were in pos-

session of the system of street railroads; that the property included the rights, privileges, and franchises originally granted to the Chicago West Division Railway Company by the state of Illinois; that on October 20, 1887, the Chicago West Division Railway Company leased the property to the West Chicago Street Railroad Company
[405] for the full term of nine *hundred and ninety-nine years; that on June 1, 1889, that company transferred and conveyed to the Chicago Union Traction Company all its property, franchises, and rights, which were taken possession of by that company and were possessed and enjoyed by it with the consent of the city council, until the appointment of complainants as receivers; that since the appointment they have been directed by the court to make expenditures of about $580,000 in procuring new equipment; for that purpose it was necessary to issue receiver's certificates to borrow money, which they alleged they were unable to do, because of the hostile acts of the city of Chicago, its mayor, its council committees and representatives, which amounted to an impairment of the contract rights and franchises secured to the complainants and granted by the acts of the general assembly of Illinois, passed February 14, 1859, and February 6, 1865. They received a notice from the superintendent of streets, dated July 16, 1903, addressed to them as receivers, and stating that all permits issued to the Chicago Union Traction Company to do work and make repairs upon the streets, alleys, or public places in the city of Chicago were to be revoked on July 30, 1903. The bill sets out a large number of ordinances of the city and acts of the state of Illinois, under which acts, it was alleged, privileges and franchises were granted on fifty-six of the streets of the city, for the period of ninety-nine years from February 14, 1859.

It was averred that the city denies any contract right with the complainants under and by virtue of the said laws and ordinances, and, for the purpose of coercing the railroad companies to surrender their franchises, received from the state, asserts and claims that the act of 1865 is unconstitutional and void; that, if valid, it only operates to the extent of such lines as were authorized and consented to before its passage; that, if valid, the railroads could only operate their lines by animal power; that by force of the ordinance of July 30, 1883, the right to operate lines constructed prior thereto was absolutely limited to July 30, 1903, and that thereafter the railroad com-
[406] pany *would be a trespasser upon the streets of the city; that, by messages and official declarations of the mayor and council of the defendant city, it was given out that, unless the railroad company would surrender its franchises and rights to occupy the streets of the city, the city would oust the railroad company therefrom and pass an ordinance granting the right to operate street railways upon the streets now occupied by the railroad company, to other persons or corporations. That unless an injunction is granted, the city will, after July 30, 1903, proceed, by declaration of forfeiture or otherwise, to interfere with and prevent the occupation and enjoyment of the fifty-six railway routes described in the bill. That as to the street railroads where ordinances provided for possession until the city shall purchase the lines, the city has never made an offer to purchase, and seeks to force a surrender of the franchises and privileges, and to compel the railroad company to accept a twenty years' license, at an oppressive and ruinous annual rental. That if the claim and contentions of the city are sustained, the entire system of the railroad company will be destroyed and its charter rights illegally confiscated.

The prayer for relief is that the Chicago West Division Railway Company be decreed to be vested by the state of Illinois with the franchises and right to own, maintain, and operate fifty-six street railway routes, described in the bill, until 1960, and until such time thereafter as the city shall purchase the lines and pay for them in cash at their then appraised value, according to the terms of the ordinance contract; that it be decreed that the claim of the city of Chicago that the rights of the companies will expire on July 30, 1903, impairs the obligation of the charter subsisting between the state of Illinois and the said companies, and constitutes an unlawful taking of the rights and property of the company without compensation, and an unlawful interference with the property in the custody of the court; that the charter rights of the companies to maintain, operate, and enjoy the lines described in the bill until the *year 1960, and thereafter until the city pur-[407] chases the same, be established and quieted as against the hostile claims of the city, and that such claims be declared and decreed unconstitutional, contrary to law, and exist as clouds upon the title of the company, and for a perpetual injunction against the city from asserting the claims aforesaid, or interfering with the possession, occupation, and enjoyment of the railroad's property, except in the proper exercise of its police power, until the lawful determination of the charter rights.

The bill in the North Chicago case is substantially the same. It avers that the

property vested in the receivers in the north division of the city is about 100 miles of street railroad and the franchises and privileges thereunto belonging; that on May 24, 1886, the North Chicago City Railway Company leased to the North Chicago Street Railroad Company for the term of nine hundred and ninety-nine years all its property, franchises, and rights, except the right to exist as a corporation. That on June 1, 1899, the North Chicago Street Railroad Company leased and conveyed the property, for the full life of the lessor corporation, to the Chicago Union Traction Company; that the traction company entered into possession of the property and continued to use the same until the appointment of the receivers named therein.

The city answered and set up, among other things, that the suits wherein the receivers were appointed were collusive and in pursuance of a scheme concocted by the West Chicago Street Railroad Company, the North Chicago Street Railroad Company, the Chicago Union Traction Company, and the Guaranty & Trust Company of New York for the purpose of conferring jurisdiction upon the circuit court of the United States on the ground of diverse citizenship; that the Guaranty Trust Company was not a bona fide owner of the judgment upon which the suits were brought; and that the evidences of indebtedness upon which that company brought suit and obtained judgment as a colorable basis for the allowance of creditor's bills and appointment of receivers were [408] not in fact owned by the Guaranty *Trust Company, but were owned by divers persons and corporations of the state of Illinois.

The city denies that the city council passed any ordinance or resolutions that constitute an impairment of the contract rights of the complainants, granted under the acts of the general assembly of the state of Illinois, February 14, 1859, and February 6, 1865, or the ordinances of the city, and denies that it has ever threatened interference with any lawful rights, franchises, or privileges held by the complainants. It admits that its superintendent of streets sent a written notice to the complainants, as alleged in the bill, but without authority from the defendant, and that on July 21, 1903, the same was rescinded and recalled.

The answer then sets up the claims of the city concerning the legislative acts and ordinances pleaded in the bill, admits the passage or attempted passage thereof, but denies that the same has resulted in investing the railroad companies with a franchise from the state, to maintain and operate the system of railroads for ninety-nine years, and avers that the rights under certain of the ordinances set up in the bill expire on July 30, 1903. Defendant denies that it unlawfully or oppressively injured the lawful rights of the company; admits that it has contended and now contends that the alleged act of 1865 is unconstitutional and void as construed by the company; that the said act, when properly construed, did not operate to extend the duration of time beyond that fixed in various ordinances respectively relating to said lines; that the said companies have no right to operate street railway lines by other than animal power; and that the time for operation of certain of the lines existing under ordinances passed prior to July 30, 1883, expired on July 30, 1903, by reason of the time limits prescribed in said ordinances, as extended by the ordinance of July 30, 1883, and by reason of the limitation in the power of the city by the city and village law of the state of Illinois, passed July 1, 1872. It avers that it has never claimed or asserted that the time for the operation of lines constructed *under or- [409] dinances passed prior to July 30, 1883, absolutely ceased and determined, but, on the contrary, has recognized and conceded the existence of the purchase clause contained in certain of said ordinances as affecting the time limitations therein, and has endeavored to procure proper fiscal legislation by the general assembly of the state, which would enable the city to avail itself of said ordinance provisions with reference to purchase, and has frequently proposed and desired negotiations with the companies to provide new ordinances for the purchase by the defendant of the tangible property of said companies. The answer denies the allegations of the bills as to unlawful threats and compulsions, but admits that it does intend to enforce its rights in its streets against the unlawful claims of the companies, and admits that, unless restrained by injunction, it will proceed by every proper and lawful method to enforce its rights in its streets as set up in the answer, and to procure necessary street railway facilities for the citizens of Chicago, and to prevent the companies from unlawful usurpation of rights in the streets or from continuing to occupy the same after the right so to do has ceased and determined. It admits that as early as 1883 a serious difference as to the nature and extent of the legal and contract rights of the street railway companies in certain of the streets of the city arose between the companies and defendant. It sets up the messages of the mayor and copies of the various resolutions of the council with regard to opening negotiations with the companies for the ascertainment of their rights and those of the city.

The case having been tried, the circuit court rendered a decree holding that the legislative acts of 1859, 1861, and 1865 constituted a grant to the companies to use the streets of the city to be designated by the council, but that the franchise to use the streets was a grant from the state; that the acts of 1859, 1861, as amended in 1865, extended the franchises of the companies for ninety-nine years, the extended life of the corporation; that the Constitution of Illinois of 1870 prohibited the further creation of corporations by special laws,
[410] and decreed *that the general assembly should not grant the right to construct any street railways in the city without acquiring the consent of the local authorities then having control over the streets; that the cities and villages act of 1872 empowered cities organized under that act to permit, regulate, or prohibit the locating, laying, or constructing of tracks of horse railroads in any street, alley, or public place, but such permission was limited to a period not to exceed twenty years; that the acts of 1859, 1861, as amended in 1865, did not constitute a grant by the legislature of streets which were authorized to be used and occupied by the city after it adopted and elected to be governed by the city and village act, and that after date of May 3, 1875, as to such streets, the street railway companies' rights were regulated by the city ordinances affecting the same; that the act of 1859, under the 10th section of which the North Chicago City Railway Company was incorporated, amended by the act of February 21, 1865, extended the life of the corporation for ninety-nine years; and held that said amendment applied not only to the Chicago City Railway Company, but as well to the rights conferred by the act of 1859 on the North Chicago City Railway Company. The case is reported in 132 Fed. 848.

Pertinent parts of the ordinance of August 16, 1858, the acts of February 14, 1859, February 21, 1861, and February 6, 1865, are given in the margin.†

Messrs. **Brainard Tolles, John S. Miller,** and **John G. Johnson** argued the cause, and, with *Messrs. Joseph S. Auerbach* and *W. W. Gurley* filed a brief for appellants in Nos. 331, 332, 334, and 335, and for appellees in Nos. 333 and 336:

The jurisdiction of the court herein must be determined alone from the record of these cases in equity, now here on appeal. The transcripts of the record of the suits at law in which the judgments were recovered which were the basis of the creditors' bills in which the receivers were appointed are no part of the transcript of record here; nor are the transcripts of record of such creditors' suits.

Pacific R. Co. v. *Missouri P. R. Co.* 111 U. S. 505, 522, 28 L. ed. 498, 504, 4 Sup. Ct. Rep. 583; *Continental Trust Co.* v. *Toledo, St. L. & K. C. R. Co.* 82 Fed. 642; *Richardson* v. *Loree,* 36 C. C. A. 301, 94 Fed. 375.

They are records of other suits than those before the court on these appeals. Neither of them can be looked into in order to defeat the jurisdiction of the court below to enter these decrees; although there is authority that they might be offered in evidence here, if necessary, in order to sustain the decrees.

Stilwell v. *Carpenter,* 62 N. Y. 639; *Wines* v. *New York,* 70 N. Y. 613.

Promissory notes were delivered to the plaintiff by the defendant bearing the indorsement of Markham B. Orde, treasurer or assistant treasurer, and the money was advanced to the defendant by the plaintiff, so that the plaintiff held the notes as first taker, and not as an assignee. The jurisdiction of the circuit court to render judgment on the notes was clear.

Wachusett Nat. Bank v. *Sioux City Stove Works,* 56 Fed. 321; *Holmes* v. *Goldsmith,* 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288; *Bank of British N. A.* v. *Barling,* 46 Fed. 357.

The notes were made payable to the order of makers, and by them indorsed, as held by this court in *Falk* v. *Moebs,* 127 U. S. 597,

†Ordinance of August 16, 1858.

An Ordinance Authorizing the Construction and Operation of Certain Horse Railways in the Streets of the City of Chicago (Passed August 16, 1858).

Be it ordained by the common council of the city of Chicago:

Section 1. That there is hereby granted to Henry Fuller, Franklin Parmalee, and Liberty Bigelow, and such other persons as may hereafter become associated with them, and to their executors, administrators, and assigns, permission and authority and consent of the common council to lay a single or double track for a railway, with all necessary and convenient tracks for turn-outs, side tracks, and switches, in and along the course of certain streets of the city of Chicago hereinafter mentioned, and to operate railway cars and carriages thereon in the manner, and for the time, and upon the conditions hereinafter prescribed; provided, that said tracks shall not be laid within 12 feet of the sidewalks upon any of the streets.

Sec. 2. That said parties are hereby authorized to lay a single or double track for a railway in and along the course of the following streets in said city, and extending the same as follows: Commencing on State street, at the south side of Lake street; thence south to the present city limits. Also, commencing on State street, at the junction of Ringgold place; thence on Ringgold place to Cottage Grove avenue, thence on Cottage Grove avenue to the present limits of the city of Chicago.

32 L. ed. 266, 8 Sup. Ct. Rep. 1319. And that question is one of general commercial law, on which that decision is conclusive, and not of Illinois law, as conceived by counsel for the city of Chicago.

Burgess v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Independent School District* v. *Rew*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 1; *McPeck* v. *Central Vermont R. Co.* 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590; *Phipps* v. *Harding* (*Hudson Furniture Co.* v. *Harding*) 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468; *Windsor Sav. Bank* v. *McMahon*, 3 L.R.A. 192, 38 Fed. 283; *Union Bank* v. *Oxford*, 90 Fed. 7.

In any event, the common counts in the declaration for money loaned and advanced to the defendant, and upon an account stated, etc., showed a controversy within the jurisdiction of the court, and it must be presumed that these counts were sustained by proof.

Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; *Galpin* v. *Page*, 18 Wall. 350, 21 L. ed. 959; *Wolcott* v. *Coleman*, 2 Conn. 324; *Bunyea* v. *Metropolitan R. Co.* 8 Mackey, 76; *Harvey* v. *Laflin*, 2 Ind. 477.

Again, this attack on the judgments is a collateral attack, and cannot be made. Every intendment is made in their favor.

Re Cuddy, 131 U. S. 280, 285, 33 L. ed. 154, 156, 9 Sup. Ct. Rep. 703; Van Fleet, Collateral Attack, §§ 12, 829.

The jurisdiction of the court to entertain

Also, commencing on State street, at the junction of the Archer road; thence along the said Archer road to the present limits of the city. Also, commencing on State street, at the intersection of Madison street, and extending west along said Madison street to the present city limits.

Sec. 3. The cars to be used upon said tracks shall be operated with animal power only; and said railways shall not connect with any other railroad on which other power is used, and no railway car or carriage used upon any other railroad in this state shall be used or passed upon said tracks.

Sec. 4. The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways. The common council shall have power at all times to make such regulations as to the rate of speed and time of running said cars or carriages as the public safety and convenience may require.

Sec. 5. The tracks of said railways shall not be elevated above the surface of the street; shall be laid with modern improved rails, and shall be so laid that carriages and other vehicles can easily and freely cross said tracks at any and all points, and in any and all directions, without obstruction.

Sec. 6. The rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for a specific purpose.

Sec. 7. The said parties, their associates and successors, shall pay one third of the cost of grading, paving, macadamizing, filling, or planking on the streets or parts of streets on which they shall construct their said railways, and in the respects last mentioned shall keep such portion of their respective streets as shall be occupied by their said railways, or either of them, in good repair and condition during the whole time that the privileges hereby granted to the said parties shall extend, in accordance with whatever orders may be passed in that behalf by the common council of the said city of Chicago; and said parties shall be liable for all legal or consequential damages which may be sustained by any person by reason of the carelessness, neglect, or misconduct of any agent or servant of said parties, in the course of their employment in the construction or the use of the said tracks or railways, and said parties shall moreover pay to the property owners on any street so used by them as aforesaid for their said railways, which has, since the 1st day of January, A. D. 1858, been paved, macadamized, or planked, and at any time between said date last mentioned and the time of going into the occupation of either of said respective streets with the said railway by said parties, their associates or successors, may be paved, macadamized, or planked, one third of the reasonable cost and expense thereof so paid by said property owners, respectively.

Sec. 8. The rights and privileges granted to said parties by virtue of this ordinance shall be forfeited to the city of Chicago unless the construction of one of said railways shall be commenced on or before the 1st day of November, A. D. 1858; and unless the said railway commencing on the south side of Lake street and extending to Ringgold place shall be fully completed and ready for use on or before the 15th day of October, A. D. 1859; and the Madison street railway, commencing at the intersection of State street, and running on said Madison street to the city limits, completed and ready for use on or before the 15th day of October, A. D. 1860; and said railway from Ringgold place to Cottage Grove avenue, and along the same to the city limits, by the 1st day of January, A. D. 1861, and all the remaining railways hereinbefore mentioned, on or before the 1st day of January, A. D. 1863, the said railways, together with all improvements made upon the same, shall be forfeited to said city of Chicago, unless the common council of said city shall grant to said parties a further extension of time; provided, that if said parties are delayed by the order or injunction of any court, the time of such delay shall be excluded, and the same time, in addition to the periods above prescribed, shall be allowed for the completion of said railways as that during which they may be so delayed.

Sec. 9. If the said parties, their associates or successors, shall hereafter become incorporated, the rights and privileges granted to them by virtue of this ordinance shall extend to such corporation for the time and upon the conditions herein prescribed, and when such act of incorporation shall have been obtained, such corporation shall have all the rights and privileges hereby granted as the successors of

the creditors' bills brought for the collection of these judgments cannot be here collaterally questioned.

Re Cuddy, supra; Commercial Nat. Bank v. *Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; *St. Paul Trust Co.* v. *St. Paul Globe Pub. Co.* 60 Minn. 105, 61 N. W. 813; *Capital City Mut. F. Ins. Co.* v. *Boggs*, 172 Pa. 91, 33 Atl. 349.

The jurisdiction of the Federal court in these cases at bar arises from possession of assets.

Freeman v. *Howe*, 24 How. 450, 16 L. ed. 749; *Krippendorf* v. *Hyde*, 110 U. S. 276, 283, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27; *Gumbel* v. *Pitkin*, 124 U. S. 131, 156, 31 L. ed. 374, 382, 8 Sup. Ct. Rep. 379; *Morgan's L. & T. R. & S. S. Co.* v. *Texas C. R. Co.* 137 U. S. 171, 201, 34 L. ed. 625, 635, 11 Sup. Ct. Rep. 61; *Re Tyler*, 149 U. S. 164, 181, 37 L. ed. 689, 694, 13 Sup. Ct. Rep. 785; *Rouse* v. *Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266.

It is also sustainable as an exercise of ancillary jurisdiction.

White v. *Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Pope* v. *Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Porter* v. *Sabin*, 149 U. S. 473, 479, 37 L. ed. 815, 818, 13 Sup. Ct. Rep. 1008; *Byers* v. *McAuley*, 149 U. S. 608, 618, 37 L. ed. 867, 872, 13 Sup. Ct. Rep. 906; *Price* v. *Abbott*, 17 Fed. 506; *Armstrong* v. *Trautman*, 36 Fed. 275; *Compton* v. *Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Lan-*

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said parties, without further action of the common council.

Sec. 10. The right to operate said railways shall extend to the full time of twenty-five years from the passage hereof, and at the expiration of said time the parties operating said railways shall be entitled to enjoy all of said privileges until the common council shall elect, by order for that purpose, to purchase said tracks of said railways, cars, carriages, station houses, station grounds, depot grounds, furniture, and implements of every kind and description, used in the construction or operation of said railways, or any of the appurtenances in and about the same, and pay for the same in the manner hereinafter mentioned.

Sec. 11. Such order shall fix the time when said city of Chicago will take such railways and other property before mentioned, which shall not be less than six months after the passage of said order, and at the time of taking said railways and other property before mentioned the city of Chicago shall pay to the parties operating the same a sum of money, to be ascertained by three commissioners, to be appointed for that purpose, as follows: One to be chosen from the disinterested freeholders of Cook county by the said common council, one in like manner by the said parties, their associates and successors, and the two persons so chosen to choose the third from said freeholders.

Sec. 12. All rights heretofore vested in the board of water commissioners and sewerage commissioners, or other corporations, are not to be impaired or affected by this ordinance, but the rights and privileges hereby granted are subject thereto.

Sec. 13. The said Henry Fuller, Franklin Parmalee, and Liberty Bigelow shall enter into a good and sufficient bond with the city of Chicago, in the penal sum of $25,000, for the faithful performance of all the terms and conditions herein contained in this ordinance, and that said railways herein mentioned shall be completed at the times and manner herein stated, unless delayed by the order or injunction of some court having jurisdiction of such matters from so completing the same, and, until such bond shall be so executed by said parties, this ordinance shall have no force or effect whatever.

Sec. 14. All ordinances or parts of ordinances heretofore passed respecting the subject-matter of this ordinance (except to which this is an amendment), or in conflict with this ordinance or that to which the same is an amendment, are hereby repealed.

Act of February 14, 1859.

Act to Promote the Construction of Horse Railways in the City of Chicago.

Section 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly*, That Franklin Parmalee, Liberty Bigelow, Henry Fuller, and David A. Gage and their successors be and they are hereby created and constituted a body corporate and politic by the name of the Chicago City Railway Company for the term of twenty-five years, with all the powers and authority incident to corporations for the purposes hereinafter mentioned.

Sec. 2. The said corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks, and appendages in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south or west divisions of the city of Chicago as the common council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the said common council has or may have contracted with said parties, or any or either of them prescribed, but said corporation shall not be liable for the loss of any baggage carried on said railways kept in and under the care of its owner, his servant or agent.

Sec. 3. [As to capital stock.]

Sec. 4. [As to directors, etc.]

Sec. 5. The said corporation is hereby authorized to extend the said several railways herein authorized to be built in the manner aforesaid to any point or points within the county of Cook in this state; and to enable said corporation to construct any or all the railways therein authorized or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed by an act entitled "An Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement," approved June 22d, 1852, and

ning v. *Osborne*, 79 Fed. 657; *Toledo, St. L. & K. C. R. Co.* v. *Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497; *Davis* v. *Martin*, 51 C. C. A. 27, 113 Fed. 6.

Jurisdiction exists by reason of Federal questions involved.

Vicksburg Waterworks Co. v. *Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *American Waterworks & Guarantee Co.* v. *Home Water Co.* 115 Fed. 171; *Riverside & A. R. Co.* v. *Riverside*, 118 Fed. 736.

There being a real debt and a real diversity of citizenship, the motive of the creditor in bringing the suit is not a matter of inquiry in this court.

South Dakota v. *North Carolina*, 192 U. S. 286, 310, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; *Dickerman* v. *Northern Trust Co.* 176 U. S. 181, 190, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; *Lehigh Min. & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 336, 40 L. ed. 444, 447, 16 Sup. Ct. Rep. 307; *Crawford* v. *Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Cheever* v. *Wilson*, 9 Wall. 108, 123, 19 L. ed. 604, 608; *Smith* v. *Kernochen*, 7 How. 198, 216, 12 L. ed. 666, 673.

In this ancillary suit this court is asked to assume, upon mere conjecture and suspicion, facts which have been conclusively disproved by evidence in the main suit. There is no color of justification for such an attempt at collateral impeachment of the jurisdiction in the main suits.

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the several acts amendatory thereof, and may exercise all the powers conferred upon railroad corporations by the 25th and 26th sections of "An Act to Provide for a General System of Railroad Incorporations," approved November 5th, 1849, ascertaining and making recompense for all damages sustained agreeably to the provisions of the act hereinbefore first mentioned.

Sec. 6. The said corporation is hereby authorized, with the assent of the supervisor of any township, to lay down and maintain the said railway or railways in, upon, over, and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same. In all cases where vehicles shall meet the cars or carriages of said railway, either in the city or country, said vehicles shall give way to the cars or carriages on the railway.

Sec. 7. All of the rights and privileges granted, or intended so to be, to said Franklin Parmalee, Liberty Bigelow, Henry Fuller, and their associates in and by the ordinances of the common council and the amendments thereto, are hereby in all things affirmed, and shall pass to and become vested in the corporation hereby created.

Sec. 8. Nothing herein contained shall authorize the construction of more than a single track, with the necessary turn-outs, which shall only be at street crossings upon State street between Madison and Twelfth streets, except by the consent of the owners of two thirds of said State street between Madison and Twelfth streets aforesaid, nor shall anything herein contained be construed to authorize the company hereby incorporated to permit the cars of any other railroad company whatever, propelled by steam, to be run along or upon the railway of the company hereby incorporated.

Sec. 9. The said company hereby incorporated shall, within two years from the passage of this act, erect, maintain, and operate two railways, one from Lake street to the southern boundary of the city and one from the south branch of the Chicago river, on Madison street, to the western boundary of said city, and upon failure to do so this act and all the privileges and franchises hereby conferred shall cease and determine.

Sec. 10. All the grants, powers, privileges, immunities, and franchises conferred upon, and all duties and obligations required of, Franklin Parmalee, Liberty Bigelow, Henry Fuller, and David A. Gage by this act for the south and west divisions of the city of Chicago and the county of Cook, are hereby conferred upon and required of William B. Ogden, John B. Turner, Chas. V. Dyer, James H. Rees, and Valentine C. Turner by the name of "The North Chicago City Railway Company" for the north division of said city, and said county of Cook, as fully and effectually to all intents and purposes as if they had been by a separate act incorporated with all of said grants, powers, privileges, immunities, and franchises conferred upon them and all of said duties and obligations imposed upon them, and the said last-named corporation may take, hold, mortgage, and convey real estate.

Sec. 11. This act shall be deemed a public act, and noticed by all courts as such without pleading, and shall take effect from its passage.

Act of February 21, 1861.

An Act to Authorize the Extension of Horse Railways in the City of Chicago.

Section 1. *Be it enacted by the people of the state of Illinois represented in the general assembly*, That Edward P. Ward, William K. McAllister, Samuel B. Walker, James L. Wilson, Charles B. Brown, Nathaniel P. Wilder, and their successors, be and they are hereby created and constituted a body corporate and politic by the name of "The Chicago West Division Railway Company" for the term of twenty-five years, with all the powers and authority pertaining to corporations for like purposes.

Sec. 2. The said corporation shall possess all the powers conferred by, and be subject to all the provisions contained in, the 2d, 3d, 5th, and 6th sections of an act entitled "An Act to Promote the Construction of Horse Railways in the City of Chicago," approved February 14, 1859: *Provided*, that nothing herein contained shall be so construed as to in any manner invalidate or injuriously affect any of the rights of either of the corporations created by said act, or to authorize the corporation hereby created to construct or use any railway track in the north division of Chicago, except by the written consent of the North Chicago City Railway Company: *And, further, provided*, the consent of the owners of two thirds of the property, by lineal measure, fronting upon the

New Orleans v. *Fisher*, 180 U. S. 185, 45 L. ed. 485, 21 Sup. Ct. Rep. 347; *Evers* v. *Watson*, 156 U. S. 527, 532, 39 L. ed. 520, 522, 15 Sup. Ct. Rep. 430; *Skillern* v. *May*, 6 Cranch, 267, 3 L. ed. 220; *M'Cormick* v. *Sullivant*, 10 Wheat. 192, 6 L. ed. 300; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Kennedy* v. *Bank of Georgia*, 8 How. 586, 12 L. ed. 1209; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Dowell* v. *Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Shinney* v. *North American Sav. Loan & Bldg. Co.* 97 Fed. 9; *Olmstead* v. *Distilling & Cattle Feeding Co.* 73 Fed. 44; *Smith* v. *Hopkins*, 10 Wash. 77, 38 Pac. 854; *Richards* v. *West*, 3 N. J. Eq. 456; *Young* v. *Wempe*, 46 Fed. 354; *Jones* v. *Blun*, 145 N. Y. 333, 39 N. E. 954; *Richards* v. *People*, 81 Ill. 551; *Rand, McN. & Co.* v. *Mutual F. Ins. Co.* 58 Ill. App. 528; *Mattingly* v. *Nye*, 8 Wall. 370, 373, 19 L. ed. 380, 381.

If nothing had been done to bring about a speedy judicial settlement of the matters in controversy by a comprehensive decree binding on the city of Chicago, a multiplicity of suits would have been brought about which would speedily have transferred the practical operation of the "ninety-nine year act" from the street railways to the courts of Cook county.

That a court of equity has power to give relief against such an intolerable condition of affairs is clear. In holding that equity will give such relief, this court has shown no disposition to be restrained within the narrow limits of ancient precedents. Cases of this kind are *sui generis*, and constitute a striking instance of the adaptability of equitable remedies to new conditions.

Walla Walla v. *Walla Walla Water Co.* 172 U. S. 1, 12, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77; *Los Angeles* v. *Los Angeles City Water Co.* 177 U. S. 558, 581, 44 L. ed. 886, 896, 20 Sup. Ct. Rep. 736; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 379, 46 L. ed. 592, 604, 22 Sup. Ct. Rep. 410; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *Cleveland* v. *Cleveland City R. Co.* 194 U. S. 517, 531, 48 L. ed. 1102, 1106, 24 Sup. Ct. Rep. 756.

A complainant is entitled to equitable relief when threatened with serious and irreparable injury, even when the means of accomplishing such injury is an ordinance or other municipal act which is void on its face, and does not require extrinsic evidence to establish its invalidity.

Vicksburg Waterworks Co. v. *Vicksburg* and *American Waterworks & Guarantee Co.* v. *Home Water Co. supra; Cicero Lumber Co.* v. *Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Glucose Ref. Co.* v. *Chicago*, 138 Fed. 209; *Monson* v. *Kill*, 144 Ill. 248, 33 N. E. 43; *Detroit* v. *Detroit Citizens' Street R. Co. supra.*

The court, having once obtained jurisdiction over the subject-matter, will proceed to a complete determination of the entire controversy between the parties relating to such subject-matter.

United States v. *Union P. R. Co.* 160 U.

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the property, in lineal measurement, lying upon streets through which said railways shall pass, shall be obtained.

Sec. 3. [As to witnesses, etc.]

Sec. 4. The corporation hereby created is authorized to purchase, hold, and convey real or personal estate; to mortgage or lease its franchises and property; to acquire, unite, and exercise any of the powers, franchises, privileges, or immunities conferred upon the Chicago City Railway Company by the act aforesaid, or any ordinance of the common council of said city, upon such terms and conditions as may, by contract between the said railway corporations, be prescribed; and the consent of the board of directors of the said Chicago City Railway Company, manifested in writing, shall be a condition precedent to the corporation hereby created exercising the powers, or any of them, conferred upon it by the 2d section of the act aforesaid, as to any street of said south and west divisions of Chicago, in which the said Chicago City Railway Company has acquired the right of laying down its track: *Provided*, that upon obtaining such contract or consent as aforesaid, this corporation shall thereupon and thereby become entitled, as to the streets last-above mentioned, and no others, to use the same according to the provisions of said contract and ordinances aforesaid, anything herein contained to the contrary notwithstanding.

Sec. 5. [As to obstructing cars, etc.]

Act of February 6, 1865.

An Act Concerning Horse Railways in the City of Chicago.

Section 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly*, That the 1st section of an act of said general assembly, entitled "An Act to Promote the Construction of Horse Railways in the City of Chicago," approved February 14th, 1859 and the 1st section of a certain other act of said general assembly, entitled "An Act to Authorize the Extension of Horse Railways in the City of Chicago," approved February 21, 1861, be, and the same are hereby, so amended as that all the words in said respective sections after the word "company" therein, respectively, shall be and read as follows, *viz.*: for ninety-nine years, with all the powers and authority hereinafter expressed, or pertaining to corporations for the purposes hereafter mentioned.

Sec. 2. That the 2d section of the act first above referred to by its title, and which section is included in and made a part of the act secondly above referred to by the title thereof, be and the same is hereby, as to both of said acts, so amended as to read as follows, *viz.*: The said corporation is hereby authorized

S. 1, 52, 40 L. ed. 319, 337, 16 Sup. Ct. Rep. 190; *Ober* v. *Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Cathcart* v. *Robinson*, 5 Pet. 264, 8 L. ed. 120.

The removal of a cloud from the title was within the ancillary jurisdiction of the court.

Davis v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *Connor* v. *Alligator Lumber Co.* 98 Fed. 155; *Lanning* v. *Osborne*, 79 Fed. 657; *Re Tyler*, 149 U. S. 164, 181, 37 L. ed. 689, 694, 13 Sup. Ct. Rep. 785; *Rouse* v. *Letcher*, 156 U. S. 47, 49, 39 L. ed. 341, 342, 15 Sup. Ct. Rep. 266.

It was no objection that complainants' title is an estate for years, and not in fee.

Goldsmith v. *Gilliland*, 10 Sawy. 606, 22 Fed. 865; *McKee* v. *Howe*, 17 Colo. 538, 31 Pac. 115; *Pennie* v. *Hildreth*, 81 Cal. 127, 22 Pac. 398; *Newport* v. *Taylor*, 16 B. Mon. 699.

The city's claim of a right to purchase was a cloud on title.

Sea v. *Morehouse*, 79 Ill. 216; *Altschul* v. *Hogg*, 62 Fed. 539; *Lane* v. *Lesser*, 135 Ill. 567, 26 N. E. 522; *Monson* v. *Kill*, *supra*; *Hodgen* v. *Guttery*, 58 Ill. 431; *Key City Gaslight Co.* v. *Munsell*, 19 Iowa, 305; *Tucker* v. *Kenniston*, 47 N. H. 267, 93 Am. Dec. 425; *Rhea* v. *Dick*, 34 Ohio St. 420; *Niles* v. *Gray*, 12 Ohio St. 320; *Onderdonk* v. *Mott*, 34 Barb. 106; *Clark* v. *Darlington*, 7 S. D. 148, 58 Am. St. Rep. 835, 63 N. W. 771.

It is no objection to complainants' right to maintain the suit that they sue in a representative capacity.

Davis v. *Gray*, *supra*; *Laverty* v. *Sexton*, 41 Iowa, 435; *Newport* v. *Taylor*, *supra*.

While it has been repeatedly held in Illinois that a suit to quiet title cannot be maintained by an administrator, the reason given is that the administrator has no estate or interest in the land, but only a power of sale.

Ryan v. *Duncan*, 88 Ill. 144.

It is no objection to complainants' right to maintain a suit to quiet title that there is no statute of Illinois specifically authorizing it. Courts of equity have inherent jurisdiction to grant such relief in a proper case.

Whitney v. *Stevens*, 97 Ill. 482; *Lamb* v. *Farrell*, 21 Fed. 5; *Allen* v. *Halliday*, 25 Fed. 688; *Sharon* v. *Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; *Holland* v. *Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495.

It is no objection to complainants' right to maintain the suit that the defendant is a municipal corporation, claiming certain powers under a statute of the state.

Watson v. *Elizabeth*, 35 N. J. Eq. 345; *Newport* v. *Taylor* and *Davis* v. *Gray*, *supra*.

The complainants were under no obligation to set out specifically in their bills the nature of the adverse claims made by the city. It was sufficient to allege generally that such adverse claims existed.

Ely v. *New Mexico & A. R. Co.* 129 U. S. 291, 32 L. ed. 688, 9 Sup. Ct. Rep. 293; *Tolleston Club* v. *Clough*, 146 Ind. 93, 43

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and empowered to construct, maintain, and operate, a single or double track railway, with all necessary and convenient tracks for turnouts, side tracks, and appendages, in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south and west divisions of the city of Chicago, as the common council of said city have authorized said corporators, or any of them, or shall from time to time authorize said corporations, or either of them, so to do in such manner, and upon such terms and conditions, and with such rights and privileges, immunities and exemptions, as the said common council has, or may, by contract with said parties, or any or either of them, prescribe; and any and all acts or deeds of transfer of rights, privileges, or franchises, between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses, and undertakings, made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts; provided, that it shall be competent for the said common council, with the written consent or concurrence of the other party or parties, or their assigns to any of said contracts, stipulations, licenses, or undertakings, to amend, modify, or annul the same. But said corporations shall not, or any or either of them, be liable for the loss of any property or thing carried on said railways, kept in and under the care of its owner, his servant or agent; provided that any contract hereafter made by the common council of the city of Chicago with either of the corporations referred to in this act, for a higher rate of fare than 5 cents, shall be subject to modification or repeal at any regular meeting of said common council, by a majority vote of all the aldermen elected, or by the general assembly of the state of Illinois.

Sec. 3. [As to the Chicago & Evanston Railroad.]

Sec. 4. Each of said corporations shall be authorized to purchase, hold, and convey, real or personal estate, necessary for the use of such corporation, and to manufacture materials, machinery, and rolling stock for the use of such corporation.

Sec. 5. This act shall be deemed a public act, and noticed by all courts as such, without pleading, and shall take effect from its passage.

N. E. 647; *Holbrook* v. *Winsor*, 23 Mich. 394.

When issues have been joined and fully tried between the proper parties, the courts will not draw fine distinctions to defeat a remedy which it is in the public interest to have administered.

Detroit v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Gridley* v. *Watson*, 53 Ill. 186; *Mollie* v. *Peters*, 28 Neb. 670, 44 N. W. 872; *Goodrum* v. *Ayers*, 56 Ark. 93, 19 S. W. 97.

The right to a complete decree effectually quieting the title and settling the controversy in all its aspects was a substantial right of the parties, which it would have been error to disregard.

Quint v. *McMullen*, 103 Cal. 381, 37 Pac. 381.

In a country constituted as this is, where sovereign powers are exercised by representative legislative bodies, the courts recognize but one mode of "favoring the state," and that is by sustaining and making effective the legislative purpose.

Romer v. *St. Paul City R. Co.* 75 Minn. 217, 74 Am. St. Rep. 455, 77 N. W. 825; *Union P. R. Co.* v. *Hall*, 91 U. S. 343, 23 L. ed. 428; *Pearsall* v. *Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Moses* v. *Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516; *State* v. *Newport Street R. Co.* 16 R. I. 533, 18 Atl. 161; *State, New Jersey R. & Transp. Co., Prosecutors*, v. *Hancock*, 35 N. J. L. 537; *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 676, 47 L. ed. 641, 649, 23 Sup. Ct. Rep. 386; *Brooklyn Heights R. Co.* v. *Brooklyn*, 152 N. Y. 244, 46 N. E. 509; *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N. Y. 528, 47 N. E. 787; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 51, 35 L. ed. 55, 65, 11 Sup. Ct. Rep. 478; *Chesapeake & P. Teleph. Co.* v. *Manning*, 186 U. S. 238, 245, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881; *Wilmington City R. Co.* v. *Wilmington & B. S. R. Co.* (Del.) 46 Atl. 12.

Unless the decisions of the court are to follow all the vicissitudes of municipal politics, it will be necessary to find some better standard of public interest than the contentions of those who may, from time to time, be acting as officers of municipalities.

Yates v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Northwestern Teleph. Exch. Co.* v. *Minneapolis*, 81 Minn. 162, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69.

The city of Chicago has no mandate from the legislature to represent the public interest. It is only a subordinate agency of the state, with limited powers, and its charter is subject to the same rules of interpretation that apply to the railway companies' charters.

Smith v. *McDowell*, 148 Ill. 51, 62, 22 L.R.A. 393, 35 N. E. 141.

The power to agree upon "terms and conditions" did not impose upon the common council the duty and power of fixing the "term" of the franchise.

Chicago Terminal Transfer R. Co. v. *Chicago*, 203 Ill. 576, 68 N. E. 99; *Hurd* v. *Whitsett*, 4 Colo. 77; *Walsh* v. *Mehrback*, 5 Hun, 448; *Rokes* v. *Amazon Ins. Co.* 51 Md. 512, 34 Am. Rep. 323; *Reynolds* v. *Coleman*, 56 L. J. Ch. N. S. 903; *Ward* v. *Lawson*, L. R. 43 Ch. Div. 353; *LeRoy* v. *Beard*, 8 How. 451, 12 L. ed. 1151; *Swansea Improv. Co.* v. *Swansea & R. Co.* 4 Ry. & Canal Traffic Cas. 339; *Thorp* v. *Philbin*, 13 N. Y. S. R. 723; *Glynn* v. *Moran*, 174 Mass. 233, 54 N. E. 535.

Only limited powers were conferred upon the Chicago council.

Westport v. *Mulholland*, 159 Mo. 86, 53 L.R.A. 442, 60 S. W. 77; *Atlantic City Waterworks Co.* v. *Consumers Water Co.* 44 N. J. Eq. 427, 15 Atl. 581; *State* v. *Dayton Traction Co.* 18 Ohio C. C. 490; *Galveston & W. R. Co.* v. *Galveston*, 90 Tex. 398, 36 L.R.A. 33, 39 S. W. 96; *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778; *Citizens' Street R. Co.* v. *City R. Co.* 64 Fed. 647; *Citizens' Street R. Co.* v. *Memphis*, 53 Fed. 715; *Beekman* v. *Third Ave. R. Co.* 153 N. Y. 144, 47 N. E. 277; *People ex rel. Woodhaven Gaslight Co.* v. *Deehan, supra; National Foundry & Pipe Works* v. *Oconto Water Co.* 52 Fed. 29.

There are limits to the doctrine of contemporaneous construction.

People ex rel. Badger v. *Loewenthal*, 93 Ill. 191; *Bruce* v. *Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Wisconsin C. R. Co.* v. *United States*, 164 U. S. 190, 205, 41 L. ed. 399, 404, 17 Sup. Ct. Rep. 45; *Chicago* v. *Evans*, 24 Ill. 52; *Wichita* v. *Old Colony Trust Co.* 66 C. C. A. 19, 132 Fed. 641; *Los Angeles* v. *Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Northwestern Teleph. Exch. Co.* v. *Minneapolis*, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69.

The act of February 14, 1859, embraced but one subject, and the entire contents of said act were within the scope of its title.

Larned v. *Tiernan*, 110 Ill. 173; *People ex rel. Caton* v. *Ottawa Hydraulic Co.* 115 Ill. 281, 3 N. E. 413; *Mahomet* v. *Quackenbush*, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. Rep. 858; Sutherland, Stat. Constr. p. 86; *People ex rel. Deneen* v. *People's Gaslight & Coke Co.* 205 Ill. 482, 98 Am. St.

Rep. 244, 68 N. E. 950; *People ex rel. Longenecker* v. *Nelson*, 133 Ill. 565, 27 N. E. 217; *Abington* v. *Cabeen*, 106 Ill. 200; *Hronek* v. *People*, 134 Ill. 139, 8 L.R.A. 837, 23 Am. St. Rep. 652, 24 N. E. 861; *Blake* v. *People*, 109 Ill. 504; *Ottawa* v. *People*, 48 Ill. 233; *O'Leary* v. *Cook County*, 28 Ill. 534; *Neifing* v. *Pontiac*, 56 Ill. 172; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *Jonesboro* v. *Cairo & St. L. R. Co.* 110 U. S. 192, 28 L. ed. 116, 4 Sup. Ct. Rep. 67; *Carter County* v. *Sinton*, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; *Montclair Twp.* v. *Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; *San Antonio* v. *Mehaffy*, 96 U. S. 312, 24 L. ed. 816; *Woodson* v. *Murdock*, 22 Wall. 351, 22 L. ed. 716; *Van Brunt* v. *Flatbush*, 128 N. Y. 50, 27 N. E. 973; *Belleville & I. R. Co.* v. *Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *Cole* v. *Hall*, 103 Ill. 30; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *Ross* v. *Chicago, B. & Q. R. Co.* 77 Ill. 127; *Fuller* v. *People*, 92 Ill. 182; *Morris & C. Dredging Co.* v. *Jersey City*, 64 N. J. L. 587, 46 Atl. 609; *Sweet* v. *Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Diana Shooting Club* v. *Lamoreux*, 114 Wis. 44, 91 Am. St. Rep. 898, 89 N. W. 880; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 391, 46 L. ed. 592, 609, 22 Sup. Ct. Rep. 410.

The title of the act of February 6, 1865, was sufficiently specific.

People ex rel. Deneen v. *People's Gaslight & Coke Co. supra.*

The constitutionality of the act has been expressly upheld in *McCartney* v. *Chicago & E. R. Co.* 112 Ill. 611.

The act was within the power of the general assembly.

People use of Peoria County v. *Hill*, 163 Ill. 186, 36 L.R.A. 634, 46 N. E. 796; *Hawthorn* v. *People, supra; Wilson* v. *Sanitary District*, 133 Ill. 443, 27 N. E. 203; *Covington* v. *Kentucky*, 173 U. S. 231, 241, 43 L. ed. 679, 683, 19 Sup. Ct. Rep. 383; *East Hartford* v. *Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Atkin* v. *Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

With the wisdom or unwisdom of the legislation the court can have no judicial concern.

Priestman v. *United States*, 4 Dall. 28, 1 L. ed. 727; *Everett* v. *Wells*, 2 Scott, N. R. 531; *McCluskey* v. *Cromwell*, 11 N. Y. 601; *Atkin* v. *Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

In giving effect to the act of 1865, the only principles of interpretation which we suggest are those applicable to any statute in which there is a plain declaration of the legislative purpose about a matter clearly within the competency of the legislature to decide.

Springfield v. *Edwards*, 84 Ill. 626; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; *Frye* v. *Chicago, B. & Q. R. Co.* 73 Ill. 399; *Beardstown* v. *Virginia*, 76 Ill. 34; *Ottawa Gaslight & Coke Co.* v. *Downey*, 127 Ill. 201, 20 N. E. 20; *Steere* v. *Brownell*, 124 Ill. 27, 15 N. E. 26; *McGann* v. *People*, 97 Ill. App. 591.

Effect must be given, if possible, to all the words of the statute.

Ogden v. *Strong*, 2 Paine, 584, Fed. Cas. No. 10,460; *Decker* v. *Hughes*, 68 Ill. 33; *Atty. Gen. ex rel. McKay* v. *Detroit & E. Pl. Road Co.* 2 Mich. 139; *Opinion of the Justices*, 22 Pick. 571; *Nichols* v. *Wells*, Sneed (Ky.) 255; *Leversee* v. *Reynolds*, 13 Iowa, 310.

A section has or can have no life except as a part of the whole statute. It has no force of meaning or significance apart from the enacting clause.

Wheeler v. *Chubbuck*, 16 Ill. 361; *Burritt* v. *State Contract Comrs.* 120 Ill. 322, 11 N. E. 180; *The Seat of Government Case*, 1 Wash. Terr. 115; *State* v. *Patterson*, 98 N. C. 660, 4 S. E. 350.

The words "hereof," "herein," or "hereby," in an original statute, refer to the act itself; in an amendatory statute they refer to the original act as amended.

Lane v. *Kolb*, 92 Ala. 636, 9 So. 873; *Holbrook* v. *Nichol*, 36 Ill. 161; *McKibben* v. *Lester*, 9 Ohio St. 628; *Ely* v. *Holton*, 15 N. Y. 595.

The acts amended by the statute of 1865 were the original charters of the North Chicago City Railway Company and the Chicago West Division Railway Company, and the phrase "during the life hereof," as found in the amended charter of each of these companies, means "during the continuance or existence of this statute as an amendatory act."

Benham v. *Minor*, 38 Conn. 252.

The suggested difficulty as to the words "as made or amended" is devoid of substance. The word "as" may express either similarity, identity, or simultaneity. It may relate to form, manner, or time. Its use in the latter significance is well established and frequently recognized.

Seibert's Appeal, 13 Pa. 500.

The New Jersey act of 1790 was the same in spirit and in purpose as the Illinois act of 1865, which in form it closely resembles, except that it committed the powers of designation and regulation to a state com-

mission instead of to the local authorities, and it expressly empowered the commission to fix the term of the contract. Parties who intended to make an enduring contract could pursue no wiser course than to adopt the language of that statute, then recently construed by this court in a decision which vigorously upheld the obligation of good faith on the part of states as well as of individuals, even in the face of changing conditions.

See *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571.

In construing acts of the general assembly the rule is always applicable that the legislature is presumed to legislate for the future, not for the past. For this reason courts are reluctant to give statutes a retrospective operation.

White v. *United States*, 191 U. S. 545, 552, 48 L. ed. 295, 298, 24 Sup. Ct. Rep. 171; *Cleary* v. *Hoobler*, 207 Ill. 97, 69 N. E. 967; *Re Day*, 181 Ill. 73, 50 L.R.A. 519, 54 N. E. 646; *Means* v. *Harrison*, 114 Ill. 248, 2 N. E. 64; *People ex rel. Johnson* v. *Peacock*, 98 Ill. 172; *United States Mortg. Co.* v. *Gross*, 93 Ill. 483; *McHaney* v. *Trustees of Schools*, 68 Ill. 140; *Thompson* v. *Alexander*, 11 Ill. 54; *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 565, 41 L. ed. 1117, 17 Sup. Ct. Rep. 653.

So firmly established is this rule of construction that the courts in many cases have construed statutes prospectively, even where the legislature had apparently confined its language, with intention, to the past or present tense.

Amsbry v. *Hinds*, 48 N. Y. 57; *Harvey* v. *Tyler*, 2 Wall. 328, 17 L. ed. 871; *Indianapolis & St. L. R. Co.* v. *Blackman*, 63 Ill. 117; *People ex rel. Columbia Constr. Co.* v. *Hinrichsen*, 161 Ill. 223, 43 N. E. 973; *Harris* v. *White*, 81 N. Y. 532.

It is settled by judicial construction in Illinois that the act in question is prospective in its general scope and effect.

Chicago City R. Co. v. *People*, 73 Ill. 541; *McCartney* v. *Chicago & E. R. Co.* 112 Ill. 611.

The prospective embodiment, in a statute, of a contract not yet in existence, and the details of which are unknown to the legislature, is not without precedent.

Bridge Proprietors v. *Hoboken Land & Improv. Co. supra; Re New York Elev. R. Co.* 70 N. Y. 327.

Words in a statute which are not technical are to be taken in their common or popular acceptation, unless some special reason exists for giving them a strict interpretation.

Chicago v. *Evans*, 24 Ill. 52; *State, McLorinan, Prosecutor*, v. *Bridgewater Twp.* 49 N. J. L. 614; *Gross* v. *Fowler*, 21 Cal. 393; *Schriefer* v. *Wood*, 5 Blatchf. 215; *Sand-Blast File-Sharpening Co.* v. *Parsons*, 54 Conn. 310, 7 Atl. 716; *Maillard* v. *Lawrence*, 16 How. 251, 14 L. ed. 925.

This principle has been held to apply with peculiar force to the titles of legislative acts.

Enterprise v. *Smith*, 62 Kan. 815, 62 Pac. 324; *West Plains Twp.* v. *Sage*, 16 C. C. A. 553, 32 U. S. App. 725, 69 Fed. 943; *Little* v. *State*, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248.

The term "horse railway" has always been used as the antithesis of "steam railway."

Omaha Horse R. Co. v. *Cable Tramway Co.* 30 Fed. 324; *Buckner* v. *Hart*, 52 Fed. 835; *Paterson R. Co.* v. *Grundy*, 51 N. J. Eq. 213, 26 Atl. 788; *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* 156 Ill. 255, 39 L.R.A. 485, 40 N. E. 1008; *Indianapolis, B. & W. R. Co.* v. *Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Bond* v. *Pennsylvania Co.* 171 Ill. 508, 49 N. E. 545; *Taggart* v. *Newport Street R. Co.* 16 R. I. 669, 7 L.R.A. 205, 19 Atl. 326; *Halsey* v. *Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859; *Detroit City R. Co.* v. *Mills*, 85 Mich. 634, 48 N. W. 1007; *Koch* v. *North Ave. R. Co.* 75 Md. 222, 15 L.R.A. 377, 23 Atl. 463; *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co.* 149 Pa. 1, 24 Atl. 179; *Baker* v. *Selma Street & Suburban R. Co.* 130 Ala. 474, 30 So. 464; *Cumberland Teleg. & Teleph. Co.* v. *United Electric R. Co.* 93 Tenn. 492, 27 L.R.A. 236, 29 S. W. 104; *State ex rel. Howard* v. *Hartford Street R. Co.* 76 Conn. 174, 56 Atl. 506; *Tuebner* v. *California Street R. Co.* 66 Cal. 171, 4 Pac. 1162; *Loric* v. *North Chicago City R. Co.* 32 Fed. 270; *Hudson River Teleph. Co.* v. *Watervliet Turnp. & R. Co.* 135 N. Y. 393, 17 L.R.A. 674, 31 Am. St. Rep. 838, 32 N. E. 148; *Harvey* v. *Aurora & G. R. Co.* 174 Ill. 299, 51 N. E. 163, 186 Ill. 290, 57 N. E. 857.

The motive power to be used by a street railway is peculiarly a subject for regulation from time to time by the police power of the state. The courts will not attribute to the legislature an intention to abridge or limit the police power by a corporate charter, even assuming that such a limitation is possible.

Pearsall v. *Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

The confirmatory act of 1897 operated to ratify all prior consents by public officers or authorities to the change of motive power, whether they were authorized or not by existing laws at the time they were given.

City R. Co. v. *Citizens' Street R. Co.* 166 U. S. 557, 569, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653.

It is true that this statute was repealed by § 5 of the act of March 7, 1899. But such repeal did not affect rights vested or contracts made or ratified by the act during the time that it was in force.

Matthias v. *Cook*, 31 Ill. 83; *Capital State Bank* v. *Lewis*, 64 Miss. 727, 2 So. 243; *People* v. *Trinity Church*, 22 N. Y. 44; *People* v. *O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

The title has passed, even though the leases were *ultra vires*.

National Bank v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188; *Swope* v. *Leffingwell*, 105 U. S. 3, 26 L. ed. 939; *Reynolds* v. *First Nat. Bank*, 112 U. S. 405, 413, 28 L. ed. 733, 736, 5 Sup. Ct. Rep. 213; *Fritts* v. *Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Hickory Farm Oil Co.* v. *Buffalo, N. Y. & P. R. Co.* 32 Fed. 22; *Rogers* v. *Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299; *Voltz* v. *National Bank*, 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69; *Old Colony R. Corp.* v. *Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Spokane* v. *Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141; *Mallett* v. *Simpson*, 94 N. C. 37; *Fayette Land Co.* v. *Louisville & N. R. Co.* 93 Va. 274, 24 S. E. 1016; *Banks* v. *Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Missouri Valley Land Co.* v. *Bushnell*, 11 Neb. 192, 8 N. W. 389; *Barnes* v. *Suddard*, 117 Ill. 237, 7 N. E. 477; *Lancaster* v. *Amsterdam Improv. Co.* 140 N. Y. 576, 24 L.R.A. 322, 35 N. E. 964; *Houston & T. C. R. Co.* v. *Shirley*, 54 Tex. 125; *Grand Gulf Bank* v. *Archer*, 8 Smedes & M. 151.

The city, as a stranger to the leases, cannot question their validity in this action.

Old Colony Trust Co. v. *Wichita*, 123 Fed. 762; *Jones* v. *Habersham*, 107 U. S. 174, 188, 27 L. ed. 401, 406, 2 Sup. Ct. Rep. 336; *New Orleans, M. & T. R. Co.* v. *Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Seymour* v. *Slide & Spur Gold Mines*, 153 U. S. 523, 38 L. ed. 807, 14 Sup. Ct. Rep. 847; *Fritts* v. *Palmer*, 132 U. S. 282, 293, 33 L. ed. 317, 321, 10 Sup. Ct. Rep. 93; *Chattanooga, R. & C. R. Co.* v. *Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *McCoy* v. *World's Columbian Exposition*, 87 Ill. App. 605, Affirmed in 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043; *Matthews* v. *Murchison*, 15 Fed. 691; *Bowman* v. *Foster & L. Hardware Co.* 94 Fed. 592; *Bone* v. *Delaware & H. Canal Co.* 18 W. N. C. 125, 5 Atl. 751; *Chicago, B. & Q. R. Co.* v. *Lewis*, 53 Iowa, 101, 4 N. W. 842; *Barrow* v. *Nashville & C. Turnp. Co.* 9 Humph. 304; *Beels* v. *North Nebraska Fair & Driving Park Asso.* 54 Neb. 226, 74 N. W. 581; *Read* v. *Citizens' Street R. Co.* 110 Tenn. 316, 75 N. W. 1056; *Starin* v. *Edson*, 112 N. Y. 206, 19 N. E. 670; *Lancaster* v. *Amsterdam Improv. Co. supra*; *United States Vinegar Co.* v. *Foehrenbach*, 148 N. Y. 58, 42 N. E. 403; *Baker* v. *Northwestern Guaranty Loan Co.* 36 Minn. 185, 30 N. W. 464; *St. Louis Drug Co.* v. *Robinson*, 81 Mo. 18; *Belcher Sugar Ref. Co.* v. *St. Louis Grain Elevator Co.* 101 Mo. 192, 8 L.R.A. 801, 13 S. W. 822; *Fayette Land Co.* v. *Louisville & N. R. Co.* 93 Va. 274, 24 S. E. 1016.

Such an amendment as is contained in the act of 1865 amends all parts of the act to which it has reference, and, from the time of the amendment, the former act is to be read as if it had originally been in the form fixed by the amendment.

Holbrook v. *Nichol*, 36 Ill. 161; *Farrell* v. *State*, 54 N. J. L. 421, 24 Atl. 725; *Dexter & L. Pl. Road Co.* v. *Allen*, 16 Barb. 15; *Drew* v. *West Orange Twp.* 64 N. J. L. 483, 45 Atl. 787; *McKibben* v. *Lester*, 9 Ohio St. 627; *Ely* v. *Holton*, 15 N. Y. 595.

Where the title of an act is open to two interpretations, that interpretation will be adopted which harmonizes with the body of the act, unless the latter contains matter wholly incongruous and in no way suggested by the title.

Jonesboro v. *Cairo & St. L. R. Co.* 110 U. S. 192, 28 L. ed. 116, 4 Sup. Ct. Rep. 67; *Boehm* v. *Hertz*, 182 Ill. 154, 48 L.R.A. 575, 54 N. E. 973; *Park* v. *Modern Woodmen*, 181 Ill. 214, 54 N. E. 932; *Hudnall* v. *Ham*, 172 Ill. 76, 49 N. E. 985; *Allardt* v. *People*, 197 Ill. 501, 64 N. E. 533; *People ex rel. Longenecker* v. *Nelson*, 133 Ill. 565, 27 N. E. 217.

The only fair construction of the act of 1865 is that the general assembly agreed to suspend, for the period specified in that act, its power of providing for a termination of the corporate powers and rights of these companies, either by city purchase or in any other manner.

Potter v. *Collis*, 19 App. Div. 392, 46 N. Y. Supp. 471, 156 N. Y. 16, 50 N. E. 413.

The general provisions of the ordinance of 1858, adopted into and made a part of the act of 1859, became applicable to the entire system of railways authorized by that act, when built or extended anywhere within the county of Cook.

Chicago Union Traction Co. v. *Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451.

It is a familiar and universal principle of construction of grants that they carry with them, by necessary implication, whatever is reasonably necessary to the full enjoyment of the things granted.

Among the many instances of the applic-

tion of this rule to the creation or extension of corporate life are:

St. Clair County Turnp. Co. v. *People*, 82 Ill. 177, 96 U. S. 63, 24 L. ed. 651; *Foster* v. *Fitch*, 36 Conn. 236; *Liverpool & L. Life & F. Ins. Co.* v. *Massachusetts* (*Liverpool & L. Life & F. Ins. Co.* v. *Oliver*) 10 Wall. 566, 19 L. ed. 1029; *Delaware Division Canal Co.* v. *Com.* 50 Pa. 399; *Com.* v. *West Chester R. Co.* 3 Grant, Cas. 200; *Stebbins* v. *Jennings*, 10 Pick. 172; *Com.* v. *Frankfort*, 13 Bush, 185.

The power of eminent domain does not extend to the taking of a fragment of a railway.

Central City Horse R. Co. v. *Ft. Clark Horse R. Co.* 81 Ill. 523.

The charter did not contemplate or permit a severance of ownership as between the main line of any railway and the extensions and feeders thereof, so as to require passengers living along the line of such extensions or feeders either to walk for a considerable distance or to pay a double fare. Any contract, whether made with the city or any other corporation, tending to produce that result, would be contrary to the purpose and obligation of the charter.

Chicago Union Traction Co. v. *Chicago*, 199 Ill. 604, 65 N. E. 470; *Beekman* v. *Third Ave. R. Co.* 153 N. Y. 144, 47 N. E. 277.

The right to remain in possession and operate a public improvement built with private funds until purchased by the state or municipality is frequently inserted in charters and contracts. Such a provision is analogous to the equity of a lessee to receive compensation for his improvements before his right of possession ceases. The lessor is thereby prohibited from re-entry, except on the condition of repayment, and the lessee has no right to remove the permanent structures. The obligation to pay covers all the improvement, not portions. The construction has been uniform that, under such a provision, the whole charter improvement must be paid for as it exists when the right of purchase comes to be exercised.

National Waterworks Co. v. *Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Los Angeles City Water Co.* v. *Los Angeles*, 103 Fed. 711.

Public policy will not permit any severance of a single franchise where a unit service is required. An enforced sale of a part will be prevented. A voluntary sale of a portion is void.

People ex rel. Atty. Gen. v. *Kankakee River Improv. Co.* 103 Ill. 491; *Snell* v. *Chicago*, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532; *Coe* v. *Peacock*, 14 Ohio St. 187.

The franchise and ordinance obligation to operate the entire system connectedly cannot be defeated by the alienation of one or more parcels, to be independently owned and operated outside the charter under which they were constructed.

Muller v. *Dows*, 94 U. S. 444, 24 L. ed. 207; *Craft* v. *Indiana, D. & W. R. Co.* 166 Ill. 590, 46 N. E. 1132; *Low* v. *Blackford*, 31 C. C. A. 15, 58 U. S. App. 737, 87 Fed. 400; *McFadden* v. *Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 191, 22 Atl. 938; *Farmers' Loan & T. Co.* v. *Canada & St. L. R. Co.* 127 Ind. 258, 11 L.R.A. 744, 26 N. E. 784; *Compton* v. *Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Tippecanoe County* v. *Lafayette, M. & B. R. Co.* 50 Ind. 85.

Nearly every ordinance authorizing extensions and feeders requires in express terms a connected service for one fare over the system. This necessarily concluded both the city and the company that the railway is a unit, and not a mere aggregate of independent and disassociated lines.

Beekman v. *Third Ave. R. Co. supra; Muller* v. *Dows*, 94 U. S. 449, 24 L. ed. 209.

The provisions of §§ 10 and 11 in the ordinance of 1858, and their frequent adoption in later ordinances, did not contemplate or authorize separate elections to purchase isolated parts of the improvement, or multiplied and conflicting valuations and apportionments by several independent sets of appraisers. They, in law, considered, separately or together, provide only for a single election, to take over a single property, on a single appraisal by one board of appraisers. That is the only lawful purchase which could be made, and the words must be so construed as to effect a lawful purchase.

Los Angeles City Water Co. v. *Los Angeles*, 124 Cal. 368, 57 Pac. 210, 571.

A part of a railroad may be of little value when its ownership is severed from the ownership of another part, and the franchise is not capable of division.

Muller v. *Dows* and *Craft* v. *Indiana, D. & W. R. Co. supra.*

If the state, by abolition of the office of supervisor, prevented the performance of a condition precedent to the enjoyment of its inviolable grant, the grant would not fail, but the condition precedent would be eliminated (*Chicago* v. *Chicago & W. I. R. Co.* 105 Ill. 73; *Williams* v. *Bank of United States*, 2 Pet. 96, 7 L. ed. 360; *United States* v. *Peck*, 102 U. S. 64, 65, 26 L. ed. 46, 47; *District of Columbia* v. *Camden Iron Works*, 181 U. S. 453, 462, 45 L. ed. 948, 953, 21 Sup. Ct. Rep. 680; *New York & H. R. Co.* v. *Forty-Second Street & G. Street Ferry R. Co.* 50 Barb. 309; Year Book, Easter Term, 12 Edw. II. folio 379,

Dette), or the president and board of trustees, upon whom were conferred general authority over highways, must be held to have succeeded to this particular power, because, though the legislature might abolish the office, it could not abolish the power (*Decker* v. *Hughes*, 68 Ill. 33; *McGurn* v. *Board of Education*, 133 Ill. 122, 24 N. E. 529; *Grand Rapids* v. *Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749; *Re First Street*, 66 Mich. 42, 33 N. W. 15; *Cravener* v. *Board of Education*, 133 Ill. 145, 24 N. E. 532).

The right of occupancy until purchase was a part of the charter powers and privileges of the North Chicago City Railway Company, and, by implication and force of law, it was written into and became part of its several ordinances.

The Binghamton Bridge (*Chenango Bridge Co.* v. *Binghamton Bridge Co.*) 3 Wall. 51, 18 L. ed. 137; *Chicago Union Traction Co.* v. *Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *Decker* v. *Hughes*, *supra*.

Messrs. John P. Wilson and *John J. Herrick* filed a brief for the Chicago City Railway Company:

The body of the acts of 1859 and 1865, constituting the charter of the North Chicago City Railway Company, did not limit the company to the use of animal power in the operation of its railway lines.

Halsey v. *Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859; *Sparks* v. *Philadelphia & C. R. Co.* 212 Pa. 105, 61 Atl. 883; *Williams* v. *Citizens' R. Co.* 130 Ind. 74, 15 L.R.A. 64, 30 Am. St. Rep. 201, 29 N. E. 408; *Detroit City R. Co.* v. *Mills*, 85 Mich. 652, 48 N. W. 1007.

The words "horse railways" in the title of the acts of 1859 and 1865 did not operate to limit or restrict the character of the power to be used by the North Chicago City Railway Company in the operation of its street railways.

Mahomet v. *Quackenbush*, 117 U. S. 511, 29 L. ed. 983, 6 Sup. Ct. Rep. 858; *Carter County* v. *Sinton*, 120 U. S. 522, 30 L. ed. 702, 7 Sup. Ct. Rep. 650; *Independent School District* v. *Hall*, 113 U. S. 141, 28 L. ed. 956, 5 Sup. Ct. Rep. 371; *Jonesboro* v. *Cairo & St. L. R. Co.* 110 U. S. 198, 28 L. ed. 118, 4 Sup. Ct. Rep. 67; *Otoe County* v. *Baldwin*, 111 U. S. 1, 28 L. ed. 331, 4 Sup. Ct. Rep. 265; *Manchester* v. *People*, 178 Ill. 285, 52 N. E. 964; *Abington* v. *Cabeen*, 106 Ill. 200; *Arms* v. *Ayer*, 192 Ill. 612, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851; *Dolese* v. *Pierce*, 124 Ill. 147, 16 N. E. 218; *Williams* v. *City Electric Street R. Co.* 41 Fed. 557; *Russell* v. *Chicago & M. Electric R. Co.* 205 Ill. 167, 68 N. E. 727; *Harvey* v. *Aurora & G. R. Co.* 186 Ill. 290, 57 N. E. 857, 174 Ill. 299, 51 N. E. 163; *Hartshorn* v. *Illinois Valley Traction Co.* 210 Ill. 609, 71 N. E. 612; *Wiggins Ferry Co.* v. *East St. Louis Union R. Co.* 107 Ill. 450; *McCartney* v. *Chicago & E. R. Co.* 112 Ill. 628; *Nye* v. *Foreman*, 215 Ill. 285, 74 N. E. 140; *Montclair Twp.* v. *Ramsdell*, 107 U. S. 155, 27 L. ed. 433, 2 Sup. Ct. Rep. 391; 15 Chicago Legal News, 7; *Brown* v. *New York*, 63 N. Y. 239; *Snell* v. *Chicago*, 133 Ill. 427, 8 L.R.A. 858, 24 N. E. 532; *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

The words "in the city of Chicago" in the title of the act of 1859 did not render void the authority conferred in the act upon the North Chicago City Railway Company to extend its lines outside of the limits of the city of Chicago.

Ottawa v. *People*, 48 Ill. 233; *Prescott* v. *Chicago*, 60 Ill. 123; *Binz* v. *Weber*, 81 Ill. 288; *Cole* v. *Hall*, 103 Ill. 30; *Timm* v. *Harrison*, 109 Ill. 597; *McGurn* v. *Board of Education*, *supra*; *West Chicago Park* v. *Sweet*, 167 Ill. 332, 47 N. E. 728; *Hudnall* v. *Ham*, 172 Ill. 76, 49 N. E. 985; *Bobel* v. *People*, 173 Ill. 23, 64 Am. St. Rep. 64, 50 N. E. 322; *Park* v. *Modern Woodmen*, 181 Ill. 227, 54 N. E. 932; *Boehm* v. *Hertz*, 182 Ill. 156, 48 L.R.A. 575, 54 N. E. 973; *London Mills* v. *White*, 208 Ill. 289, 70 N. E. 313; *Montclair Twp.* v. *Ramsdell*, *supra*; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *People ex rel. Chittenden* v. *Mellen*, 32 Ill. 181; *Lockport* v. *Gaylord*, 61 Ill. 276; *Jonesboro* v. *Cairo & St. L. R. Co.* *supra*; *People ex rel. Graff* v. *Institution of Protestant Deaconesses*, 71 Ill. 229; *Middleport* v. *Ætna L. Ins. Co.* 82 Ill. 562; *Snell* v. *Chicago*, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532.

The incorporation by the act of the legislature of the town of Lake View did not deprive the North Chicago City Railway Company of its charter right to extend its street railway lines into the town of Lake View upon its streets and highways.

Chicago Municipal Gaslight & Fuel Co. v. *Lake*, 130 Ill. 54, 22 N. E. 616; *Quincy* v. *Bull*, 106 Ill. 349; *People ex rel. Rinne* v. *Blocki*, 203 Ill. 368, 67 N. E. 809.

The act of February 14, 1859, is not unconstitutional and void by reason of its creating two private corporations, and making two separate contracts between the state and the private interests concerned in the corporations.

Ottawa v. *People*, *supra*; *Prescott* v. *Chicago*, 60 Ill. 121; *Binz* v. *Weber*, *supra*; *People ex rel. Longenecker* v. *Nelson*, 133 Ill. 565, 27 N. E. 217; *Manchester* v. *People*, *supra*.

Messrs. **Clarence S. Darrow, Glenn Edward Plumb,** and **Edgar Bronson Tolman** argued the cause, and, with *Mr. James Hamilton Lewis*, filed a brief for the city of Chicago, appellant in Nos. 333 and 336, and appellee in Nos. 331, 332, 334, and 335:

The notes originally sued upon were payable to a citizen of Illinois, and by him indorsed to the Guaranty Trust Company of New York, and afforded the court no jurisdiction to enter the original judgments on which all the proceedings were founded.

Hately v. *Pike*, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441; *Thomson* v. *Elton*, 100 Fed. 145; *Wilson* v. *Knox County*, 43 Fed. 481; *Skinner* v. *Barr*, 39 W. N. C. 255, 77 Fed. 816; *New Orleans* v. *Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Utah-Nevada Co.* v. *De Lamar*, 66 C. C. A. 179, 133 Fed. 113; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201, 208, 39 L. ed. 672, 675, 15 Sup. Ct. Rep. 563; *King Iron Bridge & Mfg. Co.* v. *Otoe County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Parker* v. *Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Pope* v. *Louisville, N. A. & C. R. Co.* 173 U. S. 577, 43 L. ed. 816, 19 Sup. Ct. Rep. 500.

The bills should have been dismissed by the court for lack of jurisdiction, upon an examination of the record, which showed upon its face collusion and the attempted imposition of a fraud upon the court.

Sage v. *Memphis & L. R. R. Co.* 18 Fed. 571, 125 U. S. 362, 31 L. ed. 694, 8 Sup. Ct. Rep. 887; *Little* v. *Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *Industrial & Min. Guaranty Co.* v. *Electrical Supply Co.* 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. 732; *Put-in-Bay Waterworks, Light & R. Co.* v. *Ryan*, 181 U. S. 409, 45 L. ed. 927, 21 Sup. Ct. Rep. 709; *Farmington* v. *Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Bernards Twp.* v. *Stebbins*, 109 U. S. 341, 354, 27 L. ed. 956, 961, 3 Sup. Ct. Rep. 252; 23 Am. & Eng. Enc. Law, 2d ed. p. 1040; *Robinson* v. *Anderson*, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011; *Overton* v. *Memphis & L. R. R. Co.* 3 McCrary, 436, 10 Fed. 866; *People* v. *Weigley*, 155 Ill. 491, 40 N. E. 300.

Regarded as a bill to remove a cloud from and quiet title to property in the custody of the receivers, the allegations of the bill and proofs were insufficient to warrant the exercise of the jurisdiction of the court.

Preston v. *Smith*, 26 Fed. 885; *Madison Ave. Baptist Church* v. *Madison Ave. Baptist Church*, 26 How. Pr. 73; *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. ed. 231; *Meloy* v. *Dougherty*, 16 Wis. 270; *Ecton* v. *Smith*, 6 Ky. L. Rep. 224; *Dunklin County* v. *Clark*, 51 Mo. 60; *Leach* v. *Day*, 27 Cal. 644; *Gamble* v. *Loop*, 14 Wis. 466; *Parker* v. *Shannon*, 121 Ill. 452, 13 N. E. 155; *Spring Valley Waterworks* v. *Bartlett*, 8 Sawy. 555, 16 Fed. 616; *Sanders* v. *Yonkers*, 63 N. Y. 489; *Fox* v. *Williams*, 92 Wis. 320, 66 N. W. 357; *Ogden City* v. *Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; *Rich* v. *Braxton*, 158 U. S. 375, 39 L. ed. 1022, 15 Sup. Ct. Rep. 1006; *Simpson* v. *Edmiston*, 23 W. Va. 675; *Roby* v. *South Park*, 215 Ill. 200, 74 N. E. 125; *Holland* v. *Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *United States ex rel. McIntosh* v. *Crawford*, 47 Fed. 561.

Regarded from the point of view of bills to prevent an interference on the part of the city with the receivers' possession of the estate, the *allegata et probata* made out no case of interference or threatened interference.

An act embracing more than one subject is unconstitutional, even though both subjects are expressed in its title.

People ex rel. Longenecker v. *Nelson*, 133 Ill. 565, 27 N. E. 217; 4 Cooley, Const. Lim. 6th ed. chap. 6, § 4, p. 177.

A private or local act which attempts to incorporate two private corporations, and make two separate contracts between the state and the private interests concerned in the corporations, offends against the constitutional inhibition.

Belleville & I. R. Co. v. *Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *People ex rel. Estes* v. *Denahy*, 20 Mich. 349; *Ex parte Conner*, 51 Ga. 571; *King* v. *Banks*, 61 Ga. 20.

And for a close analogy see:

Fulton County v. *Mississippi & W. R. Co.* 21 Ill. 338; *People ex rel. Peoria & O. R. Co.* v. *Tazewell County*, 22 Ill. 147.

Sections providing for extensions beyond the city limits are not expressed in the words "in the city of Chicago," which limit the whole title, and are, therefore, void.

People ex rel. Chittenden v. *Mellen*, 32 Ill. 181; *Lockport* v. *Gaylord*, 61 Ill. 276; *People ex rel. Graff* v. *Institution of Protestant Deaconesses*, 71 Ill. 229; *Middleport* v. *Ætna L. Ins. Co.* 82 Ill. 562; *Snell* v. *Chicago*, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532; *Re Paul*, 94 N. Y. 497.

If the acts of February 14, 1859, and February 6, 1865, are valid to any extent and for any purpose, the only rights which the complainants could receive thereunder would be limited to horse railways in the city of Chicago.

North Chicago City R. Co. v. *Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

The power of the city to prescribe terms and conditions included the power to fix the time when the privileges granted should terminate.

Cleveland Electric R. Co. v. *Cleveland*, 137 Fed. 111; *Louisville Trust Co.* v. *Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; *Detroit Citizens' Street R. Co.* v. *Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 646; *Chicago Terminal Transfer R. Co.* v. *Chicago*, 203 Ill. 576, 68 N. E. 99; *Coverdale* v. *Edwards*, 155 Ind. 374, 58 N. E. 495; *Plymouth Twp.* v. *Chestnut Hill & N. R. Co.* 168 Pa. 181, 32 Atl. 19; *Minersville* v. *Schuylkill Electric R. Co.* 205 Pa. 294, 54 Atl. 1050.

The time limit and the consent are inseparable. The court cannot strike down the one and hold the other valid. The consent must stand or fall in its entirety.

St. Louis & M. River R. Co. v. *Kirkwood*, 159 Mo. 239, 53 L.R.A. 300, 60 S. W. 110; 3 Elliott, Railroads, § 1081; *Blaschko* v. *Wurster*, 156 N. Y. 437, 51 N. E. 303.

Where a municipality has the power to give or refuse consent to the occupation and use of its streets for street railway purposes, it may impose terms and conditions, including a time limit; and an acceptance of a grant carries with it all the conditions and limitations upon which it is based.

Chicago Terminal Transfer R. Co. v. *Chicago, supra; Byrne* v. *Chicago General R. Co.* 169 Ill. 75, 48 N. E. 703; *Chicago General R. Co.* v. *Chicago*, 176 Ill. 253, 66 L.R.A. 959, 68 Am. St. Rep. 188, 52 N. E. 880; *Chester* v. *Wabash, C. & W. R. Co.* 182 Ill. 382, 55 N. E. 524; *People ex rel. Jackson* v. *Suburban R. Co.* 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349; *Coverdale* v. *Edwards, Plymouth Twp.* v. *Chestnut Hill & N. R. Co.* and *Minersville* v. *Schuylkill Electric R. Co. supra; Allegheny* v. *Millville, E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202; *St. Louis & M. River R. Co.* v. *Kirkwood, supra; Detroit* v. *Ft. Wayne & B. I. R. Co.* 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; 3 Elliott, Railroads, § 1081; McQuillin, Mun. Ord. § 576; Dill. Mun. Corp. 3d ed. § 706.

The companies and the city for over forty years have repeatedly contracted for limited periods of street occupancy. The grants of the city have proceeded upon its right and power, and the full recognition thereof by the companies, to impose time limits. This practical construction of the acts and ordinances is controlling.

Brooklyn L. Ins. Co. v. *Dutcher*, 95 U. S. 269, 273, 24 L. ed. 410, 411; *Topliff* v. *Topliff*, 122 U. S. 131, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1057; *Chicago* v. *Sheldon*, 9 Wall. 54, 19 L. ed. 596; *Lehigh Coal & Nav. Co.* v. *Harlan*, 27 Pa. 439; *District of Columbia* v. *Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; *Burgess* v. *Badger*, 124 Ill. 295, 14 N. E. 850.

The ratification of the conveyances from one private corporation to another private corporation of personal property and ordinance rights, and of contracts between these companies respectively and the city, are not included within the title of the act of February 6, 1865.

Lockport v. *Gaylord*, 61 Ill. 276.

That interpretation of the words "during the life hereof" must be adopted which will give to the companies, as against the city and the public, the minimum of privileges in the streets.

Coosaw Min. Co. v. *South Carolina*, 144 U. S. 550, 561, 36 L. ed. 537, 541, 12 Sup. Ct. Rep. 689; *Stein* v. *Bienville Water Supply Co.* 141 U. S. 67, 80, 35 L. ed. 622, 627, 11 Sup. Ct. Rep. 892; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666, 24 L. ed. 1036, 1038; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 49, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 48, 54, 43 L. ed. 67, 71, 18 Sup. Ct. Rep. 732; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 598, 45 L. ed. 679, 688, 21 Sup. Ct. Rep. 493; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 696, 41 L. ed. 1168, 17 Sup. Ct. Rep. 718; *Rockland Water Co.* v. *Camden & R. Water Co.* 80 Me. 562, 1 L.R.A. 388, 15 Atl. 787; *Chicago Terminal Transfer R. Co.* v. *Chicago*, 203 Ill. 576, 68 N. E. 99; *Long* v. *Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547, 51 N. W. 913; *Wright* v. *Nagle*, 101 U. S. 796, 25 L. ed. 923; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544, 9 L. ed. 822; 3 Rose's Notes, pp. 582–587; *Detroit* v. *Detroit City R. Co.* 56 Fed. 872; *Omaha Horse R. Co.* v. *Cable Tramway Co.* 30 Fed. 324; *Citizens' Street R. Co.* v. *Jones*, 34 Fed. 579; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; *State, Atlantic City Waterworks Co., Prosecutor*, v. *Consumers Water Co.* 51 N. J. L. 422, 17 Atl. 825; *Freeport Waterworks Co.* v. *Prager*, 3 Pa. Co. Ct. 371; *Saginaw Gaslight Co.* v. *Saginaw*, 28 Fed. 529; *Clarksburg Electric Light Co.* v. *Clarksburg*, 47 W. Va. 739, 50 L.R.A. 142, 35 S. E. 994; *Com.* v. *Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471.

Where a statute or clause of a statute contains repugnant or irreconcilable provisions, the last in order of date or position must prevail.

Endlich, Interpretation of Statutes, § 183; Potter's Dwarr. Stat. p. 156 and note; *Harrington* v. *Rochester Trustees*, 10 Wend. 554; *Brown* v. *Philadelphia County*, 21 Pa. 42; *Packer* v. *Sunbury & E. R. Co.* 19 Pa. 211; *Hall* v. *Equator Min. & Smelting Co.* Fed. Cas. No. 5,931; *Smith* v. *Moore*, 26

Ill. 392; *Quick* v. *White-Water Twp.* 7 Ind. 570.

As against a statute framed in covert and obscure language, and claimed to ratify and confirm by wholesale the acts of a municipality in its dealing with the claimants, the court will adopt the strictest possible construction in order to prevent the wresting of valuable rights from the public by such insidious and surreptitious legislation.

Oakland v. *Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277; *Coosaw Min. Co.* v. *South Carolina, supra;* Ordronaux, Const. Legislation, p. 604.

The Chicago West Division Railway Company, Chicago City Railway Company, and North Chicago City Railway Company had no corporate capacity to accept permission from the city of Chicago to operate their cars by other than animal power.

North Chicago City R. Co. v. *Lake View,* 105 Ill. 207, 44 Am. Rep. 788; *McCartney* v. *Chicago & E. R. Co.* 112 Ill. 611; *Omaha Horse R. Co.* v. *Cable Tramway Co. supra; Farrell* v. *Winchester Ave. R. Co.* 61 Conn. 127, 23 Atl. 757; *Honolulu Rapid Transit & Land Co.* v. *Hawaiian Tramway Co.* 13 Haw. 371; *Indianapolis Cable Street R. Co.* v. *Citizens Street R. Co.* 127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1054, 26 N. E. 893; *Newport & D. Street R. Co.* v. *Newport,* 1 Ky. L. Rep. 404; *People ex rel. Third Ave. R. Co.* v. *Newton,* 112 N. Y. 396, 3 L.R.A. 174, 19 N. E. 831; *Denver & S. R. Co.* v. *Denver City R. Co.* 2 Colo. 673.

The leases and transfers under which the receivers claim are invalid.

5 Thomp. Corp. § 5880; Noyes, Intercorporate Relations, §§ 135, 170, 172; *Chicago* v. *Evans,* 24 Ill. 52; *People ex rel. Peabody* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *Chicago Union Traction Co.* v. *Chicago,* 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *Cox* v. *Terre Haute & I. R. Co.* 66 C. C. A. 433, 133 Fed. 371.

None of the rights conferred by the ordinance of August 16, 1858, on Parmalee *et al.,* ratified by § 7 of the act of February 14, 1859, passed to the North Chicago City Railway Company by virtue of the provisions of § 10 of said act.

St. Clair County Turnp. Co. v. *People,* 82 Ill. 174, 96 U. S. 63, 68, 24 L. ed. 651, 652; *Coosaw Min. Co.* v. *South Carolina,* 144 U. S. 554, 36 L. ed. 540, 12 Sup. Ct. Rep. 689.

An act which adopts by reference the whole or a portion of another statute incorporates the law referred to as it exists at the time of the adoption, and does not include subsequent amendments of the statute so adopted, unless so declared expressly or by strongly implied legislative intent.

Culver v. *People,* 161 Ill. 96, 43 N. E. 812; *Charleston* v. *Cadle,* 166 Ill. 487, 46 N. E. 1120; *Charleston* v. *Johnston,* 170 Ill. 336, 48 N. E. 985; *Andrews* v. *People,* 173 Ill. 126, 50 N. E. 335; *Lawrence* v. *People,* 188 Ill. 407, 58 N. E. 991; *Re Heath,* 144 U. S. 93, 36 L. ed. 359, 12 Sup. Ct. Rep. 615; *Postal Teleg. Cable Co.* v. *Southern R. Co.* 89 Fed. 190; *Kendall* v. *United States,* 12 Pet. 524, 626, 9 L. ed. 1181, 1221; *Tatum* v. *Tamaroa,* 9 Biss. 475, 14 Fed. 103; *Darmstaetter* v. *Moloney,* 45 Mich. 621, 8 N. W. 574; *Ely* v. *Holton,* 15 N. Y. 595; *Knapp* v. *Brooklyn,* 97 N. Y. 520; *Re Main Street,* 98 N. Y. 454; *Jones* v. *Dexter,* 8 Fla. 276; Endlich, Interpretation of Statutes, § 85; Sutherland, Stat. Constr. § 257.

If there be any doubt as to whether or not the act of February 6, 1865, operated to amend § 10 of said act of 1859, or if there be any doubt whether or not it was operative as to either the corporate life or the municipal contracts of the North Chicago City Railway Company, that doubt must be resolved against the company.

Northwestern Fertilizing Co. v. *Hyde Park,* 97 U. S. 666, 24 L. ed. 1038; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 54, 43 L. ed. 71, 18 Sup. Ct. Rep. 732; *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Chicago Terminal Transfer R. Co.* v. *Chicago,* 203 Ill. 576, 68 N. E. 99; *Com.* v. *Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471.

The legislative intent must be derived from the words of the act, and not from conjectures of the court.

Gardner v. *Collins,* 2 Pet. 58, 7 L. ed. 347; *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; *United States* v. *Goldenberg,* 168 U. S. 103, 42 L. ed. 398, 18 Sup. Ct. Rep. 3; *Springfield* v. *Edwards,* 84 Ill. 626; *Com.* v. *Pennsylvania Ins. Co.* 13 Pa. 165; *Bradbury* v. *Wagenhorst,* 54 Pa. 180; *Pittsburgh* v. *Kalchthaler,* 114 Pa. 547, 7 Atl. 921; *M'Cowan* v. *Baine* [1891] A. C. 401; *Salomon* v. *A. Salomon & Co.* [1897] A. C. 22; Potter's Dwarr. Stat. 182; Story, Confl. L. 10; Hardcastle, Statutory Law, 76.

The question of the effect of the act of February 6, 1865, in amending §§ 1 and 2 of the acts of 1859 and 1861, aforesaid, and its inefficacy to amend § 10, is peculiarly one of local law, as to which the decisions of the supreme court of the state of Illinois are of controlling persuasiveness.

South Ottawa v. *Perkins,* 94 U. S. 260, 24 L. ed. 154; *Post* v. *Kendall County,* 105 U. S. 667, 26 L. ed. 1204.

Even if the supervisors' permit of Oc-

tober 2, 1863, was of any validity, it authorized only the operation of a horse railway thereon.

North Chicago City R. Co. v. *Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

Said company originally constructed a steam dummy railway thereon, so that the franchise, if any ever existed, was forfeited by misuser.

Ibid.

The subsequent ordinances of the town of Lake View, authorizing the construction and operation of a street railway on said streets, expressed no time during which the privileges thereby conferred should continue, and they were and are terminable at will.

Boisé City Artesian Hot & Cold Water Co. v. *Boisé City*, 59 C. C. A. 236, 123 Fed. 232.

Mr. Justice **Day** delivered the opinion of the court:

The jurisdiction of the circuit court to render the original judgments against the companies and to maintain the ancillary bill is challenged at the outset. These objections require notice before considering the controversy upon its merits. It is insisted that the circuit court had no jurisdiction to render the judgments at law because of the provisions of the act of August 13, 1888 (25 Stat. at L. 433, 434, chap. 866, U. S. Comp. Stat. 1901, p. 508), providing that no circuit court shall have cognizance of any suit to recover the contents of any promissory note in favor of any assignee or subsequent holder if such instrument be payable to bearer, unless such suit might have been prosecuted in such court to recover, if an assignment or transfer had not been made. As the notes were made payable to the order of "Markham B. Orde, Treas.," and there is no allegation that Orde was not a citizen of the state of Illinois, of which state the defendant companies were corporations and citizens, it is insisted that the jurisdiction must fail, under the provisions of the statute just referred to. Assuming, without
[448] deciding, that this question *could be raised by way of defense to the ancillary bill, we think the objection must fail, for, under the allegations of the declaration, the money was furnished directly to the defendants by the Guaranty Trust Company, and that company was the first taker of the notes. In *Falk* v. *Moebs*, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319, it was held that notes made in this form, payable to the treasurer, indorsed before delivery by him, are the notes of the company. And when it appears that the indorser is not in fact an assignee of the paper, suit may be brought in a Federal court by a holder having the requisite diverse citizenship, notwithstanding the indorser might have been a citizen of the same state with the defendant. *Holmes* v. *Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288.

It is further argued that the entire proceedings were fraudulent and collusive; that no money was in fact loaned, and that they were the result of a conspiracy between corporations of Illinois, to obtain the jurisdiction of the Federal court, and its decision on the controverted rights of the parties under the statutes of the state. We have examined the supplemental records submitted since the argument in this court, on this branch of the case, and think the charges of bad faith and conspiracy are not sustained. We have no doubt that the money was loaned by the Guaranty Trust Company to these corporations, and that the original judgments were bona fide. As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking Federal jurisdiction is immaterial. *South Dakota* v. *North Carolina*, 192 U. S. 286, 310, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; *Dickerman* v. *Northern Trust Co.* 176 U. S. 181, 190, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; *Lehigh Min. & Mfg. Co.* v. *Kelly*, 160 U. S. 327,[449]
336, 40 L. ed. 444, 447, 16 Sup. Ct. Rep. 307; *Crawford* v. *Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Cheever* v. *Wilson*, 9 Wall. 108, 123, 19 L. ed. 604, 608; *Smith* v. *Kernochen*, 7 How. 198, 216, 12 L. ed. 666, 673.

It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been made in that direction, but we perceive in this no legal objection to the jurisdiction of the court. It is further insisted by the counsel for the city that the ancillary bills cannot be sustained upon their merits. But we think a case was made out by the allegations of the bills, especially when considered with reference to the admissions of the answer, which showed that the extent and character of the property rights of the corporations whose rights and franchises were the sub-

jects of the receivership were in direct and serious controversy between the company and the receiver on the one hand and the city on the other. While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested the asserted rights of the corporations to the franchise to use the streets of the city for ninety-nine years, the term claimed to have been granted to them by the act of February, 1865. It was the claim of the city that as to many of the ordinances granting rights in a number of the streets, the right to the use and occupancy of them would expire July 30, 1903. The city had asserted in a number of ways its purpose to treat the rights of the companies and whatever franchises they had as terminated at that date. It declares its purpose to resume possession of the streets and resort to all legal means to protect its rights against what were deemed the unfounded claims of the companies as to the extended franchises. Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property which was in the hands of the
[450] receivers to be administered *under the orders of the court, and that in such case the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers, and that in such case it was proper to grant an injunction until the rights of the parties could be determined. *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Rouse* v. *Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *White* v. *Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018. We think, then, that the court had jurisdiction of the case made in the ancillary bills.

A further preliminary question is made in the contention that the leases under which the various transfers were made, and which are supposed to have vested title in the Chicago Union Traction Company, are void for want of corporate power in the companies to make or receive the same. We do not think the city of Chicago is in a position to raise that question. The corporations have undertaken to transfer the rights of the lessor companies, and the lessees have gone into possession thereof, and the same are now in possession of the receivers under authority of the court. All of the companies are parties to the suit, and the rights and franchises of all are, by order of the court, vested in the receivers. They hold the title to all these rights to be sold at judicial sale, or otherwise dealt with, as the court may direct. In this view we cannot see that it is material to inquire into the validity of the intermediate transfers between the companies. No contract is undertaken to be enforced with the city of Chicago which depends upon the validity of these transfers. The city has no power to invalidate them, and the state has not attempted to inquire into their validity by a proceeding in quo warranto. In such case, we think, the principle laid down in *Fritts* v. *Palmer*, 132 U. S. 282, 293, 33 L. ed. 317, 321, 10 Sup. Ct. Rep. 93, 96, is controlling: "The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes or in certain quantities *has taken title to real estate for purposes [451] not authorized by law, or in excess of the quantity permitted by its charter, concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there is something in the statute, expressly or by necessary implication, authorizing them to do so."

Passing now to the merits of the case, we will first notice the objection that the acts of 1859, 1861, and 1865 are unconstitutional. The Illinois Constitution of 1848 contained the provision that no private or local law shall embrace more than one subject, and that shall be expressed in the title. The acts are attacked upon the ground that they are violations of this requirement. But we do not think that these objections are tenable. The title of the act of February 14, 1859, is "An Act to Promote the Construction of Horse Railways in the City of Chicago;" the title of the act of February 21, 1861, is "An Act to Authorize the Extension of Horse Railways in the City of Chicago;" the title of the act of February 6, 1865, is "An Act Concerning Horse Railways in the City of Chicago." In *People ex rel. Deneen* v. *People's Gaslight & Coke Co.* 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950, the Illinois cases were reviewed and the conclusion reached that the purpose of the constitutional provision is accomplished if the title is comprehensive enough as reasonably to include within the general subject or the subordinate branches thereof, the several objects which the statute seeks to effect. And it was held that generality of the title is no objection to a law so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment

can be included as having necessary or proper connection. In the case of *Montclair Twp.* v. *Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391, a statute of New Jersey was before this court which was claimed to be unconstitutional because it embraced more than one subject, not expressed in its title. The provision of the New Jersey Constitution was "To avoid improper influences which may result from intermixing, in one and the same act, such things as have no proper relation to each other, every law shall embrace but one [452] object, *and that shall be expressed in the title." [Art. 4, § 7.] The *Montclair Twp. Case* held: 1. That this provision does not require the title of an act to set forth a detailed statement or an index or abstract of its contents; nor does it prevent uniting in the same act numerous provisions having one general object, fairly indicated by its title. 2. That the powers, however varied and extended, which a township may exercise, constitute but one object, which is fairly expressed in a title showing nothing more than the legislative purpose to establish such township. In the late case of *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, the court had occasion to deal with a similar provision in the Constitution of Michigan. In it the language of Judge Cooley in *People ex rel. Secretary of State* v. *State Ins. Co.* 19 Mich. 392, was quoted with approval: "We must give the constitutional provision a reasonable construction and effect. The Constitution requires no law to embrace more than one object, which shall be expressed in its title. Now, the object may be very comprehensive and still be without objection, and the one before us is of that character. But it is by no means essential that every end and means necessary or convenient for the accomplishment of the general object should be either referred to or necessarily indicated by the title. All that can reasonably be required is that the title shall not be made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." Applying this principle, we do not think that any of the subjects treated were so far foreign to the title of the several acts as to be open to this constitutional objection. See also upon this subject: *Independent School District* v. *Hall*, 113 U. S. 141, 28 L. ed. 956, 5 Sup. Ct. Rep. 371; *Jonesboro* v. *Cairo & St. L. R. Co.* 110 U. S. 192, 198, 28 L. ed. 116, 118, 4 Sup. Ct. Rep. 67; *Otoe County* v. *Baldwin*, 111 U. S. 1, 28 L. ed. 331, 4 Sup. Ct. Rep. 265; *Mahomet* v. *Quackenbush*, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. Rep. 858; *Carter County* v. *Sinton*, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650.

Without taking time to analyze the acts in this connection we pass to what we deem more important features of the case.

The principal controversy in this case turns upon the construction *of the act of [453] 1865, amending the act of 1859. On the part of the companies it is insisted that this act means to give an irrevocable grant from the state of the right to use the streets of the city of Chicago for street railway purposes for a term of ninety-nine years from the passage of the law; that the only right conferred upon the city is one of designation of the streets to be occupied and the regulation by agreement with the companies of what are termed the "administrative" features of the occupancy. It is insisted that this broad right is derived from the public act of the state legislature, which, upon its acceptance, has become an inviolable contract between the state and the companies. Upon the part of the city it is contended that there has been no grant to the railways to occupy the streets of the city except with the authorization of the city council and upon such terms and conditions, including the term of occupancy, as that body may see fit to fix by contract with the companies; that the only legitimate effect of the act of 1865, other than the extension of the corporate life of the companies, has been to continue the control of the city over the streets, and to reaffirm the contracts theretofore made between the city and the companies. The theory that the franchise to use the streets was derived solely from the state, subject only to the right of the city to designate the streets to be occupied, and to regulate the "administrative" features of the use, was adopted by the learned circuit court in construing the act in controversy. It is therefore important to consider the nature of the franchises, licenses, rights, and privileges dealt with in the act of 1865, to ascertain, as near as may be, in what sense its terms were used, and with what meaning they are incorporated into the act. In order to construe this act and determine, if possible, its true meaning and the extent of the powers and rights intended to be granted or confirmed, reference may appropriately be had to prior legislation upon the subject, for the act of 1865 is amendatory, and can only be understood if a correct apprehension is first had of the powers previously granted, and the extent and nature of the rights and *privileges [454] conferred and the sources from which they severally came. Whether the city charter, granted while the Constitution of 1848

was in force, gave the city the right to grant to railway companies the privilege of using the streets for street railway purposes, is a question much discussed in the briefs and the arguments at bar. The city, by the charter of 1851, and the amendment of 1863, had general power to control the use and occupation of the streets of the city and to regulate the use of horse railways therein and the laying of tracks thereon. It is insisted for the city that, independent of the acts under consideration in this case, the general powers conferred in the city charter, as construed by the supreme court of Illinois, were broad enough to empower it to grant the use of the streets for street railway purposes. See *Quincy* v. *Bull*, 106 Ill. 337, 349, and cases cited in the opinion. On the part of the companies it is contended that this right could only come from the state, and that the effect of the act in question was to confer the right upon the companies as a charter right granted by the sovereign power.

It is said to have been the settled understanding of all concerned, and in accordance with the then-existing policy of the state, that the act of 1859 was a franchise directly granted by the state, giving the full right to use the streets of the city for the term of the corporate life of the companies, subject only to the designating power of the city as to streets to be used. In this connection it may be observed that the supreme court of Illinois in *Chicago Union Traction Co.* v. *Chicago*, 199 Ill. 484, 525, 59 L. R. A. 631, 645, 65 N. E. 451, 462, distinctly stated that the act of 1859 recognized the power of the common council to pass the ordinance of August 16, 1858. "There," it is said in the opinion, "was no other action of the common council, taken before the passage of the act of February 14, 1859, except the ordinance of August 16, 1858. By the use of the words, 'with such rights and privileges as the said common council has prescribed,' the legislature could not have referred to any other action of the common council than the passage of
[455] the ordinance *of August 16, 1858. It thereby recognized the power of the common council to pass that ordinance, and the appellant here introduces it and relies upon it. The legislature, by thereby affirming and recognizing the passage of the ordinance of August 16, 1858, also recognized the power of the common council to pass that ordinance under clause 9 of § 4 of chapter 4, of the charter of 1851." In the act of 1859 the legislature did not assume to fix independently the term for the use of the streets, but affirmed that which the common council had authorized the corporators to do, and gave authority to confer future rights by agreement with the corporations. In the first grants after the passage of the act of February 14, 1859, those of May 23, 1859, to the Chicago City Railway Company and the North Chicago City Railway Company, as we shall have occasion to show later, so far from acting upon the theory that the state had granted to the corporations the full right to use the streets for the corporate life of the companies, and needed no permission from the city council other than such as designated the streets and regulated administrative features, the council made and the companies accepted the ordinances which, on the north side, were for the term of twenty-five years and no longer, and on the south and west sides for the term named in the act of 1859, which had affirmed the grant from the council in the ordinance of 1858. The south and west side ordinance, as its recitals show, was not only passed in pursuance of the act of February 14, 1859, but also by virtue of the power and authority otherwise vested in the common council by its charter. *Union Traction Co.* v. *Chicago*, *supra*. Thereafter and frequently until the passage of the act of 1865, the council made and the companies accepted specific ordinances fixing the time of occupancy, as had been done in the original ordinances of May 23, 1859. And neither before nor after the passage of the act of 1865 was the ninety-nine year term recognized or acted upon in ordinances granting the use of the streets.

Under the ordinance of 1858 the council undertook to authorize *the persons named [456] to lay and operate a horse railway in certain streets of the city. This right, by the terms of the ordinance, was granted for the period of twenty-five years, and until the common council, in the manner designated, should elect to purchase and pay for the property of the railway companies. If this ordinance had been without legislative authority previous to the act of February 14, 1859, that act constituted the persons named in the ordinance of 1858, with one other, and their successors, a body politic and corporate under the name of the Chicago City Railway Company, for the term of twenty-five years, with all the powers incident to such corporations. The corporation was authorized to construct, maintain, and operate a single or double track railway in the city of Chicago, within the present or future limits of the south or west divisions of the city. But the grant did not stop there. It was immediately qualified and limited by the authority given to the common council of the city, for it provided that this right to maintain and operate

street railways was upon streets, etc., "as the common council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do in such manner and upon such terms and condition, and with such rights and privileges, as the common council has or may, by contract with said parties, or any or either of them, prescribe." The corporation was given the right of eminent domain. Then, as to the action of the city, already taken under the ordinance of 1858, by § 7, all of the rights and privileges granted or intended so to be to the incorporators and their associates by the ordinances and amendments thereto passed by the council were approved and vested in the corporation. By § 10 of the act the North Chicago City Railway Company was incorporated. Is this act consistent with the theory that the full franchise of occupying and using the streets, without regard to authority from the city, except in designating streets, was vested by the state in the companies incorporated? This act conferred upon the railway companies, it is true, the [457] right to use and occupy *the streets of the city, but this right was upon the terms prescribed in the law. Conceding the plenary power of the legislature over the subject at that time, and that franchises, broadly speaking, are rights and privileges conferred by the state, and are derived from a grant of the sovereign power, nevertheless the state, while exercising its authority, might give to the city such measure of right and control in the manner as it saw fit. Dill. Mun. Corp. 3d ed. § 705; *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U. S. 521, 24 L. ed. 734. The city is the corporate body directly interested in the use and control of the streets. By the charter of 1851 exclusive control over the streets was given to the council. That it was the intention of the legislature to give effect to the right of municipal control in the act under consideration is shown in its confirmation of terms already fixed by contract between the city and the companies. As to the future, companies were to have no right to the use and occupancy of the streets until they should obtain from the city council authority to that end, under contracts to be agreed upon as to terms and conditions. A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be "authorized" by the city council before it can lay tracts or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to "clothe with authority" (Webster's dict.); "to give legal power to" (Century dict.). It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets. This power of the city, in the absence of language in the statute excluding the authority and reserving its exercise to the state, necessarily includes the right to fix the time for which the streets may be used. This doctrine was, we think, correctly stated by Judge Lurton, in delivering the opinion of the court of appeals in *Louisville Trust Co.* v. *Cincinnati*, 22 C. C. A. 334, 346, 47 U. S. App. 36, 59, 76 Fed. 296, 308. "The right of the local authority to impose terms and conditions is *clearly conferred, and no such corporation [458] can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation, in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant." *Coverdale* v. *Edwards*, 155 Ind. 374, 381, 58 N. E. 495; Elliott, Railroads, § 1081.

The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets.

While the decisions of the supreme court of the state are not binding upon us in determining whether a contract was made which is entitled to protection under the Federal Constitution, we may notice the case of *Chicago City R. Co.* v. *People*, 73 Ill. 541. That was a proceeding in quo warranto against the Chicago City Railway Company, asking to declare a forfeiture of its franchise to operate upon a portion of Indiana avenue. The grounds relied upon were that the railway company had not obtained the consent of two thirds of the owners of the

property fronting on the avenue within fif-
[459] teen months from the passage of the *ordinance of August 22, 1864, the time limited for construction in the ordinance of that date. The respondent, the Chicago City Railway Company, relied upon an ordinance passed November 13, 1871, amendatory of the ordinance of August 22, 1864, extending the time to complete its railway for a period of two years from the date of the last-named ordinance. The court found that two thirds of the property owners had consented, as provided in the ordinance of August 22, 1864, but found that the company had neglected to construct its road to the city limits within fifteen months from the passage of the ordinance, as therein provided. The question turned upon the validity of the extending ordinance of November 13, 1871, passed after the Constitution of 1870 went into effect. The majority of the court—Chief Justice Walker and Justices Breese and Sheldon dissenting—held that the common council had authority, under the act of 1865, to extend the time for the building of the roads on Indiana avenue, as the time limitation was a provision in favor of the city, which it might waive, as the charter of the company was silent upon the time within which the railway might be constructed, and in this connection held that the right granted by the city to construct the railway was a license as distinguished from a franchise derivable from the state, and, therefore, not within the constitutional prohibition against the passage of local or special laws granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for that purpose, or granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. The minority of the court were of opinion that the Constitution of 1870 made the extending ordinance invalid. In neither the majority nor the dissenting opinions is there any intimation that the railway company could occupy or use a street of the city of Chicago without the permission of the city. In discussing how far the charter authorized the company to act without the consent of the city, Mr. Justice Sheldon, in the course of an able dissenting opinion, concurred in by the Chief
[460] *Justice and Mr. Justice Breese, is careful to point out that the right to occupy the streets is not complete in the grant of the charter from the state, and is only capable of being exercised when supplemented by the authorization of the city. And see *People's Pass. R. Co.* v. *Memphis City R. Co.* 10 Wall. 38, 55, 19 L. ed. 844, 850. In that case this court held that a charter authorizing a street railroad company to operate street railroads in all the streets of the city "with the consent of the city" was unavailing until the consent of the city was first had, which consent was a condition precedent to the use of the streets.

What, then, was conferred in the franchise granted by the state? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the state is of no practical value until supplemented by the consent and authority of the council of the city. After the passage of the act of 1859 the common council of the city, on May 23, 1859, passed an ordinance authorizing the extension and operation of certain horse railways in the streets of the south and west divisions of the city, and granting the use thereof to the Chicago City Railway Company. The city purported to act under authority of the act of 1859, and by virtue of the powers and authority otherwise vested in the common council by law. By this ordinance the term of use and occupation was fixed at "during all the term in the said act of the 14th of February, A. D. 1859, specified and prescribed." On the same day the council passed an ordinance granting rights in certain streets to the North Chicago City Railway Company. This ordinance contained this language: "The rights and privileges granted to the said company by this ordinance, or intended to be, shall continue and be in force for the benefit of said company for the full term of twenty-five years from the passage of this ordinance, and no longer." On February 21, 1861, the legislature passed an act incorporating the Chicago West Division Railway Company for the term of twenty-five years, the corporation to possess *the powers [461] enumerated in the 2d, 3d, 5th, and 6th sections of the act of February 14, 1859. By § 4 of the act the corporation was authorized to acquire from the Chicago City Railway Company the powers, franchises, privileges, and immunities conferred upon that company, and the consent of the directors of said company was made a condition precedent to the exercise of the powers conferred as to any streets of the south and west divisions of the city of Chicago.

Before the passage of the act of 1865 a number of ordinances were passed, conferring the privilege of using streets, in most cases with a time limit definite in character. The record discloses that by an agreement of July 29, 1863, the Chicago City Railway Company had agreed to convey to the Chicago West Division Railway Company certain rolling stock, equipment, etc., together with "all and singular the franchises,

rights, privileges, and immunities" of the Chicago City Railway Company in and upon certain streets, "conferred, given, or granted by or under any or all acts of the general assembly of the state of Illinois, and any and all ordinances of the city of Chicago, or contracts with the common council." In this contract it was also provided that if at any time it should be adjudged that consent to the sale by the council of the city of Chicago is or was necessary to secure to the grantee company the rights and privileges embraced in the contract, the grantor company would do all in its power by reasonable and proper effort to secure such consent of the common council. By the deed of transfer of July 30, 1863, the grantor company conveyed its rights, privileges, and franchises in the use and occupation of certain streets, "to have and to hold the above bargained and granted premises and property to the party of the second part, etc., for and during all the time which the said party of the first part might hold, exercise, and enjoy the same under its present charter and any and all extensions thereof." On December 13, 1859, the Chicago City Railway Company by agreement gave to the North Chicago City Railway Company permission and authority
[462] to make, construct, and use for *twenty-four years, tracks, etc., as might be necessary to extend its railway southerly to such points in the south and west divisions along certain streets, "as the party of the first part (Chicago City Railway Company) has been or may be authorized to make and have the same."

It thus clearly appears, at least up to the passage of the act of 1865, that legislation upon the subject recognized and enforced the right and authority of the city to fix the term during which the streets might be occupied by street railway companies. The legislature had confirmed the ordinance of the city fixing the term at twenty-five years and until the city should see fit to purchase the property of the railway company. It had required the companies to obtain the authority of the city before using the streets, such use to be upon terms and conditions, and with such rights and privileges, as the city had or might thereafter prescribe by contract with the companies.

We find no intention evidenced in legislative action thus far to prevent the municipal authorities from exercising the important and far-reaching authority of fixing by contract with the persons or corporations to whom franchises are granted by the state the term during which the occupancy shall continue. This feature of the right to use the streets, it need hardly be said, is of most vital importance to both parties. Some latitude of time is essential to the value and stability of the investment to be made. An unduly long period might conclude municipal action when changing conditions and growing population demanded it in the public interest.

We come now to the act of 1865. Does its interpretation justify the contention that by its terms the state took from the local authorities the control which had been theretofore recognized, the right and authority to determine upon what terms and for what length of time the railways might occupy the streets, and without other consideration than the building, equipment, and operation of the roads, conferred upon the companies the right to use and occupy for ninety-nine years to *come the streets of [463]
the city which might thereafter be designated by the city council, and confirmed without qualification for that term the right to use and occupy the streets covered in contracts already made with the city? We may premise, before taking up this act for more detailed consideration, that it is a firmly established rule, which we shall have occasion to refer to later on in this discussion, but which must be borne in mind as we enter upon the consideration of this act, that one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. The 1st section of the act of 1865 was effectual to extend the corporate life of the two companies, created by the acts of 1859 and 1861, from twenty-five to ninety-nine years each. The 2d section authorizes the construction and maintenance of street railways in the city of Chicago upon such streets, etc., within the limits named, as the common council have authorized or shall from time to time authorize, the rights, privileges, and immunities and exemptions to be such as the common council has prescribed, or may, by contracts with said parties, or either of them, prescribe. In the first clause of that section, then, there is shown no disposition to depart from the policy of the state as indicated by the act of 1859, and the action of the companies thereunder, which required the street railway companies, before entering upon the occupation or use of the streets, to obtain, by agreement with the city, its sanction and authority for the right and privilege of so doing. Then comes the clause which, it is contended, works a revolution of former policies and extends former franchises and rights to the full

term of ninety-nine years, and withholds from the city the power of granting any further use of the streets to the railway companies, except upon terms of extending the right for the like period. While we have no right to consider this act by segregating its clauses as though they were
[464] separate enactments, *for the purpose of having its provisions clearly in view, we insert this clause:

"And any and all acts or deeds of transfer of rights, privileges, or franchises, between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses, and undertakings, made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts."

Does a fair interpretation of this clause of the act extend all the franchises, privileges, and contracts theretofore made for the term of ninety-nine years? This clause deals with:

1. The transfers of rights, privileges, or franchises between the corporations.

2. Comprehensively speaking, the contracts made between the city and the companies.

The definition of "rights and privileges," as the terms are used in this act, is not difficult to find. It is contained in the context of the act confirming "such rights and privileges, immunities and exemptions, as the common council has [prescribed], or may, by contract with said parties, or any or either of them, prescribe." This definition conforms to the use of the terms in prior acts of the legislature on the subject as well as to ordinances of the city granting the use of the streets. The rights and privileges intended are such as have been derived from contracts with the city. Franchises in the sense we have stated have been the grants of the state. Licenses and all other privileges have been obtained from the city, acting under the authority of the acts of the legislature in the manner outlined earlier in this discussion. As to the deeds and acts of transfer of rights,
[465] privileges, and franchises, as well *as the contract rights secured from the city, the act declares they "shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts."

What does this mean? It cannot operate to extend the contract rights and privileges, obtained directly from the city before or after the transfer by one company to the other, ninety-nine years, for as to these the act distinctly declares that the contracts, stipulations, licenses, and undertakings, between the council and the companies, shall stand "as made or amended." This declaration is in the past tense, and can have no reference, by any fair construction, to future engagements.

The contracts, by this clause, in all their terms, including time limits, are written into the original acts of 1859 and 1861, as if made a part thereof. Much discussion has been had as to the proper interpretation of the ambiguous expression "during the life hereof." For the companies it is insisted that its meaning is to extend all franchises and contracts, and whether the latter have been or may thereafter be made, to the end of the ninety-nine years, so as to give the railways the franchise to use the streets for that period by an irrevocable grant, irrespective of any limitations by state or municipal action subsequently undertaken. To give this act the construction insisted on by the companies is inconsistent with the policy of the state, declared in the act of 1859, which ratified the ordinance of 1858, and gave additional rights in the streets only upon obtaining the consent of the city. It practically reads out of the act the preceding clause of the very section under consideration, which expressly recognizes the authority of the city council to control the use of the streets by contracts which it has made or may make in the future. To say that contracts, the terms and conditions of which are left to agreement with the city, could only be made upon terms of extension to ninety-nine years, is to nullify in an important particular *the powers conferred in the act.
[466] The construction contended for requires us to ignore or entirely change the sense of terms establishing the contracts as made, and requires an interpretation which applies to the future what is specifically stated to be meant for the past. It does violence to the rule contended for by counsel for the companies,—that words are to be considered in their ordinary signification, and every part of the statute, if practicable, given meaning in harmony with its other provisions upon the subject. It is urged that the words "as made or amended" must have reference to the future, and were intended to give a prospective operation to the act, and to read into all contracts thereafter to be made, as well as theretofore

made, a right to use the streets without the consent of the city for the extended period. And it is said that this is particularly shown by the use of the words "as amended." But this expression was used in the seventh paragraph of the act of 1859, vesting in the corporations the rights and privileges granted by the ordinances of the common council "and the amendments thereto." The ordinance of August 16, 1858, was itself an amendment of prior municipal legislation. The purpose of the act of 1865 was to continue, as made, the former contracts, with their amendments. If it was intended to extend all past contracts and licenses for the use of the streets to the term of ninety-nine years, and to require the city council to enter into no new engagements for terms and conditions which should not extend to that period, it would have been easy to give expression to such purpose in plain words, and not resort to language which, as stated in one of the briefs of the learned counsel for the companies, is "unusual and more or less figurative." If the words used have no effect to control the right of future contract, but do extend the term of the contracts made to ninety-nine years, then we may have the anomalous situation of some contracts for short and some for long terms in the same system of railroads. It is true that we are to consider the situation as it was when the act was passed, and not in the light of the subsequent
[467] growth and development *of the city. But in 1865 the policy of local control of the streets for railway purposes had been declared and acted upon. So radical a departure as is contended for must be found in terms plainly stated and clearly defined. It is contended that unless the construction insisted upon for the companies is given to the act, no force or effect is given to the expression "during the life hereof," and a well-recognized rule is invoked that all parts of this law must be given force and effect in interpreting its meaning. While it is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred, we think this act can be given a construction which shall give some meaning and effect to the words "during the life hereof." Literally construed, the phrase would mean for the life of the act. It has been suggested that it may mean until the corporations, by forfeiture or otherwise, go out of existence. But these meanings do not seem to aid the purpose manifested in the law, and meaningless phrases are not supposed to be used to express the legislative will. Bearing in mind that the franchises granted came from the state, the nature and extent of the rights included in those franchises, that the franchise to be a corporation was extended by the 1st section of the act, and that the franchise, the transfer of which was intended to be confirmed in the clause now before us, embraced the right granted by the state to use the streets with the authority of the city, and that the rights and privileges were obtained from the city, let us see if some meaning can be found consistent with the other parts of the act and recognized rules of construction. Conceding for this purpose the contention on behalf of the companies that the phrase, "during the life hereof," may mean for the term of ninety-nine years, for that period the act provides that certain things "shall be deemed and held and continued in force." What *are they? 1. "Any and [468]
all acts or deeds of transfer of rights, privileges, or franchises between the corporations in said several acts named or any two of them." 2. "All contracts, stipulations, licenses, and undertakings, made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of the railways in or upon the streets or any of them of said city." The context of the act, as we have seen, defines rights and privileges to be such as are derived from the contracts with the city. It recognizes, as do the ordinances previously passed, in the use made of the same phrase, that the city is the source from whence they came. Franchises, as we have said, came from the state. The phrase, "during the life hereof," cannot be held to extend contract rights to ninety-nine years without doing violence to the terms which just precede this phrase and are found in the same sentence, confirming all contracts, stipulations, licenses, and undertakings "as made or amended." The vital part of such contracts is the duration of the occupancy of the streets, expressly limited to twenty-five years, and in some cases twenty-five years and until purchase by the city. To say that "during the life hereof," in the sense that it means ninety-nine years, is to be the life of the contracts, permits that part of the sentence to repeal the provision of the clause which reads them into the original act in all respects as made or amended. Rejecting, therefore, such impossible construction as doing violence to the very terms of the law, there is only left

of the things provided for which can be consistently extended for ninety-nine years, the acts or deeds of transfer between the corporations so far as they relate to franchises which are not subject to the express limitations of the act,—that they shall stand as made. These franchises as conveyed were necessarily limited to twenty-five years, the then life of the companies. The first part of this act has prolonged the corporate life to ninety-nine years. In the sense which we have already defined the
[469] franchise granted by the state, as *conferring the right to use and occupy the streets with permission from the city, the act may be consistently held to extend and validate the deeds of transfer as conveying a continued right to such franchise for the extended period of the lives of the corporations. This construction gives some weight and force to this ambiguous expression, and, taking the entire act together, is more consistent with the legislative purpose expressed than is the one put forward, which ignores the reference to the contracts in their original form and extends them all for ninety-nine years, while the act declares they shall not be disturbed as made. It is not to be understood that the interpretation herein suggested frees the judicial mind from doubt as to the meaning of this act, any more than its ambiguous and contradictory phrases could have impressed upon the legislative understanding the meaning now contended for by the companies. It is the application of the settled rule of interpretation to such grants which invalidates the claims made for it, rather than any clear and satisfactory interpretation which has been suggested by counsel or arrived at by the court.

This construction is in harmony with the policy of the state, as evidenced in its prior legislation on the subject, and, in the earlier part of the section under consideration, it gives some meaning to all parts of the act, and makes its provisions consistent with each other. It preserves local control of streets for railway purposes, which the legislature, in all of the acts under consideration, has sought to protect. Considering the act as a whole, it has the effect to extend the life of the corporations to ninety-nine years and to authorize the use of the streets of Chicago, with the consent and upon terms agreed upon with the council, and this right may be acquired in like manner during the extended life of the corporations for such periods as may be contracted for. Contracts already made are affirmed as made. The transfers between the companies are validated.

Further contracts may be entered into and amendments made without resort to new legislation empowering the corporations, *as the right of amendment is given,
[470] reserving the right of modification or repeal, by a majority of the aldermen elected or act of the general assembly, of the right to charge a higher rate than 5 cents.

While it is true that if, by the act, the state had conferred a grant of the right to use the streets for the period of ninety-nine years, entitled to the protection of the contract clause of the Constitution, such right could not be impaired by any subsequent legislation, it is worthy of note, as showing the continuous legislative policy of the state, that in the act of March, 1867, amending the charter of the city of Chicago, it was provided that no grant of the right to use the streets should be given, or those already given extended, unless by a vote of three fourths of all the aldermen elected, and that no grant, consent, or permission theretofore given or made, or thereafter given, should in any case be extended until within one year of the expiration of the grant, consent, or permission, and in case of veto by the mayor such grant or permission should receive the vote of three fourths of all the aldermen. This act shows a consistent policy of local control, and is inconsistent with the theory of a grant already made for the use of the streets for ninety-nine years.

In reaching the conclusions herein stated as to the proper construction of the act of 1865, amending the act of 1859, we are not unmindful of the fact that much can be said in favor of the view contended for by the learned counsel for the companies. The construction of this act, as we have said, is by no means free from difficulty.

It is true that Governor Oglesby, in his message returning this act with his veto, gave it a construction which would maintain the right to use the streets for the period of ninety-nine years. While his construction was assumed rather than demonstrated, and the stress of his argument was upon the impropriety and constitutional invalidity of thus postponing the right of the city to purchase, it may be admitted that his interpretation of the act sustains the view contended for by *the companies.
[471] But, as we have said, the act upon its face is ambiguous and uncertain. We must judge of it by the terms in which it is expressed. A construction can be given it which would extend all the contracts with the city for the term of ninety-nine years. On the other hand, it can be maintained, with at least equal force, that, notwithstanding the Governor's view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of twenty-five years, for which they

expressly stipulated. It must be, therefore, uncertain whether the legislators voted for this act upon one construction or the other. It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. Pierce, Railroads, 491; *New Orleans & C. R. Co.* v. *New Orleans*, 34 La. Ann. 447. "Words of equivocal import," said Mr. Chief Justice Black, in *Pennsylvania R. Co.* v. *Canal Comrs.* 21 Pa. 9, 22, "are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature." "The just presumption," says Cooley, in his work on Constitutional Limitations, 7th ed. p. 565, "in every such case is, that the state has granted in express terms all that it designed to grant at all," and, after quoting from the supreme court of Pennsylvania to the same effect, the learned author observes: "This is sound doctrine, and should be vigilantly observed and enforced."

Since the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, [472]*this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the state, or municipalities acting under state authority. Concurrent with this principle, and to be considered when construing an alleged grant of this character, is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, and has been uniformly applied in many subsequent cases in this court. In *Perrine* v. *Chesapeake & D. Canal Co.* 9 How. 172–192, 13 L. ed. 92–100, the same eminent Chief Justice, speaking for the court, said: "The rule of construction in cases of this description . . . is this,—that any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded." In the case of *The Binghamton Bridge* (*Chenango Bridge Co.* v. *Binghamton Bridge Co.*) 3 Wall. 51, 75, 18 L. ed. 137, 143, it was said: "The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state."

This principle has been declared axiomatic as a doctrine of this court. *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666, 24 L. ed. 1036, 1038. *In *Slidell* v. [473] *Grandjean*, 111 U. S. 412, 438, 28 L. ed. 321, 330, 4 Sup. Ct. Rep. 475, it is declared a wise doctrine; "It serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." Among other cases affirming the principle in this court is *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689, in which it was applied in adopting, of two doubtful constructions, the one more favorable to the state. Many of the cases are cited in a note to *Knoxville Water Co.* v. *Knoxville*, decided at this term. 200 U. S. 22, 34, *ante*, 353, 359, 26 Sup. Ct. Rep. 224, 227. Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865 contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years, and for that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not

to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted fail when they can only be maintained by strained construction in their favor.

The effect of the act of 1865 was to affirm the contracts as made between the council and the companies; these contracts must stand as concluded, unless changed by subsequent agreement between the parties. As we have said, the principal question in the case concerns the construction of the act of February 14, 1859, as amended by the act of February 6, 1865. The learned circuit court, holding the opinion that the right to use the streets was extended for the prolonged term of the corporate life of the companies, also held that the [474]adoption of *the cities and villages act by the city of Chicago, in May, 1875, which act was passed under the Constitution of Illinois, taking effect in 1870, put an end to the right of the city of Chicago to thereafter designate streets under the former acts, and that contracts subsequently made were subject to the limitation of twenty years, as provided in the cities and villages act of 1872. The court applied the principles upon which it construed the acts in question, and gave it effect as to numerous streets which were the subject of contracts between the city and the companies. Under our conclusions the decree must be reversed, and the construction we have given the act may require a decree differing from that rendered in the circuit court, when applied to particular streets. But we shall not take up all these controversies in detail, and shall leave to the circuit court a readjustment of the decree upon the lines of this opinion. There are, however, certain matters in the case which have been fully argued and should be determined before the case is again considered in the circuit court. On these features of the case we will not enter upon extended discussion, but briefly indicate our views upon them.

It was held by the learned circuit court that the amending act of 1865 had application to the North Chicago City Railway Company, and had the effect to extend the corporate life of that company. We think this is a correct view. By the 10th section of the act of 1859 all the grants, powers, privileges, immunities, and franchises conferred upon Parmalee and others, by the act for the south and west divisions of the city of Chicago, were conferred upon certain persons by the corporate name of the North Chicago City Railway Company, for the north division of the city, in the county of Cook, as fully and effectually as if they had been by a separate act incorporated, with all of said grants, powers, immunities, privileges, and franchises. By the 1st section of the act of 1865 the corporate lives of the Chicago City Railway Company, created by the 1st section of the act of 1859, and the Chicago West Division Railway Company, created by the 1st section of the *act of 1861, were ex-[475] pressly extended for ninety-nine years. While nothing was specifically said of the North Chicago City Railway Company in this connection, the 10th section of the act, after this amendment, we think, should be read in connection with the amended act, so that the act of 1859 is to be read as if it had originally been in the amended form. In this view the extended life of the corporations created by the 1st section must be read into the charter of the North Chicago City Railway Company, created by the 10th section.

We believe this view is sustained by reason and authority. *Holbrook* v. *Nichol*, 36 Ill. 161. The rule was thus stated in *Farrell* v. *State*, 54 N. J. L. 421, 24 Atl. 725: "As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *People ex rel. Parsons* v. *Circuit Judge*, 37 Mich. 287. In *Conrad* v. *Nall*, 24 Mich. 275, a section in a chapter of the Code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter, in its present form, must be read as one act.

"The rule is correctly stated in Endlich on Interpretation of Statutes, § 294, as follows: 'A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.'" This view is strengthened by the language of the 2d section, which speaks of the deeds of transfer of rights between the corporations, in said several acts, or "any two of them."

The city of Chicago has constantly recognized the corporate existence of this company and has made numerous agreements with it as such corporation. In *Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594, in considering a contract between the North Chicago City Railway Company and the city as

to the extent of street improvement by way of paving, etc., which could be required of
[476] *the company under the ordinance of May 23, 1859, granting it rights and privileges in the streets, this court, speaking through Mr. Justice Nelson, concluded its opinion as follows: "A point is made that the legislature have not conferred or intended to confer authority upon the city to make this contract. We need only say that full power was not only conferred, but that the contract itself has been since ratified by this body." The learned justice, speaking of the contract, obviously referred to the ordinance of May 23, 1859, passed under the authority conferred by the act of February 14, 1859, and the ratification by the legislature under the act of February 6, 1865. We have no doubt that this act was intended to apply to the North Chicago City Railway Company as well as to the companies specifically covered in the 1st section of the act. The ordinance of 1858 in its 10th section gave the right to operate the "said railways for twenty-five years, and thereafter to parties operating said railways the enjoyment of all privileges granted until the common council shall elect, by order for that purpose, to purchase the tracks, railway cars, carriages, station houses, station grounds, furniture, and implements of every kind and description used in the construction and operation of said railways or the appurtenances in and about the same." By § 7 of the act of February 14, 1859, all of the rights and privileges granted or intended so to be to Parmalee and others, by the ordinances and amendments, were confirmed and vested in the corporations. The affirmance of these rights and privileges gave them the sanction and made them part of the legislative act. Afterwards certain of the rights and privileges of the Chicago City Railway Company were transferred by the deed of July 30, 1863, as stated in said conveyance, to the Chicago West Division Railway Company. This deed of transfer is confirmed by the act of 1865. Later the system of railways was extended under ordinances of the city and with the assent of village boards of trustees. It is the contention of the receivers that by reason of the premises the railway companies became entitled to operate the
[477] entire system for *the extended period of the act of 1865—for ninety-nine years—and thereafter until the city of Chicago shall lawfully purchase all of the said railways, property, equipment, and appurtenances, and pay for the same in cash at its then appraised value. It is the contention of the city that this extension of the right to purchase by virtue of the ordinance of 1858, affirmed in the act of 1859 and the amendment of 1865, must be confined to the streets covered by the ordinance of 1858. That the right to use the streets under the ordinance of 1858 was extended to all subsequently acquired rights to use the streets under the new contracts, so that the right would continue until purchase be made of the entire property of both systems of railway, we cannot concede. It does violence to the language of the ordinance of 1858, which, by its terms, is limited to the railways therein and thereby provided for, and would be an extension of corporate privileges by implication, in violence of the settled rule to which we have had occasion to refer in the principal discussion.

While not conceding the soundness of the contention that the right of purchase is extended to all the property of the railway companies by reason of the unity of the system, there are certain ordinances confirmed by the act of 1865 which require special attention. As we have seen, by the ordinance of May 23, 1859, permission was given to lay a street railway on and along certain streets and bridges in the south and west divisions of the city of Chicago, "and the same to keep, maintain, and use and to operate thereon railway cars and carriages during all the term of the said act of February 14, 1859, specified and prescribed, in the manner and upon the conditions hereinafter designated." On the same day, May 23, 1859, a grant was made to the North Chicago City Railway Company of the right to use certain streets, the rights and privileges granted to be in force for the benefit of the company for the full term of twenty-five years from the passage of the ordinance, and no longer. This difference in the grants to the two railway companies is significant. In the ordinance of 1858 the *grant to Par-
[478] malee and others was for the term of twenty-five years, with the right of the parties operating the railways to enjoy all the said privileges until the common council elect, by order for that purpose, to purchase the tracks and other property used in the construction and operation of said railways and appurtenances, and pay for the same in the manner designated in the ordinance. This grant was expressly confirmed by the act of 1859, in § 7 thereof. Otherwise there was no specific grant in that act fixing the time for which the railway company might operate in the streets. As we have seen, in that law there was a distinct affirmation of what the common council had authorized the corporators to do, and might thereafter authorize the corporation to do by contract. The North Chicago City Railway Company, prior to the act of 1859, had no agreement as to streets. The reason for the grant of different terms to the different

companies, we think, is apparent. On the west side reference was made to the term granted in the act of February 14, 1859, for the purpose of giving the Chicago City Railway Company the same term as had been granted and confirmed therein as to the streets named in the ordinance of August, 1858, and, in our judgment, gave to that company a grant in the same terms, that is, for twenty-five years, and until the city purchase in the manner designated. On the north side, there being no such legislative confirmation of rights already undertaken to be conferred by the council, the grant was specifically limited to a period of twenty-five years, "and no longer."

In considering the effect of the ordinances passed by the common council of the city of Chicago in the period from February, 1859, to May 3, 1875, it may be well to briefly summarize the terms of these ordinances. They will be found in the margin.‡

[479] *After the passage of the cities and villages act of 1872, accepted by the city of Chicago in May, 1875, the following ordinance was passed, being the so-called "compromise ordinance:"

*"July 10, 1883 (amended August 6, 1883)— [480]
"Extending the Term for Twenty Years from This Date. Accepted by North Chicago City Railway Company, August 8, 1883; by the Chicago City Railway Company and the Chicago West Division Railway Company, August 10, 1883."

This ordinance contained this proviso: "But nothing in this section contained, or the acceptance hereof, shall in any manner impair, change, or alter the existing rights, duties, and obligations of the city or of said companies, respectively, from and after the said term of years hereinbefore mentioned."

We thus perceive a consistent purpose running through the grants to the north side company to adhere to the term of the original ordinance of May 23, 1859, limiting the right to use the streets to the period of twenty-five years, "and no longer," by reference in subsequent ordinances to the prior ordinance. We do not regard the exceptional character of the ordinance of October 26, 1874, amended April 26, 1875, as overcoming, as to other ordinances, the general purpose reflected in them. That ordinance was a grant in part to the *North [481]

‡On the west side we find the following:
May 23, 1859—
"A grant during all the term in the said act of February 14, 1859, specified and prescribed." Streets are designated and the time for completion of the railways thereon is limited, for some at three months, others at five, one year and eighteen months, and still others "as soon as practicable."
February 13, 1860—
Amendatory of the above last-mentioned ordinance. Extends the time for completion to ten years for some, and five years for others. Certain lines mentioned must be completed in two years.
November 18, 1861—
Exempting certain streets and substituting others. Ordinance of May 23, 1859, in force except as amended, and time for completion of certain railways named is extended to five years.
November 16, 1863—
Excluding railways from certain streets named.
March 14, 1864—
Releasing one street and substituting another.
March 28, 1864—
Authority to remove from one street to another.
March 28, 1864—
Authorizing temporary tracks while a bridge is being constructed.
July 11, 1864—
Amending ordinances of March 28, 1864, repealing the temporary use of certain streets.
August 17, 1864—
Creating new lines, extending others, and regulating the use thereof. Times for completion fixed at ninety days and fifteen months. No time or duration stated by reference or directly.
November 13, 1871—
Extension of tracks on certain streets named.
March 8, 1875—
Authorizing the construction and operation of a new line. To be completed by October 1, 1876, and the term to extend to October 1, 1894, and thereafter until purchased by the city.
April 19, 1875—
Amending last-mentioned ordinance as to certain uses and legal claims arising from the operation of the lines.
On the north side we find the following:
May 23, 1859—
Term "twenty-five years and no longer." Times for completion fixed at January, 1860, and July, 1862, different for some than others.
January 18, 1864—
Term "subject to all the rules and limitations and restrictions" prescribed in the ordinance of May 23, 1859. Authorizes connection of tracks.
August 11, 1864—
Term "subject to all the restrictions and conditions, the rights and privileges, mentioned" in ordinance of May 23, 1859. Time for completion fixed at sixty days, unless restricted, etc.
May 8, 1871—
Same term. Time for completion fixed at June 1, 1872, for the street railway named.
November 20, 1871—
Term "subject to all rules and limitations and restrictions" prescribed in ordinance of May 23, 1859. Rights and privileges granted shall continue for a term of ———years.
October 26, 1874—
Term until October 1, 1894, and thereafter until purchased by the city. To be completed July 1, 1875. As lessee of Chicago City Railway Company as to certain portion.
April 26, 1875—
Amending the last-mentioned ordinance, and otherwise similar to it as to terms and conditions.

Chicago Company as the lessee of the Chicago City Company, and was doubtless changed in terms to make it comply with the grant of the latter company as to streets in which it operated.

As to the west side companies we find running through the ordinances making grants in the divisions covered by that system a purpose to preserve the original permission of the ordinance of August 16, 1858, which granted the use of the streets for the term of twenty-five years and until purchase by the city. The language used in the ordinance of May 23, 1859, granting the use of the streets, is "during all the term in said act of the 14th of February, A. D. 1859, specified and prescribed." This ordinance and similar ones passed prior to the act of February 6, 1865, were confirmed by that act, and rights under them were reserved by the compromise ordinance of July 10, 1883. We hold that when streets were occupied under the authority of these ordinances the company has the right to the use of the streets until the city shall purchase under the contracts thus made.

In the west side system, the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets, a point which we do not feel called upon to decide. The other ordinances by direct terms or references to prior ordinances have made the grants for the west side system for the term of twenty-five years, and until purchase by the city, in the manner stated, and we do not think there was any intention to depart from the plan in this one ordinance omitting specifically to name a definite time of occupancy. At this time there had been no extension of the life of the corporation, and it was specifically limited to twenty-five years.

In reaching this conclusion we are not unmindful of the decision of this court in *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 395, 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410, holding that although a cor-
[482] poration *be organized for a limited period by the terms of its charter, it may receive a grant which would inure to the benefit of those lawfully entitled to succeed to the rights of the corporation, although for a period of years beyond the corporate life. But in the present case the right granted must be construed with reference to the system of which it was made a part, and where the terms of the grant were limited to twenty-five years, and until purchase, we can find no intention to grant or receive a perpetuity simply because no term of years was named in the one ordinance under consideration.

It is contended that whatever rights would otherwise be included in contracts confirmed by the act of 1865, they were lost to the companies by accepting the privileges conferred in the "power ordinances" of June 7, 1886, and March 30, 1888. But prior to the passage of those ordinances was the so-called "compromise ordinance" of July 10, 1883, as amended August 6, 1883, settling certain controversies as to license fees and street paving, and extending the time of operation for twenty years, and further providing: "But nothing in this section contained, or the acceptance hereof, shall in any manner impair, change, or alter the existing rights, duties, and obligations of the city, or of said companies, respectively, from and after the expiration of the said term of years hereinbefore mentioned." In the North Chicago City Railway ordinance and the West Chicago City Railway Company ordinance clauses are inserted to the effect that privileges as to time after the expiration of the term of twenty years are to be governed by ordinances theretofore passed. In view of this reservation we are of opinion that whatever rights and privileges the company had in the streets after the expiration of the time limitation in the "power ordinances" were not lost by the acceptance of privileges conferred in those ordinances.

It is contended that the railway companies had no power to accept ordinances for the use of other than animal power in the operation of railways, because of the titles of the various *acts which constituted [483] the charter of the companies, limiting them to the use of animal power, and because of the constitutional provision, which we have referred to earlier in this opinion, providing that no private or local law shall embrace more than one subject, which shall be expressed in its title. We think the intention of the legislature in this respect was not to confine the operation of the road to animal power, but to incorporate street railway companies as distinguished from steam railways, and to endow them with the rights and privileges named in the acts. Section two of the law (act of 1865) expressly gives the power of amendment, in providing that "it shall be competent for the said common council, with the written consent or concurrence of the other party or parties or their assigns to any of said contracts, stipulations, licenses, or undertakings, to amend, modify, or annul the same." We think this grant of power was broad enough to authorize the city to grant, and the railway company to accept, a changed method of operation of the railways by applying

thereto a new and more efficient and economical power. It is true that the supreme court of Illinois in *North Chicago City R. Co.* v. *Lake View*, 105 Ill. 207, 44 Am. Rep. 788, held that the charter of the North Chicago City Railway Company had not authorized a steam railway, but that court has held in later decisions that an electric railway, incorporated under the general incorporation acts to build horse and dummy railways, might organize a street railway company to be operated by electricity or by any motive power other than steam, and might appropriate private property for this purpose. *Harvey* v. *Aurora & G. R. Co.* 174 Ill. 299, 51 N. E. 163. The court has also held that the provisions of the horse and dummy act applied to electric railway companies, as did a paragraph of the general incorporation act in regard to horse railways. We think the Illinois cases recognize the distinction in legislation in that state between railways intended to be operated upon the streets of the city of Chicago and other cities for local accommoda-
[484] tion, and steam railways, as such are *generally understood. And the declaration inserted in the title of the acts, that they concern horse railways, will not, because of the constitutional provision, prevent the exercise of the power of amendment conferred by law upon the city and the companies in such manner as to authorize the use of such power as electricity and cable. We agree with the learned circuit court that these grants as to changed methods of operation were within the powers legally conferred by the act of 1865. Furthermore, on June 9, 1897, the legislature passed an act having application to companies organized under general or special laws, which provided: "Every such street railway may be operated by animal, cable, electric, or any other motive power that may have been or shall hereafter be granted to it by the public officers or authorities, except steam locomotive engines." It is true that this statute was repealed by the act of March 7, 1899, but we do not perceive how this could destroy its effect to ratify the contracts which were in existence when the act was passed. This view renders it unnecessary to pass upon the question whether the city of Chicago, having undertaken to authorize the use of new power, upon the faith of which authority large sums of money have been expended and extensive changes made, can now be heard to say that it had no authority to grant such right.

The learned circuit court held that privileges granted under ordinances of the town of Jefferson were limited to twenty years. This ruling, it is contended by the Chicago West Division Railway Company, is erroneous, because of the act of 1859, which provided: "Section 5. The said corporation is hereby authorized to extend the said several railways herein authorized to be built in the manner aforesaid to any point or points within the county of Cook in this state; and to enable said corporation to construct any or all of the railways herein authorized, or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed," etc. Section 6: "The said corporation is hereby authorized, *with the assent of the [485] supervisor of any township, to lay down and maintain its said railway or railways in, upon, over, and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same." The town of Jefferson was one of the townships of Cook county, adjoining the city of Chicago on the northwest. So far as the record discloses, no effort was made to extend the lines of the Chicago West Division Railway Company into the town of Jefferson until 1877. Before that year the town of Jefferson had adopted the provisions of the cities and villages act of 1872, in which the power to grant the use of the streets for street railway purposes was limited to twenty years. On January 28, 1878, the village passed the ordinance granting to the Chicago West Division Railway Company and its successors the right to maintain and operate a street railway in Milwaukee avenue and Armitage road, in said village, the rights and privileges thereby granted to extend for the term of eighty-one years. Under the act of 1859 the right to lay down tracks and maintain railways over and along the common highways in the townships in Cook county required the consent of the supervisor in the township. This does not appear to have been obtained, and when the authority was given by the president and board of trustees of the village, it was subject to the limitation already referred to. We cannot assent to the soundness of the argument that the act of 1859, in the event of the abolition of the office of supervisor, during the life of the corporation, would authorize the extension to these adjoining townships of the system of railways intended to be constructed, without official consent.

Before the passage of the act of 1865, incorporating the board of trustees of the town of Lake View, the supervisors granted permits to use some of the highways of Lake township. This authority was exercised under §§ 5 and 6 of the act of February 14, 1859. We cannot agree that the duration of these permits would be in perpe-

tuity, because of the fact that no time was specifically named in them. The extension [486] into *Lake View was part of the north side railway system, which, by the terms of the grants from the city, were limited to twenty-five years, and no longer. There certainly could be no intention in granting these permits from the supervisors as extensions of the system to make perpetual grants, when the right of user of the main part of the line was expressly limited to twenty-five years. A fair inference would be that, in extending this part of the system so as to make a portion of that already granted, such grants were to be for the same term as those already made. As to extensions in the town of Lake View, obtained otherwise than from the supervisors, it appears that on February 16, 1865, an act was passed entitled "An Act to Incorporate a Board of Trustees for the Town of Lake View, in Cook County," and it was provided that the supervisors, assessors, and commissioners of highways and their successors in office should be constituted and incorporated, *ex officio*, a board of trustees for said town of Lake View. On March 5, 1867, an amendatory act was passed entitled "An Act to Incorporate a Board of Trustees for the Town of Lake View, in Cook County," which provided (§ 7) that the board of trustees should have the control and supervision of the highways, streets, alleys, and public parks in said town. This board afterwards passed ordinances consenting to the laying down of tracks in the town of Lake View, on a number of avenues and streets named in the ordinances.

The cases in the state courts are much divided as to the right of a municipal corporation, because of its charter power of controlling the streets, to grant the use thereof to a street railway company. Some of the cases are collected in *Detroit Citizens' Street R. Co.* v. *Detroit*, 26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, 637.

The act of 1859, § 6, required the consent of the supervisor to the extension of the railways into townships of Cook county outside of Chicago. When the supervisor became a member of the township board of trustees, and that board gave its consent, we think this satisfied the requirement of the act in that respect. The legislature [487] might have given the railway *company the right to extend its lines in Cook county without the consent of any local authority. We are not concerned with the general powers of the supervisor. When the legislature designated him as the official whose assent should be obtained, it empowered him to give such assent, and when given in any substantial way, that satisfied the requirements of the act of 1859.

As we understand the decisions of the supreme court of Illinois, the power to control the streets and highways by the township trustees, given by the act of March 5, 1867, would include the right to authorize their use for street railway purposes. In *Chicago Municipal Gaslight & Fuel Co.* v. *Lake*, 130 Ill. 54, 22 N. E. 616, the court held: "The power to control and regulate the streets, alleys, and other public places within the limits of the town of Lake, and abate any obstructions, encroachments, or nuisances thereon, was given, in its charter, to the corporate authorities of the town. Under this power the town could lawfully permit any use of such streets and alleys that is consistent with the public objects for which they are held, and could make a grant of a right of way for the purpose of laying gas pipes and mains under the surface." In *People ex rel. Rinne* v. *Blocki*, 203 Ill. 363, 368, 67 N. E. 809, 810, the same court said, having reference to a grant of the right to lay switch tracks in the street: "The street, at the time said permits were granted, was under the control of the board of trustees of the town of Lake, and, under the power conferred upon that municipality by law, it was authorized to allow the use of said street for any purpose not incompatible with the purpose for which it was established, and to allow a railroad track to be laid therein was not a use incompatible with the purpose for which it was established." In *Quincy* v. *Bull*, 106 Ill. 337, on page 349, it was said: "In this state there is vested in municipal corporations a fee-simple title to the streets. Under the power of exclusive control over streets it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of streets, which is not incompatible *with the [488] ends for which streets are established, and that it is a legitimate use of a street to allow a railroad track to be laid down in it. *Moses* v. *Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516; *Murphy* v. *Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Chicago & N. W. R. Co.* v. *People*, 91 Ill. 251." In view of these Illinois decisions, construing the legislative acts of the state, we think the learned circuit court erred in holding that the trustees of the town of Lake had no power to grant the railway the use of the streets for street railway purposes.

The question remains as to the term for which the rights granted by the trustees and the municipality of Lake View were to be held. The ordinances making these grants required the company to perform certain duties to the municipalities, such as the

laying of pavement, subject to the approval of the trustees. On April 16, 1887, the incorporated town of Lake View became incorporated as the city of Lake View under the cities and villages act of 1872. On July 15, 1889, the territory included in the city of Lake View was annexed to the city of Chicago. We think in such case that the terms granted would not extend beyond the life of the corporation conferring them, where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity. Our attention has been called to a late case decided in the supreme court of Illinois (*People ex rel.* v. *Chicago Telephone Co.* 220 Ill. 238, 77 N. E. 245) in which it was held that where trustees of villages and towns have granted rights extending telephone privileges, not for a definite period, that such grants could not be construed to be perpetuities, and did not extend beyond the lives of the corporations granting them. The court says: "The ground of the defendant's claim that the ordinance does not limit its charges in the annexed territory is that, before the annexation, the minor municipalities had granted to it the right to occupy the streets therein for its business, without any limits as to time. If the
[489] grants had been for terms of *years under legislative authority authorizing them, and the term had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city, because they had become binding contracts, under which the defendants had vested contract rights for such term; but they were not for definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service to the town or village hall or the village authorities, free or for some reduced rate. Such grants cannot be construed to be perpetual, and, at most, cannot extend beyond the lives of the corporations granting them. Upon annexation there ceased to be any town or village authorities entitled to the benefits of the contract or authorized to demand or receive them, and it could not have been understood that the grant could continue, discharged of the obligation annexed to it. . . . The ordinances of the city extended over the annexed territory immediately upon annexation (*Illinois C. R. Co.* v. *Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509) and the limitations of the ordinance applied to the annexed territory."

This seems to us a reasonable view, and, being the construction of the highest court of the state of Illinois, we are willing to accept it. Furthermore, these grants in Lake View were mere extensions of the old system, which, as we have seen, was limited in its rights to use the streets received from the city to the term of twenty-five years, extended twenty years by the compromise ordinance. In the absence of express language conferring a longer term, we do not think it was intended to extend the grant beyond the period already permitted to the system by grants from the city.

As we have said, we do not deem it necessary to take up all the questions which were raised and determined by the circuit court in considering the case and settling the decree in that court. Upon further proceedings the judgment of this court is only to be held conclusive upon matters specifically stated in this opinion.

The decree is reversed and the cause re-[490] manded to the Circuit Court for further proceedings in accordance with the views herein expressed.

Mr. Justice **McKenna**, with whom concur Mr. Justice **Brewer** and Mr. Justice **Brown**, dissenting:

This case as to questions common to all the railways depends mainly upon the acts of 1859 and 1865,—incidentally upon the act of 1861. The latter act may be omitted from special consideration, as it depends upon the others. Ill. Private Laws 1861, p. 340. It incorporated the Chicago West Division Railway Company and gave to that company all the powers conferred upon the other companies by the 2d, 3d, 4th, and 6th sections of the act of 1859.

It will be observed of the acts of 1859 and 1865 that they created corporations respectively for the period of twenty-five and ninety-nine years, and empowered them to construct, maintain, and operate a single and double track railway in Chicago.

The acts, as was remarked by the circuit court, fall into three divisions: (1) The granting part,—the authority of the companies to construct railways; (2) the identifying part,—the designation of the streets by the common council; (3) the terms and conditions of the occupation of the streets by the companies and the manner in which the terms and conditions shall be prescribed.

The meaning of the third division is one of the chief controversies in the case; in other words, the extent of the authority of the common council,—whether it was virtually an authority to grant rights in the streets or authority to regulate the rights conferred by the legislature; or, as it is aptly expressed by the circuit court, whether it was an authority to fix, by stipulation with the companies, that which relates "to

the physical side of the occupancy of the streets or the administrative side of the operation of the lines."

[491] *It will be convenient in the discussion to exhibit the acts of 1859 and 1865, showing wherein the latter amends the former, omitting the provision extending the corporate lives of the companies from twenty-five years to ninety-nine years, about which there is no dispute. The words in italics are the amendments made by the act of 1865:

"The said corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks, and appendages, in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south *and* [or] west divisions of the city of Chicago, as the common council of said city have authorized said corporators, or any of them, or shall *from time to time* authorize said corporations, *or either of them*, so to do, in such manner, and upon such terms and conditions, *and* with such rights and privileges, *immunities and exemptions*, as the said common council has or may, by contract with said parties, or any or either of them, prescribe; *and any and all acts or deeds of transfer of rights, privileges, or franchises between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses, and undertakings made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts; provided that it shall be competent for the said common council, with the written consent or concurrence of the other party or parties, or their assigns, to any of said contracts, stipulations, licenses, or undertakings, to amend, modify, or annul the same.*"

It is obvious, as far as words can accomplish it, and as directly as words *can* ac-

[492] complish it, the companies were granted *the right "to construct, maintain, and operate" railways upon the streets of the city. And no other power could have granted such right. *Chicago City R. Co.* v. *People*, 73 Ill. 541.

That such grant must come from the state is, of course, not denied; but it is urged that the grant of rights passed to the railway companies through the agency of the city, the city receiving a delegation of the state's power. This is based upon the words of the city's charter, and the authority given in the acts of 1859 and 1865 to designate the "terms and conditions" upon which the streets might be occupied.

The view I take of the acts makes it comparatively unimportant to consider the city's charter. There seemed to be a necessity for the acts, and they were complete in themselves, independent of other grants of power, except what were continued or confirmed by them. If the charter was adequate to invest in the city plenary power over the streets, we may wonder at the enactment of those statutes and many years of misapprehension of them and concern about them. Counsel for the companies assert, and the assertion does not seem to be denied, that an injunction was issued by the circuit court of Cook county, restraining the laying of tracks under the ordinance of 1858. The extent of the power of the city, however, I shall presently consider more at length, and will now pass to those parts of the act which the city insists conferred authority on the common council.

The stress of the argument is on the words "terms and conditions," in the third division. The city contends, and the court decides, reversing the decree of the circuit court, that the authority of the city to prescribe terms and conditions of the occupation of the streets included the authority to fix the time of occupation. I dissent from that interpretation for several reasons. It is opposed to the context in which the words "terms and conditions" are used. It is opposed to their primary and natural meaning. It would be a careless employment of them, and disregard or destroy distinctions *necessary to be observed. As [493] was said by the circuit court, ordinarily in legal phraseology those terms are not employed "to convey power over or relating to the time or period through which the tenure dealt with is intended to run; but conveys power over, or relates to the means, the methods, and the incidents connected with the exercise of such tenure." Citing *Hurd* v. *Whitsett*, 4 Colo. 77; *Chicago Terminal Transfer R. Co.* v. *Chicago*, 203 Ill. 576, 68 N. E. 99. Of course, directness and simplicity of methods are not always used, but some argument can be based on their omission, and it is natural to believe that had it been intended to give the power contended for to the city, words would not have been employed which would have to be turned from their first and legal signification to express it, and which could be claimed to be in opposition to other parts of the act, and made dependent, besides, upon contracts with the companies, which

could only be amended by consent of the companies. The power would have been more directly conferred by a delegation of the whole matter to the city, and would have been absolute,—not limited or embarrassed or opposed by conditions unnecessary to it.

The act of 1859 was certainly a direct grant from the state to the companies for the time of their charter life, and the necessity or the advisability of conferring authority upon the city to limit the time of occupancy of the streets could not have entered into the head of anybody. No conditions existed which suggested the necessity or prudence of giving such authority. The time of occupancy expressed in the ordinance of 1858, the time of the life of corporations prescribed in the act of 1859, and the time for which the franchises conferred by that act could be exercised, all coincided. It could not have occurred to anyone that twenty-five years, the term fixed in all the instruments, was injuriously long and demanded authority somewhere to limit its excess. To these considerations as proof that the words "terms and conditions" were not intended to give authority
[494] to prescribe a time of occupancy of the streets may be added that of contemporary practice.

By an ordinance passed in 1859 the time of occupation was expressed to be "during all the term in the said act of the 14th of February, A. D. 1859, specified and prescribed." This, as said by counsel for the companies, "is a distinct recognition of the fact that the term for the enjoyment of the franchise was to be found in the statute, and was not among the elements of the contract which the ordinance might prescribe."

With the act of 1865 there came a change,—differences from the act of 1859 of conspicuous and striking import. These differences were too full of meaning not to be considered enlargements of the act of 1859, and they were not misunderstood. The lives of the corporations were extended to ninety-nine years. There is no dispute about this, and it would seem necessarily that the other provisions were on account of and completed the purpose of the extension. And the extension had some valuable purpose. It was certainly not for the purpose only of extending the time of the abstract beings with nothing to do,—no functions to exercise, no rights, no obligations,—and the latter might, we can conceive, be as necessary for the public to enforce as the former for the companies to exercise. *Chicago Union Traction Co.* v. *Chicago*, 199 Ill. 484, 59 L. R. A. 631, 65 N. E. 451. It would be a strange confusion and confounding of purposes to make the existence of a corporation more important than that which it was created to do. Necessarily, life and functions went together, the term of the rights and obligations of the corporations coinciding with the term of their life.

This coincidence of the life and the rights of the corporations being kept in mind, we can easily resolve whatever ambiguities are in the statute of 1865. It will give to every word a use and meaning, and keep distinct the power which was exercised by the legislature and the powers to be exercised by the common council. Let me, at the expense of repetition, enter into some detail. The act of 1865, amending the act of 1859, *enlarged the life of the corporations from [495]
twenty-five years to ninety-nine years, and in § 2 empowered the companies to "construct, maintain, and operate" a single or double track of railway in the streets of Chicago. These words necessarily imported a continuing power. Time was of the very essence of the right. It is true that there was no designation of time but the life of the corporations, but this was sufficient, in the absence of qualification, and there was no qualification; certainly none in explicit words. Streets were not designated by name, but, in a certain sense, all streets were subject to whatever right was given, though it could be exercised in none without the designation of the common council. This is sought to be made very dominant,—determinative, indeed, of the power of the city,—making the city, in effect, the source of the rights of the companies, not merely the regulator of the manner of exercising those rights.

Upon what reasoning is the conclusion based? Before considering the question, however, let me refer to the statement in the opinion that "the council made, and the companies accepted, specific ordinances fixing the time of occupancy, as had been done in the original ordinances of May 23, 1859. And neither before nor after the passage of the act of 1865 was the ninety-nine-year term recognized or acted upon in ordinances granting the use of the streets." I am uncertain as to the conclusion deduced from the statement. It needs some explanation. Standing alone it may produce an erroneous impression. If the companies accepted the ordinances, conceding the power of the city, without protest or reservation of their rights under the act of 1865 to longer terms of occupancy, there could be no controversy over the interpretation of the act of 1865. Other considerations would supervene and demand attention. Counsel for the city contended for an estoppel against the companies, and because the court has not responded to that contention, but discusses

and bases its opinion upon the meaning of the act, I also have discussed its meaning as necessary to the case and determinative of
[496] it; *and I recur to the question, Upon what reasoning is the plenary power of the city supported?

First, let me quote the language of the act of 1865, separated from the parts which I think are not relevant to the present part of the discussion: The said corporation is authorized and empowered to construct, maintain, and operate a single or double track railway . . . in the city of Chicago, and in, on, over, and along such street or streets . . . as the common council of said city have authorized said corporators, or any of them, or shall from time to time authorize said corporations, or either of them, so to do, in such manner and upon such terms and conditions . . . as the said common council has (prescribed)† or may by contract with said parties, or any or either of them, prescribe, . . . and any and all acts or deeds of transfer of rights, privileges, or franchises between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses, undertakings made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, *shall be deemed and held and continued in force during the life hereof, as valid and effectual to all intents and purposes as if made a part of said several acts . . .*" (Italics mine.)

The language is orderly and, to me, unmistakable in its relations and meaning. What element is omitted necessary to the clear expression of a definite purpose? Not one. We have already seen that the rights given would have been, if there had been no other expression of time, coincident with the life of the corporations, but time was not left to implication, however clear the implication might have been. It was expressed. It is true it is not said that the rights, contracts, etc., shall be "held and continued in force" for ninety-nine years.
[497] If it *had, there certainly would be no ambiguity. It would suit with the other words, and complete their meaning without change of a single syllable. Why then is there any ambiguity, if we substitute an equivalent for the phrase "for ninety-nine years?" If "during the life hereof" is not the equivalent for "ninety-nine years," that is, the life of the corporations, what does it mean?

†In Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 524, 59 L. R. A. 631, 645, 65 N. E. 451, 462, it is said: "The word 'prescribed,' to which the word 'has' applies, was accidentally omitted."

There are various answers offered, some accepting that meaning, others disputing it. One counsel for the city submits rather tentatively that the words "during the life hereof" may be words of limitation, and that "the grants by the common council thus ratified by the act should continue for their full term," unless "the corporate existence of one or more of the corporations be terminated by dissolution or forfeiture within the period for which its privileges in the streets were granted." It is said, "Thus construed, the act means precisely and exactly what it says,—that is, during the life, *i. e.*, during the corporate lives of the several companies, the contracts made with them by the common council are as valid and effectual as if made part of the act. . . ."

Other counsel for the city leave a choice of interpretations. They say "The expression 'during the life hereof'" is vague and ambiguous. It may be capable of three interpretations: As meaning the life of the act; or the life of the deeds, licenses, and contracts; or the lives of the railway corporations, respectively. They incline rather to the second, and say that "during the life hereof" means the life of the section or the matters mentioned in the section, and "hereof" should be changed to "thereof." The court accepts neither of the interpretations, but gives its authority to another. It was apparent that the interpretations advanced by counsel were too restricted and ignored too much the words of the act. It was apparent that the clause referred to the lives of the corporations (ninety-nine years), continued something for those lives, and the court selects as the things so continued "the acts or deeds of transfer between the corporation so far as *they relate[498]
to franchises which are not subject to the express limitations of the act—that they shall stand as made." The construction, however, is not confidently asserted. It seems to be adopted in submission to the rule of strict construction. A word, therefore, as to that rule.

I concede the rule to be that nothing passes by a grant of franchises, such as those conferred by the acts under review, unless it be clearly stated or necessarily implied; but I do not think the statutes under review call for an application of the rule. Whatever is ambiguous in the acts yields a definite and consistent purpose and meaning by the application of the simple rules of interpretation. In such case there is no place for the rule of strict construction. Our reports abound in cases where, against bold and able controversy, public grants have been sustained, and where division in the court has marked with emphasis the strength

of the doubts which existed. And we have taken care to warn against a misunderstanding of the rule in a case of significant import. It will be conceded, I think, that the power of taxation is the highest attribute of sovereignty, one the most necessary to it, and against the limitation of which all intendments proclaim. *The Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888. Limitations of this power have been sustained in favor of private individuals, arising from statutes of disputable meaning. In *Citizens' Bank* v. *Parker*, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181, interpreting the charter of the bank, it was held that the bank was exempt from the license tax, and we there said that the rule of strict construction is to be used to solve ambiguities, not to create them. There was a dissent that pressed the rule against the reasoning and conclusions of the court.

Returning, then, to the argument of the court, not required by any rule to find ambiguity in the statutes, but required by every rule to solve if found, what is that argument? Its first premise is the assumption that it was the policy of the state to vest in the city the control of the streets. Some control, yes; but how much? Was it
[499] a policy of unlimited or qualified *control; the grant of rights in them or the regulation of rights? Or, to use a technical term, the grant of franchises or the grant of power of administration over their exercise? The answer is found in the case of *Chicago City R. Co.* v. *People*, *supra*.

The case was based on the act of 1859, and the right derived from it as distinguished from the rights derived from an ordinance of the city. It was said: "It is a misconception of the law to suppose the railway company derives its power to construct a railroad from any ordinance of the city. All its authority is from the state, and is conferred by its charter. The city has delegated to it the power to say in what manner and upon what conditions the company may exercise the franchises conferred by the state, but nothing more." The reason given was that the ordinance emanated from a source not "competent to grant a franchise." That power the legislature alone possessed. The date of the ordinance was November 13, 1871. It is manifest therefore, that the policy of the state of Illinois up to 1871, and necessarily in 1859 and 1865, was not to give its municipal corporations the authority to grant a right in the streets, but only empowered them to regulate the right. And it was necessary to decide the kind and the extent of authority that was vested in the city. It was urged that the ordinance passed on purported to grant "special privileges" or "franchises," and was therefore void under the Constitution of 1870. The court replied that the ordinance did not grant a franchise, and that by no construction could the Constitution be said to be a "limitation upon the municipal corporation to designate certain streets and fix the conditions upon which a railway company, organized under a special charter previously granted, or under a general law since the adoption of the Constitution, might lay its track." (P. 548.)

This view acquired emphasis from the dissenting opinion, which took issue with the court, and virtually made the city the source of the rights of the railway, and not the state, and, *describing what the court [500] said as to the power of the city, observed: "These special privileges of the rights of the railway upon particular streets are said to be conferred, not by the city, by its ordinance, but by the state, by the company's charter, and the *city only regulates the use.*" (Italics mine.)

The case was decided in 1874, and the principle it declared is the exact contention of the railways to-day, and, to the strength of the reasoning of the court, may be added the consideration that the property acquired and the investments made under the sanction of the decision for thirty-two years now claims its protection against impairment. Such considerations should prevail over ambiguity, could ambiguity ever have been asserted to exist. It received its solution and should never again be brought forward to cloud the meaning of the statute.

The distinction between the plenary and the limited control over the streets by the city is substantial in the controversy between it and the railway companies. Manifestly, the power to grant a franchise is not the same as the power to designate streets on which the franchise can be exercised. Of course, the streets must be designated before the franchise can be exercised, and therefore the power to designate may be magnified and confounded with the other power. It is so magnified, and the inability of the railroads to compel any action upon the part of the city is urged and dwelt on by counsel. The argument is that, as the city could have refused to designate any street, it had the right to exact anything of the railroads. In other words, the defects in the remedies of the railway companies enlarged the power of the city and changed the nature of the grant to the companies. Or it may be put this way,—the power given to the city as a subordinate instrumentality of the state may be employed to defeat the purpose of the state. This cannot be done. *Pittsburgh's Appeal*, 115 Pa. 4,

7 Atl. 778; *Atlantic City Waterworks Co.* v. *Consumers Water Co.* 44 N. J. Eq. 427, 15 Atl. 581; *Galveston & W. R. Co.* v. *Galveston*, 90 Tex. 399, 36 L. R. A. 33, 39 S. W. 96, 91 Tex. 17, 36 L. R. A. 44, 39 S. W. 920;
[501] *Homestead *Street R. Co.* v. *Pittsburg & H. Electric Street R. Co.* 166 Pa. 171, 172, 27 L. R. A. 383, 30 Atl. 950, 955. And I may observe that there are some duties, the performanee of which cannot be immediately coerced. It need not be pointed out that the agencies of government are kept, in a great measure, to eo-operation by sense of duty and propriety, and if they should, disregarding that sense, exercise the mere physical power possessed to refuse to act, disorder, temporary at least, would result. It is, besides, a strange contention to me that a municipality of a state, because of its ability, physical, it may be, more than legal, to refuse to exercise powers conferred upon it, ean assume or assert other powers. Let us not overlook that a municipality must have warrant, express or necessarily implied, for what it does. It, too, is within the rule of strict construction. Dill. Mun. Corp. § 91.

In the grant of franchises from the state and their regulation merely by the city there was no ineonsistency, and this division of functions was not only natural of itself, but comported with the policy of the state, as explained in *Chicago City R. Co.* v. *People, supra.* The decision eannot, it seems to me, be explained away. It was nearer in time to the enaetment of the statutes than we are to-day, and it is the conditions of that time we should try to realize. This is not as easy as it seems to be. Whatever we may profess, it is not easy to realize the conditions, thoughts, and purposes of another time. In 1859 nothing indicated the necessity of giving the city the power now contended for. In 1859 there eould be no foresight of the development of street railways. Then they were just beginning to be thought of as a means of transportation, and the city was as eager to procure them as eapitalists to construct them. It is said that time is the wisest thing on earth, and taking to ourselves its wisdom, in 1906, we are sure we would have seen in an enterprise just starting, and yet tentative, the growth it might attain and the measures that would be necessary to restrain and control it. But if there was anyone eapable of such
[502] prophecy, the aet of 1859 did *not ehallenge its exercise. There was nothing in it excessive, as I have already pointed out; nothing to invoke a jealous care. I dwell on this because the provisions of the aet of 1859 were carried into the act of 1865, and certainly were not intended to give a greater power to the city than when used in the act of 1859. In other words, a provision which eould have had no purpose in the act of 1859 to give power to the city to fix the time of the occupation of the streets eould not, by mere repetition in the act of 1865, have such purpose.

The situation in 1859 was exceedingly simple. Certain persons had been given the power by an ordinance of the city to construct a street railway. The right under the ordinance was questioned,—maybe it had been adjudged illegal, and the act of 1859 was passed. It explicitly gave, in my opinion, the right to eonstruet and operate railways in the streets, and gave authority to the city only to regulate the exercise of the right. But granting that some of its words are ambignous,—granting that the words "terms and conditions" can be interpreted to authorize a limitation of time,—such interpretation is not the only one of which they are susceptible. We should, therefore, consider whether that interpretation ean be adhered to in view of the other provisions of the act of 1865.

First, I may lay down as a fundamental rule that we must seek the meaning of the aet from its words, and that we should so exercise interpretation "as to bring a sense out of the words used, and not to bring a sense into them." *McCluskey* v. *Cromwell*, 11 N. Y. 593, 602. And with the consequences of the act we should not eoncern ourselves. This court has said that a plain meaning of a provision of a statute, not contradicted by another provision, must prevail, even against a charge of absurdity and injustice, unless they be so monstrous that all mankind would, without hesitation, unite in rejecting the meaning. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202, 4 L. ed. 529, 550. With these rules in mind, and by referring to § 2 of the act of 1865, it will be observed that its parts are providently arranged and its words are clear,—so clear, that conjecture must be put *to work and [503]
speculation must be indulged in to resist their manifest meaning.

The section makes provision for certain things, to wit, (1) the acts or deeds of transfer of rights, privileges, or franchises between the eorporations; (2) contracts, stipulations, lieenses, and undertakings made and entered into "and as made or amended" between the corporations and the eommon council "respecting the location, use, or exclusion of the railways in or upon the streets." And what is done with these things? The answer is in the following provision: "Shall be deemed and held and continued in force during the life hereof as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts."

Can a distinction be made between the things provided for? Which of those things shall "be deemed and held and continued in force during the life" of the corporations? I say life of the corporations, as that, it is decided, is the meaning of the phrase.

Considering the language of the provision, there can be but one answer. It permits no exception of any of the things, nor a distinction between them. A distinction is, however, asserted, and the provision is confined to the instruments transferring "franchises," as distinguished from the instruments transferring "rights and privileges," and is denied all application to the "contracts, stipulations, licenses, and undertakings" between the companies and the city. In what way is this done and with what consequences?

It will be observed that the provision does not simply confirm or ratify either the acts or deeds of transfer or the contracts; it does more. It continues them in force and makes them valid and effectual for the life of the act, the conceded equivalent of the life of the corporations. The provision is not, therefore, that the contracts and privileges obtained from the city shall "stand as made," but shall be continued in force during the life of the corporations,—a distinctly different purpose,—one which the words of the act sustain and at the same time exclude the other. It was not a pro-
[504] vision for simple ratification *which would carry, by necessary force, the time limits of the contracts, but one which adopts another measure of time,—the life of the corporations. And a provision was necessary to make the new measure of time applicable to the contracts. It was afforded, and again the necessity is demonstrated of adhering to the words of the act, unless we may regard it a mistake in the act for any of its words to have a purpose.

Plainly, therefore, the phrase "during the life hereof" cannot be limited to the acts or deeds of transfer of franchises. To do so is not only to distinguish between the instruments of transfer of franchises and the instruments of transfer of rights and privileges, but is to detach the phrase and its correlated words from its immediate objects, the "contracts, stipulations, licenses, and undertakings" entered into by the common council and the companies, and to leave those objects without provision,—without connection with anything, coherence, or purpose. Against this all the rules of interpretation protest, and the rules of construction cannot be invoked to justify a greater liberty. The purpose of construction, it is true, is to arrive at conclusions beyond the absolute sense of the text. (Leiber, 53.) But the integrity of the text cannot be disregarded. I do not overlook the fact that the court sees an inconsistency between the parts of § 2, and attempts to reconcile them. But in what way? As it seems to me, by magnifying the obscure in one part of the section and making it prevail over the manifestly clear in another part. By making the words "terms and conditions"—doubtful necessarily, and which, as I think, can only by an extreme indulgence be given the meaning put upon them—dominate everything else, even to the breaking of the section into unrelated and meaningless parts. To my mind a strange situation is presented. The legislature of the state had in its mind, we are told, a simple purpose,—the purpose to create corporations and to give them power to acquire rights from the city; and how did they express the purpose—simply, directly, and obviously? No; but in such way that the words *it employed con-[505] fused or opposed the purpose. And the legislature was dealing with important rights, some to be confined to twenty-five years, others to be extended to ninety-nine years, and we are asked to believe that it bunched those rights indiscriminately and trusted to a searching construction to sort them afterwards and take them out of the meaning of words which included them all.

There is another consideration of potent weight. The construction of the court was not the contemporary construction of the act of 1865. It was not the construction proclaimed by the governor, justifying his veto of the act. He pointed out that the necessary effect of extending the lives of the corporations was to extend their rights in the streets of the city, and that he had received petitions signed by a large number of the citizens of Chicago, protesting against the measure as one which had been passed without their assent, or that of the corporate authorities, and that it extended the franchise for ninety-nine years in advance of the term already vested in the corporation. And he also pointed out that the right given to the city to purchase the railway property at the end of twenty-five years, secured to it by the ordinance of August 16, 1858, was also extended to ninety-nine years. And, upon a fair construction, the governor said, "the act seems hardly susceptible of any other meaning," and he had heard, he further said, "none other claimed for it." The governor also considered the clause which continued in force the acts or deeds of transfer, and, so far as his words indicate, he perceived no difference betwen the instruments of transfer.

Seldom has a statute enacted at a distant time received so clear and influential proclamation of its meaning and effect as is afforded of the act of 1865, by the governor's

message. It seems now, forty years removed from the enactment of the law, that the governor, who was close to its enactment, and the citizens of Chicago, who protested against it, were mistaken in its meaning. And the governor was part of the lawmaking power. It was his duty, therefore, to
[506] study the statute, and *to try to know its purpose, not only from its text but from external circumstances. His misunderstanding needs to be accounted for. The misunderstanding of the protesting citizens of Chicago needs to be accounted for. Explanation cannot be found by asserting ambiguities in the act. There is not a syllable of evidence to indicate that any were perceived or regarded of consequence. The governor was confident in his views. Of one of the effects of the act, and one which could not result unless his construction was correct, he said he had heard no other claimed for it than that which he entertained and expressed. There was no doubt with him, therefore,—no disguise of the measure by its advocates. We are, however, now asked to believe that the legislature alone either saw or was persuaded of the real merits of the measure, and passed it over a groundless veto and ignorant opposition, with consciousness that it would be construed to have the meaning now given it.

I am unable to so believe and am constrained to dissent from the judgment.

WEST CHICAGO STREET RAILROAD COMPANY, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF ILLINOIS *ex rel.* CITY OF CHICAGO.

(See S. C. Reporter's ed. 506–529.)

1. Error to state court—Federal question—decision on non-Federal ground.—A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.

2. Constitutional law—impairment of contract obligations—compelling the lowering of a street railway tunnel under navigable river.—Contract obligations are not impaired by compelling a street railway company, at its own expense, to lower, or, at its option, remove, a tunnel constructed by it under the Chicago river, which, though not an obstruction to navigation when constructed, has since become such by reason of the increased size of the vessels plying on that river, where the municipal ordinance under which such tunnel was constructed contains no stipulation that the city will not exert any power it possesses to deepen the channel and improve navigation, and it was adopted while a state statute was in force which, as construed by the state courts, made it a condition of the construction of such a tunnel that navigation should not be unnecessarily interrupted.

3. Waters—paramount right of navigation.—The rights of a street railway company in a tunnel under a navigable river, arising from its ownership of the fee of the land on either side of the river or in its bed, are subject to the paramount right of navigation over the waters of such river.

4. Constitutional law—due process of law—taking private property for public use.—Requiring a street railway company to stand the expense of lowering, or, at its option, removing, a tunnel constructed by it under the Chicago river, which, though not an obstruction to navigation when constructed, has since become such by reason of the increased size of the vessels plying upon that river, does not deny it the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use, where the ordinance under which the tunnel was constructed was adopted while a statute was in force which, as construed by the state courts, made it a condition of the construction of such tunnel that navigation should not be unnecessarily interrupted.

NOTE.—*On the general subject of writs of error from the United States Supreme Court to state courts*—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

As to public rights on navigable waters—see notes to Eisenbach v. Hatfield, 12 L.R.A. 632; Mills v. United States, 12 L.R.A. 673; and Swanson v. Mississippi & R. River Boom Co. 7 L.R.A. 673.

On the right to improve the navigability of a stream—see note to Beidler v. Sanitary District, 67 L.R.A. 820.

On the right to obstruct or destroy rights of navigation—see note to Hutton v. Webb, 59 L. R. A. 33.

5. Municipal corporations—power over navigable waters—approval of Secretary of War.—The city of Chicago was empowered, without the approval of the Secretary of War, to require the lowering of a street railway tunnel under the Chicago river to give a clear depth of 21 feet of water above it, or, in the alternative, to compel its removal, by the declaration in the river and harbor act of March 3, 1899 (30 Stat. at L. 1156, chap. 425), that all the work of removing and reconstructing bridges and piers and lowering tunnels, necessary to permit a practicable channel with the prescribed "project" depth of 21 feet in the Chicago river should be done by the city without expense to the United States.

[No. 241.]

Argued January 10, 11, 1906. Decided April 9, 1906.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which, affirming the reversal in the Appellate Court for the First District of a judgment of the Circuit Court of Cook County, in that state, awarded a peremptory mandamus directing a street railway company at its own expense to lower, or, at its option, remove, its tunnel under the Chicago river. *Affirmed.*

See same case below, 214 Ill. 9, 73 N. E. 393.

The facts are stated in the opinion.

Mr. **John P. Wilson** argued the cause, and, with *Mr. Charles S. Babcock*, filed a brief for plaintiff in error:

Until the United States assumed jurisdiction over the Chicago river by the act of Congress of September 13, 1900, the state of Illinois had plenary authority over the Chicago river.

Willson v. *Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound* v. *Turck*, 95 U. S. 459, 24 L. ed. 525; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Corrigan Transp. Co.* v. *Sanitary District*, 125 Fed. 611; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Miller* v. *New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Prosser* v. *Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811.

The tunnel was as lawful as though it had been directly constructed by the city itself under its charter powers.

McCartney v. *Chicago & E. R. Co.* 112 Ill. 611.

The carrying of passengers through the tunnel is commerce of the same grade as the carrying of passengers or freight on the river.

Northern Transp. Co. v. *Chicago, supra.*

The tunnel, being the lawful property of the railroad company, could not be taken from the company for the purpose of improving the navigation of the Chicago river without compensation being made to the company.

Yates v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470, 26 L. ed. 1143; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *United States* v. *Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Chicago* v. *Laflin*, 49 Ill. 172; *Chicago* v. *Van Ingen*, 152 Ill. 624, 43 Am. St. Rep. 285, 38 N. E. 894.

The enforcement of the judgment of the state court would constitute a taking of the railroad company's property.

Newport & C. Bridge Co. v. *United States*, 105 U. S. 470, 506, 26 L. ed. 1143, 1155.

The enforcement of the ordinance requiring the railroad company to lower its tunnel at its own cost would deprive the company of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581.

The Secretary of War was not alleged or shown to have approved or consented to the doing of the work required by the ordinanee, and therefore the company was neither under obligation nor had the right to do the work required by the ordinance and the mandate of the court.

On the rights of littoral owners on navigable stream—see notes to Fulmer v. Williams, 1 L.R.A. 604; Case v. Loftus, 5 L.R.A. 684; Miller v. Mendenhall, 8 L.R.A. 89; and Eisenbach v. Hatfield, *supra.*

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S 156; Sweet v. Rechel, 40 L. ed. U. S. 188; Baekus v. Fort Street Union Depot Co. 42 L. ed. U. S. 853; and High Bridge Lumber Co. v. United States, 16 C. C. A. 468.

River and harbor act, 1899, § 10; River and harbor act, 1890; *Cummings* v. *Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Chicago* v. *Law*, 144 Ill. 569, 33 N. E. 855; *Lussem* v. *Sanitary District*, 192 Ill. 404, 61 N. E. 544.

The horse and dummy act does not control or affect the rights of the railroad company in its tunnel.

McCartney v. *Chicago & E. R. Co. supra.*

Mr. John P. Wilson also filed a separate reply brief for plaintiff in error:

The writ of error should not be dismissed for want of jurisdiction.

Vicksburg, S. & P. R. Co. v. *Dennis*, 116 U. S. 667, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; *Bryan* v. *Board of Education*, 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; *Capital City Light & Fuel Co.* v. *Tallahassee*, 186 U. S. 406, 46 L. ed. 1223, 22 Sup. Ct. Rep. 866; *Wilson* v. *Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Northwestern University* v. *Illinois*, 99 U. S. 321, 25 L. ed. 389; *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; *St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 148, 45 L. ed. 791, 21 Sup. Ct. Rep. 575.

The ordinance requiring the company, at its own cost and expense, to reconstruct this tunnel, in the absence of any legal obligation or contract so to do, not only impaired the obligation of the contract under which it was constructed, but also deprived the railway company of its property without due process of law.

Delaware, L. & W. R. Co. v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

Messrs. **James Hamilton Lewis** and **Granville W. Browning** argued the cause and filed a brief for defendant in error:

There is no Federal question involved. The writ of error should be dismissed.

Bacon v. *Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Rutland R. Co.* v. *Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; *Leonard* v. *Vicksburg, S. & P. R. Co.* 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Allen* v. *Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; *Bier* v. *McGehee*, 148 U. S. 137, 37 L. ed. 397, 13 Sup. Ct. Rep. 580; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Beaupre* v. *Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *St. Louis, C. G. & Ft. S. R. Co.* v. *Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; *White* v. *Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604; *Yesler* v. *Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

The finding that this tunnel is an obstruction to navigation will not be reviewed.

Telluride Power Transmission Co. v. *Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

The tunnel is now an unlawful structure.

Atlee v. *Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *Chicago, B. & Q. R. Co.* v. *People*, 212 Ill. 103, 72 N. E. 219; *United States* v. *Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343.

The title of the street railway company is subject to the paramount right of navigation.

Chicago, B. & Q. R. Co. v. *People, supra; Chicago* v. *Laflin*, 49 Ill. 172; *Stockton* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9; *Braxon* v. *Bressler*, 64 Ill. 488; *Hawkins Point Light-House Case*, 39 Fed. 87; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 458, 36 L. ed. 1044, 13 Sup. Ct. Rep. 110; *Scranton* v. *Wheeler*, 179 U. S. 163, 45 L. ed. 137, 21 Sup. Ct. Rep. 48, 6 C. C. A. 535, 16 U. S. App. 152, 57 Fed. 809; *Parmeter* v. *Gibbs*, 10 Price, 412; *Sage* v. *New York*, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Colchester* v. *Brooke*, 15 L. J. Q. B. N. S. 59; *Atty. Gen.* v. *Parmeter*, 10 Price, 378; *Atty. Gen.* v. *Richards*, 2 Anstr. 603; 1 Wood, Nuisances, p. 119; *Weber* v. *State Harbor*, 18 Wall. 57, 21 L. ed. 798; *Gibson* v. *United States*, 166 U. S. 269, 276, 41 L. ed. 996, 1002, 17 Sup. Ct. Rep. 578.

The city has power to order this obstruction removed.

Escanaba & L. M. Transp. Co. v. *Chicago*, 107 U. S. 679, 27 L. ed. 443, 2 Sup. Ct. Rep. 185; *Harmon* v. *Chicago*, 140 Ill. 397, 29 N. E. 732; *Chicago* v. *McGinn*, 51 Ill. 266, 2 Am. Rep. 295; *West Chicago Street R. Co.* v. *People*, 214 Ill. 9, 73 N. E. 393, 203 Ill. 551, 68 N. E. 78; *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Cummings* v. *Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472.

The street railway company is not entitled to compensation.

West Chicago Street R. Co. v. *People* and *Chicago, B. & Q. R. Co.* v. *People, supra; Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Gibson* v. *United States* and *United States* v. *Bellingham Bay Boom Co. supra; Scranton* v. *Wheeler*, 179 U. S. 159, 45 L. ed. 135, 21 Sup. Ct. Rep. 48, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 803; *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470, 26 L. ed. 1143; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *United States* v. *Moline*, 82 Fed. 592; *Hawkins Point Light-House Case*, 39 Fed. 77; *Stockton* v. *Baltimore & N. Y. R. Co. supra; State* v. *Sargent & Co.* 45 Conn. 358; *New Orleans Gaslight Co.* v. *Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471.

Mr. Justice **Harlan** delivered the opinion of the court:

This case presents some questions of jurisdiction and constitutionality arising out of the relative rights and duties of the city of Chicago and the West Chicago Street
[514] Railroad Company *in respect of a tunnel maintained by that company under the south branch of Chicago river at or near Van Buren street, in that city.

The judgment in the circuit court of Cook county, Illinois, was in favor of the railroad company, but it was reversed in the appellate court, first district, the former court being directed to give to the city the relief asked. Upon appeal to the supreme court of Illinois a judgment was rendered in favor of the city.

The contention of the company is that the judgment under review cannot be sustained consistently either with the contract clause of the Constitution of the United States or with the due process of law enjoined by the 14th Amendment.

The case presented by the record is substantially as will be now stated.

On or about April 2d, 1888, the city council of Chicago adopted in due form the following ordinance:

"Whereas, the board of directors of the West Chicago Street Railroad Company, on the second day of April, 1888, by and at the request of the mayor of the city of Chicago, adopted the following resolution: Resolved, That the West Chicago Street Railroad Company, in consideration of the passage and approval by the mayor of the three ordinances passed by the city council of Chicago on the 30th day of March, 1888,—one granting to the West Division Railway Company the right to change its motive power from horse to cable or electric power; one granting to the Chicago Passenger Railway Company the right to make the same change; and one granting to the West Chicago Street Railroad Company the right to construct its tracks on Jefferson street, between Madison and Washington streets, and to use horse, cable, or electric power thereon,—hereby agrees, by and with the city of Chicago, at its own expense to construct a tunnel under the Chicago river, and acquire the necessary right of way therefor on a route to be located by said company between Madison and Twelfth streets, with the east terminus at Fifth avenue or west thereof, and *the [515] western terminus at Halsted street or east thereof; provided, however, that this company shall have the right from said city to construct said tunnel under any intervening street or streets and said river within said limits, but such location and construction shall be such as not to interfere with the capacity, usefulness, or grade of said streets; said tunnel to be used by this company for street railroad tracks, and the construction thereof shall be commenced within three years, and be completed within four years, after the said city council shall grant permission to said railroad company to make said improvements, unless prevented by injunctions or strikes, and the time said construction is so interfered with shall be added to said four years, all work to be done in a manner satisfactory to the commissioner of public works, and the tracks through the tunnel shall be connected with the street railroad tracks controlled by this company. Now, therefore, be it ordained by the city council: That the agreement in said resolution contained be and the same is hereby accepted by and on behalf of the city of Chicago as a consideration from said company for the passage and approval by the mayor of the ordinances in said resolution specified, and authority is hereby granted said company to make the improvements therein mentioned."

When this ordinance was passed there was in force what is known as the horse and dummy act, passed in 1874, which provided: "That any company which has been or shall be incorporated under the general laws of this state, for the purpose of constructing, maintaining, or operating any horse or dummy railroad or tramway, may enter upon and appropriate any property necessary for the construction, maintenance, and operation of its road, and all necessary siding, side tracks, and appurtenances, and may, subject to the provisions contained in this act, locate and construct its road upon or over any street, alley, road, or highway, or across

or over any waters in this state, *in such manner as not to* unnecessarily obstruct the public use of such street, alley, road, or highway, or *interrupt the navigation of such waters.*"

[516] *In 214 Ill. 9, 19, 73 N. E. 393, 396, the supreme court of Illinois, referring to this act, said: "This act was *an addition* to the charter of any company organized under the general incorporation act, and its provisions have existed under some form ever since, conferring powers upon street railroad companies organized as the defendant is. It gave the defendant the right to construct its railroad either over or across the Chicago river, which included the tunnel, *subject to the condition contained in it.* Defendant could only hold real estate for the transaction of its business of maintaining and operating a street railroad, and the statute fixed the conditions under which it might use its real estate for building the tunnel."

The tunnel was completed by the railroad company in March, 1894, and has ever since been used and is now being used as a passageway under the river for its cars. When constructed (as well as at the present time) the water in the south branch of the Chicago river over the tunnel, near Van Buren street, varied in depth from 17 to 18 3-10 feet.

On the 3d day of March, 1899, Congress passed a river and harbor act, among the provisions of which was one directing the Secretary of War to cause surveys to be made and the cost of improving certain rivers and harbors to be estimated and reported to Congress, as follows: "Improving Chicago river in Illinois: Survey and estimate of cost for a channel twenty-one feet deep from its mouth to the stock yards, on the south branch, and to Belmont avenue, on the north branch, so far as may be permitted by existing docks and wharves, exclusive of cost of removing or constructing bridges or piers or lowering tunnels; and the aforesaid depth of twenty-one feet is hereby adopted as the project depth for the improvement in lieu of that fixed by the act of June third, eighteen hundred and ninety-six [29 Stat. at L. 202, chap. 314]; *Provided*, That all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a practicable channel with said

[517] depth to *be obtained shall be done, or caused to be done, by the city of Chicago, without expense to the United States." 30 Stat. at L. 1156, chap. 425.

After the passage of that act steps were taken to dredge the Chicago river so as to deepen its channel in accordance with the provisions of the act of Congress, and, it is alleged, such work "has been proceeding under the authority and supervision of the government of the United States, for the purpose of providing a sufficiently deep channel for the uses and purposes of commerce and navigation as aforesaid."

For the purpose of obeying the act of Congress, and in order to obtain a free and unobstructed navigation of the Chicago river for the benefit of commerce, interstate and domestic, the city council of Chicago, on the 19th day of March, 1900, duly passed the following ordinance: "*Whereas*, by act of Congress of March, 3d, 1899, it is provided that in the survey and estimate of cost for a channel 21 feet deep, in the improvement of the Chicago river from its mouth to the stock yards on the south branch, and to Belmont avenue on the north branch, the aforesaid depth of 21 feet is adopted as the project depth for such improvement; *whereas*, it is in said act further provided that all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a practicable channel with said depth to be obtained shall be done or caused to be done by the city of Chicago, without expense to the United States; *whereas*, the tunnel under the south branch of the Chicago river at Van Buren street was constructed by the West Chicago Street Railroad Company under a certain ordinance of the city of Chicago, passed April 2d, 1888; *whereas*, a channel in the Chicago river of the depth of at least 21 feet, is now made necessary by the requirements of navigation and by the increase in the draft of vessels engaged in the shipping trade of the Lakes; *whereas*, the said tunnel is an obstruction to said proposed improvement to the Chicago river and to the navigation thereof, and, as such obstruction, must be lowered so that there may be above it in *said river a depth of at least 21 feet [518] of water, or be removed altogether: *Now, therefore, be it ordained by the city council of the city of Chicago:* That the West Chicago Street Railroad Company be and it is hereby ordered and directed within three months after the date of the passage of this ordinance, at the sole cost and expense of said West Chicago Street Railroad Company, and without cost, damage, loss, or expense of any kind whatsoever to the city of Chicago, to proceed to lower the tunnel under the south branch of the Chicago river at or near Van Buren street, being the same tunnel heretofore constructed by the said West Chicago Street Railroad Company under an agreement dated April 2, 1888, between the said West Chicago Street Railroad Company and the city of Chicago, and an ordinance passed

by the city council of the city of Chicago, April 2, 1888, authorizing the construction of said tunnel in accordance with the provisions of said agreement, so as to provide for a clear depth above said tunnel of at least 21 feet of water at all times. Said work shall be performed by the said West Chicago Street Railroad Company under the supervision and direction, and subject to the approval, of the commissioner of public works of the city of Chicago, and shall be completed on or before March 1, 1901."

In execution of the provisions of that ordinance the city caused notice to be given to the railroad company, demanding compliance with its provisions. The company did not heed that notice.

The present action was thereupon instituted by the people of Illinois, on the relation of the city of Chicago, against the railroad company. The specific relief asked was the issuing of a writ of mandamus directing the railroad company, without cost, damage, loss, or expense of any kind whatsoever to the city, to proceed to lower its tunnel under the south branch of the Chicago river at or near Van Buren street, so as to provide for a clear depth above it of at least 21 feet of water at all times, for its entire width and length, *or* to wholly remove it, "so that the same shall cease to [519]be an obstruction to the free *navigation of said Chicago river or the south branch thereof, and to perform said work under the supervision and direction of the commissioner of public works of the city of Chicago."

The circuit court found the issues for the defendant, and denied the application for a mandamus. Upon error to the appellate court, first district, the judgment of the circuit court was reversed and the cause remanded with directions "to issue a writ of mandamus commanding the railroad company to remove its tunnel, said writ not to be executed until the Washington street and La Salle street tunnels are both removed or lowered to a sufficient depth to be no longer an obstruction to navigation."

Upon appeal to the supreme court of Illinois a final judgment was there entered awarding a peremptory writ of mandamus as prayed for in the petition. 214 Ill. 9, 73 N. E. 393.

As explanatory of the reference to the tunnels on Washington and La Salle streets it may be here stated that those tunnels belonged to the city, and were located between the tunnel at Van Buren street, owned by the railroad company, and the mouth of the river at the lake. Of course, until the city's tunnels are lowered or removed, the lowering or removal of the tunnel on Van Buren street would not be of material aid to navigation.

We come now to consider the questions arising on the record and discussed at the bar.

1. The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United States,—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting *the [520]state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, B. & Q. R. Co.* v. *People* (recently decided) 200 U. S. 561, *ante*, 596, 26 Sup. Ct. Rep. 341.

2. Great stress is placed by the railroad company on the fact that it is the owner in fee of the bed of the river at the point where the tunnel was constructed. But that fact is not vital in the present discussion; for it was adjudged by the state court—in harmony with settled doctrines, as will presently appear—that "the title to land under a navigable river is not the same as the title to the shore land;" that "in a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed;" that "the title to the upland is absolute and paramount, while the title to the lands over which the navigable water flows is subordinate to the public right of navigation;" and that "the city could not, if it would, grant the right to obstruct the navigation of the river, or bind itself to permit anything which has become an obstruction to be continued." 214 Ill. 9, 20, 21, 73 N. E. 393, 397.

3. We next consider the first of the strictly Federal questions raised by the company. Its contention is that the tunnel was constructed under a valid contract with the city, evidenced by the ordinance of 1888, and that the mere order to remove or lower the tunnel impaired the obligation of that contract, in violation of the Constitution.

Upon a careful scrutiny of the ordinance [521] of 1888, we find no *clause or provision which so restricted the power of the city that it could not require the railroad company to lower or remove the tunnel when the public interests, as involved in the unobstructed navigation of Chicago river, demanded that to be done. The railroad company, in consideration of certain rights and privileges granted to it by the city, undertook to construct the tunnel; and it is true that when constructed the tunnel did not interfere with navigation; nor would it now obstruct navigation, if only boats and vessels of the size and capacity in use when the tunnel was constructed were engaged in commerce on the river. But such boats and vessels are insufficient to meet the present needs of commerce at Chicago. The business of that city has enormously increased since the passage of the ordinance of 1888, and, admittedly, the tunnel is now an obstruction to free navigation on the river by boats and vessels of large size. The railroad company may have believed, when the ordinance of 1888 was passed, that the tunnel would never interrupt or obstruct navigation. Nevertheless, the ordinance did not expressly or by necessary implication bind the city to forbear the exercise of any power it had to deepen the channel of the river and thereby improve navigation. As the city could not legally adopt an ordinance inconsistent with a statute of the state, we must read into the ordinance of 1888 that part of the act of 1874 which, as construed by the supreme court of Illinois, made it a condition of the right of a street railroad company to cross its cars through a tunnel under Chicago river that its road and tunnel should be so located and constructed as not unnecessarily to interrupt navigation. Apart from any question as to the power of the city to bargain away or surrender its authority to improve navigation and protect it against obstruction, the railroad company must be held to have accepted the ordinance and constructed the tunnel subject to the requirement that navigation should not be interrupted by it. As the present tunnel is an obstruction to the use of the river by many boats and vessels employed in commerce on the Lakes, and as, by the ordi- [522] nance *in question, the city did not stipulate —even if it could lawfully have stipulated —that it would not exert whatever powers it had in order to protect the free navigation of Chicago river whenever it became necessary or proper to do so, the result must be that the execution of the order to lower or remove the tunnel would not impair the obligation of any contract protected by the Constitution of the United States. If, in the ordinance of 1888, the city had stipulated that it would meet the expense of any alteration of the tunnel made by its direction, a different question would have been presented. But the ordinance cannot be construed as containing such a stipulation, and consistently with the settled doctrines of this court no such stipulation can arise from mere implication. There is, in our judgment, no ground whatever for holding that the city, by the ordinance of 1888, came under the obligation of a *contract* to meet the cost of any changes in the tunnel that might be lawfully required in order that the river could be safely navigated by large vessels.

4. This brings us to the principal question in the case: Whether, consistently with the Constitution of the United States, the railroad company can be required to lower or remove the tunnel in question and (if it continues to use a tunnel in crossing Chicago river with its cars) to construct and maintain, at its own expense, such a tunnel as will conform to the provisions of the ordinance of March 19th, 1900.

It is indisputable, on this record, that the depth of water over the present tunnel is not sufficient to accommodate many boats and vessels now commonly employed in commerce between Chicago and other cities and towns on the Lakes. It is to be taken also as indisputable that, in order that such boats and vessels may navigate the south branch of Chicago river with safety the depth of water over the Van Buren street tunnel must be at least as great as that specified in the city ordinance of 1900. We assume also—as by the record we may properly do—that the ordinance is a reasonable, not an arbitrary, exertion of the power conferred on the city "to construct and keep *in repair bridges, viaducts, [523] and tunnels, and to regulate the use thereof," and "to deepen, widen, dock, cover, wall, alter, and change the channel of the water courses." We must, in addition, upon this record, assume that the means adopted by the city have a direct, real, and substantial connection with the public object intended to be accomplished, namely, to free the navigation of the south branch of Chicago river from an obstruction which prevents the use of that river by

vessels of the size demanded by the vast business transacted at Chicago.

As already observed, the contention of the company is, in effect, that even if the present tunnel be an obstruction to the navigation of the river by large vessels, the lowering or removal of the tunnel, against the company's will, would be a *taking* of private property for public use without compensation, in violation of the constitutional guaranty of due process of law.

This result, it is supposed by the railroad company, necessarily follows from the fact that the present tunnel was constructed with the assent of the city, and when constructed was sufficient for purposes of navigation by vessels, of whatever size, then engaged in commerce on the Chicago river. But these facts are not all that must be considered in this discussion. They cannot be considered apart from other matters of a vital character, namely: That the city was under the duty of protecting the free navigation of the river and its branches,—a duty from the discharge of which it could not be exempted by any agreement it might make with the railroad company; that the city granted the right to construct the present tunnel under the river subject to the condition, necessarily implied by the statute of 1874, in force when the ordinance of 1888 was adopted, that the tunnel should not interrupt navigation; that if the assent of the company to such a condition was important, it must be held to have given such assent by accepting the ordinance of 1888, into which, as already indicated, must be read the requirement in the statute of 1874 that navigation should not be unnecessarily interrupted; and that the
[524] provision in *that statute forbidding any interruption of the navigation of the river had reference to the needs of navigation not only at the time the tunnel was constructed, but its needs at any subsequent period, as found and declared by the city, upon reasonable grounds; which declaration would, of course, be subject to the condition, vital in our system of government, that the courts may look through and behind mere forms, and interfere, whenever necessary, for the protection of private rights against an illegal, arbitrary exercise of governmental power.

In addition to these considerations we may suggest the important one that the rights of the company, as the owner of the fee of land on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river. *Weber* v. *State Harbor*, 18 Wall. 57, 66, 21 L. ed. 798, 802; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 458, 36 L. ed. 1018, 1044, 13 Sup. Ct. Rep. 110; *Shively* v. *Bowlby*, 152 U. S. 30, 38 L. ed. 342, 14 Sup. Ct. Rep. 548; *Gibson* v. *United States*, 166 U. S. 269–276, 41 L. ed. 996–1002, 17 Sup. Ct. Rep. 578; *Scranton* v. *Wheeler*, 179 U. S. 163, 45 L. ed. 137, 21 Sup. Ct. Rep. 48; *Chicago, B. & Q. R. Co.* v. *People*, 212 Ill. 103, 72 N. E. 219; *Braxon* v. *Bressler*, 64 Ill. 488; *People* v. *Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351; *Sage* v. *New York*, 154 N. Y. 61, 38 L. R. A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *State* v. *Parrott*, 71 N. C. 311, 17 Am. Rep. 5; *State* v. *Dibble*, 49 N. C. (4 Jones, L.) 107; *Diedrich* v. *Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Parmeter* v. *Gibbs*, 10 Price, 412; *Williams* v. *Wilcox*, 8 Ad. & El. 314; *Colchester* v. *Brooke*, 7 Q. B. 339. The principle is thus declared by a leading text writer: "The privilege of navigation upon all waters which are capable of such use in their natural condition, and are accessible without trespassing upon private lands, is a common and paramount right. . . . At common law the right of navigating a public stream is paramount to the right of passage across the stream by means of a bridge." Gould, Waters, §§ 86, 88.

If, then, the right of the railroad company to have and maintain a tunnel under the Chicago river is subject to the paramount public right of navigation; if its right to maintain a tunnel in the river is a qualified one, because subject to the specific condition in the act of 1874 that no tunnel should interrupt navigation; if the present tunnel is an obstruction to *navi-[525] gation, as, upon this record, we must take it to be; and if the city, as representing the state and public, may rightfully insist that such obstruction shall not longer remain in the way of free navigation,—it necessarily follows that the railway company is under a duty to comply with the demand made upon it to remove, at its own expense, the obstruction which itself has created and maintained. If the obstruction cannot be removed except by lowering the tunnel to the required depth and (if a tunnel is to be maintained) providing one that will not interrupt navigation, then the cost attendant upon such work must be met by the company. The city asks nothing more than that the railroad company shall do what is necessary to free navigation from an obstruction for which it is responsible, and (if it intends not to abandon its right to maintain a tunnel at or near Van Buren street) that it shall itself provide a new tunnel with the necessary depth of water above it. The case differs somewhat from *Chicago, B. & Q. R. Co.* v. *People* (just decided) 200 U. S. 561,

ante, 596, 26 Sup. Ct. Rep. 341. In that case we held it to be the duty of the railway company, at its own cost, to remove the bridge, culvert, timbers, and stones which it placed in Rob Roy creek, and which prevented the execution of the plan devised by the drainage commissioners. But the commissioners demanded that more be done; for their plan contemplated that earth outside of the railroad bridge and culvert be removed, in order that the channel be enlarged, widened, and deepened. But in that improvement the railway company had no interest. It was not responsible for the inadequacy of the original channel of Rob Roy creek for the system of drainage adopted by the commissioners. Its only duty, and the only burden imposed upon it, was to remove, at its own cost, the obstructions placed by it in the creek, and which stood in the way of the proposed system of drainage. In the case before us the public demands nothing to be done by the railroad company except to remove the obstruction which itself placed and maintains in the river under the condition that navigation should not at any time be
[526] thereby interrupted. *The removal of such obstruction is all that is needed to protect navigation. So that whatever cost attends the removal of the obstruction must be borne by the railroad company. The condition under which the company placed its tunnel in the river being met by the company, the public has no further demands upon it. This cannot be deemed a taking of private property for public use or a denial of the equal protection of laws, within the meaning of the Constitution, but is only the result of the lawful exercise of a governmental power for the common good. This appears from the authorities cited in *Chicago, B. & Q. R. Co.* v. *People, supra.* † The state court has well said that to maintain the navigable character of the stream in a lawful way is not, within the meaning of the law, the taking of private property or any property right of the owner of the soil under the river, such ownership being subject to the right of free and unobstructed navigation. *People ex rel. Chicago* v. *West Chicago Street R. Co.* 203 Ill. 551, 557, 68 N. E. 78. What the city asks, and all that it asks, is that the railroad company be required, in the exercise of its rights and in the use of its property, to respect the public needs as declared by competent authority, upon reasonable grounds, to exist. This is not an arbitrary or unreasonable demand. It does not, in any legal sense, take or appropriate the company's property for the public benefit, but only insists that the company shall not use its property so as to interrupt navigation.

Further discussion of the general question will be found in **Chicago, B. & Q. R. Co.* v.
[527] *People, supra.* We need not repeat all said in the opinion in that case on this question.

Another matter requires notice. The railroad company contends that the city had no power to require or authorize any changes in the bed of the river without the approval of the Secretary of War. River and harbor act of 1899, § 10, 30 Stat. at L. 1151, chap. 425, U. S. Comp. Stat. 1901, p. 3541. The same act contains directions for the improvement of Chicago river. Construing all the provisions together, we think it clear that when Congress declared in the river and harbor act of 1899, under the heading of "Improving Chicago River in Illinois" (p. 1156), that "all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a practicable channel" with the prescribed "project" depth of 21 feet in Chicago river should be done by the city, without expense to the United States, it meant to give the assent of the United States to any work done by the city towards accomplishing the end which the government had in view. The state court properly said that "the city has power, under its charter, to deepen the channel, and as a preliminary to doing so, to require this tunnel to be lowered or removed, and the act of Congress permits it to proceed, so far as the lowering of the tunnel is concerned."

As showing that the action taken by the city of Chicago is in accordance with the will of Congress, we may refer to the act of Congress of April 27th, 1904, relating to certain tunnels under Chicago river, including the particular tunnel here in question. That act provides: "That the tunnels under

†Northern Transp. Co. v. Chicago, 99 U. S. 635, 642, 25 L. ed. 336, 338; Mugler v. Kansas, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 561, 38 L. ed. 269, 271, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 252, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581; Gibson v. United States, 166 U. S. 269, 271, 276, 41 L. ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Mills v. United States, 12 L. R. A. 673, 46 Fed. 738; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; Ohio & M. R. Co. v. McClelland, 25 Ill. 140, 144; Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Carthage v. Frederick, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; Sedgw. Stat. & Const. Law, 313, 314.

the Chicago river, in the state of Illinois, at La Salle street, Washington street, and near Van Buren street, in the city of Chicago, in said state of Illinois, are, and each of them is, hereby declared to be, as now constructed, an unreasonable obstruction to the free navigation of said Chicago river, and each of said tunnels is hereby declared to be a public nuisance. And it shall be the duty of the Secretary of War to give notice to the persons or corporations owning or controlling said tunnels, or any of
[528] them, so to *alter the same as to render navigation over said tunnels free, easy, and unobstructed. and in giving such notice he shall specify the changes recommended by the chief of engineers that are needed to be made in order that said tunnels, or any of them, shall not thereafter be an obstruction to navigation, and shall prescribe in each case a reasonable time in which to make said changes. If, at the expiration of such time, such changes have not been made, the Secretary of War shall forthwith notify the United States district attorney for the northern district of Illinois, in which said tunnels are situated, to the end that the criminal proceedings hereinafter prescribed may be taken. If the person or persons, corporation or corporations, owning or controlling any of the said tunnels shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, fail or refuse to remove the same or to make the changes specified in the notice of the Secretary of War, such person or persons, corporation or corporations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars; and each and every month such person or persons, corporation or corporations, shall remain in default in respect to the removal or alteration of such tunnel shall be deemed a new offense and subject the person or persons, corporation or corporations, so offending to the penalty herein prescribed: *Provided*, That in any case arising under the provisions of this act an appeal or writ of error may be taken from the district court or from the circuit court direct to the Supreme Court either by the United States or by the defendants." 33 Stat. at L. 314, chap. 1615. For some reason, not explained in the record, no allusion was made to this act in the opinion of the supreme court of Illinois, nor is it alluded to in the briefs of counsel. That act, it seems to the court, emphasizes and strengthens the views expressed in this opinion, and tends to support the conclusions reached.

Mr. Justice **Holmes** concurs in the judgment, upon the authority of *Chicago, B. & Q. R. Co.* v. *People.*

For the reasons we have stated, and in conformity with the principles announced in *Chicago, B. & Q. R. Co.* v. *People*, *the judg-*[529] *ment of the Supreme Court must be affirmed.*

It is so ordered.

The CHIEF JUSTICE, Mr. Justice **Brewer**, Mr. Justice **White**, and Mr. Justice **McKenna** dissent.

CITY OF CLEVELAND and the Forest City Railway Company, *Appts.*,

v.

CLEVELAND ELECTRIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 529–543.)

1. **Street railway—franchise—extension of term.**—An intention to prolong the life of a street railway franchise from the date originally fixed for its termination to February 10, 1908, which was the date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was, with the consent of the city, consolidated, must be inferred from subsequent ordinances authorizing the consolidated company to extend its lines and change to electricity as a motive power, the rights under all of which were to terminate with the franchise of the "main line," which was recognized as continuing until that date.

2. **Street railway—franchise—municipal extension of term—validity.**—Municipal ordinances extending the life of a street railway franchise from the date originally fixed for its termination to the date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was, with the consent of the city, consolidated, do not violate the provisions of Ohio Rev. Stat. § 2502, that a municipal corporation shall not, during the term of a street railway grant or renewal thereof, release the grantee from any obligation or liability thereby imposed.

3. **Street railway—franchise—municipal extension of term—validity.**—Municipal extensions of the life of a street railway franchise before the original grant has expired are authorized by Ohio Rev. Stat. § 2501, although the language of that section is that the council may renew any such grant at its expiration.

[No. 183.]

NOTE.—*As to rights of street railways in the city streets*—see note to Detroit Citizens' Street R. Co. v. Detroit R. Co. 43 L. ed. U. S. 67.

Argued February 27, 28, 1906. Decided April 9, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio to review a decree enjoining the enforcement of a municipal ordinance granting a street railway franchise in streets included in a franchise previously granted to another street railway company, which is alleged not to have expired. *Affirmed.*

See same case below, 135 Fed. 368.

Statement by Mr. Justice **McKenna:**

[530] *Bill in equity to enjoin the enforcement of an ordinance of the city of Cleveland, passed January 11, 1904, purporting to grant to the Forest City Railway Company the right to maintain and operate a street railroad upon streets alleged to be covered by grants to the appellee, not yet expired, and which, it is contended, constitute contracts, the obligation of which is impaired by the ordinance of January 11, 1904, in violation of the contract clause of the Constitution of the United States.

A preliminary injunction was granted, which, upon final hearing, was made perpetual. 135 Fed. 368. And this appeal was taken. The case was heard upon bill and answer, and an outline of the facts is as follows:

The Cleveland Electric Railway Company is a consolidated company, organized under the laws of Ohio in 1893. None of its constituent companies had at that time any rights in the streets in controversy. In 1903 the company acquired by purchase the lines of railway and the rights, privileges, and franchises of the Cleveland City Railway Company. The latter company was constituted of the Woodland Avenue & West Side Street Railway Company and the Cleveland City Cable Railway Company, each of these companies being itself a consolidated company.

The Woodland Avenue Railway Company, before its consolidation with the West Side Street Railroad Company, was the successor by purchase, in 1885, of the Kinsman Street Railroad Company, its rights, property, and franchises, which, by the terms of the consolidation of the Woodland Avenue and West Side Companies, in 1886, vested in the Woodland Avenue & West Side Railroad Company.

The rights, privileges, and franchises of the Kinsman Street Railroad were derived from the city by an ordinance dated August 25, 1879, which granted to the company and to its successors and assigns the right to maintain and operate a double track street railroad in the city of Cleveland, "commencing on Superior street, at the intersection of Water street, thence through Superior street and around the southwest corner of *Monu- [531] mental square to Ontario street; thence through Ontario street to and through a portion of Broadway and Woodland avenue (formerly Kinsman street); thence through said Woodland avenue to Madison avenue."

It was provided that "the authority, privileges, and franchises . . . granted and renewed to said company, its successors and assigns," should continue for a period of twenty-five years from the 20th day of September, 1879. The expiration of the grant was, therefore, fixed at September 20, 1904. The ordinance was accepted by the Kinsman Company.

On May 14, 1883, the city passed an ordinance entitled "An Ordinance to Permit the Woodland Avenue Railway Company to Extend its Lines of Railway on Woodland Avenue from the Cleveland and Pittsburgh Crossing to Corwin Street." The ordinance was accepted and the line built as an extension of the tracks built by the Kinsman Company.

Prior to the year 1885 the two companies which formed the Woodland Avenue & West Side Street Railroad Company were independent lines, with independent franchises from the city, one operating on the west side of Cuyahoga river, the other upon the east side, and running to the southeasterly portion of the city. There was no interchange of traffic between them, and, at the time of the consolidation, the West Side Company had the right by ordinance from the city to operate its road for twenty-five years from February, 1883,—namely, to February, 1908.

Under the laws of Ohio the city council had the power to fix the terms and conditions upon which railways might be consolidated, and in pursuance of the statute the companies notified the council of their proposed consolidation, and thereupon the council passed an ordinance February 1, 1885, giving the consent of the city to the consolidation upon the following conditions:

"The said consolidated company is to carry passengers through, without change of cars, by running of the cars through from the workhouse on the line of the Woodland Avenue Railway *Company to the point on [532] the West Side Railroad where Gordon avenue crosses Lorain street; and, when practicable in the judgment of the council, to do likewise on the branches of the consolidated lines; and that for a single fare from any point to any point on the lines and branches of the consolidated road no greater charge

than 5 cents shall be collected; and that tickets at the rate of eleven for 50 cents or twenty-two for $1 shall at all times be kept for sale on cars by conductors."

It was provided that the ordinance should take effect after its legal publication and the filing of the written acceptance by the companies of the terms thereof. The written acceptance was filed and the terms of the ordinance complied with.

The line fixed in the ordinance covers the lines of the Kinsman Street Railroad Company and the lines referred to in the ordinance of January 11, 1904, sought to be enjoined.

No date for the expiration of the grant was fixed, but it was provided that the consolidated company should be liable to all the liabilities, conditions, and penalties to which the several companies were liable.

On April 8, 1887, an ordinance was passed authorizing the consolidated company to lay an additional track on Franklin avenue between Pearl street and the westerly line of Franklin circle, and to occupy and operate said extension as therein provided, but on the express condition that no increase of fare should be charged by said railroad company or any part *of its main line* or *said extension*, and so that but one fare, not to exceed 5 cents, should be charged between any points on *said company's main line or extensions*. The ordinance contained the following provision: "And the grant here granted shall terminate with the *present grant of the main line*, to wit, 10th day of February, 1908." And it is alleged that the "main line" referred to includes the line operated on Woodland avenue (formerly Kinsman street) and originally granted to the Kinsman Street Railroad Company by the ordinance of August, 1879.

[533] *On August 12, 1887, an ordinance was passed authorizing the consolidated company to lay and extend a track in Franklin avenue, from Kentucky street to Waverly avenue. In this ordinance there was a prohibition of increase of fare "between any points on said company's *main line or extension*," and that the right granted should "terminate with the present grant of the *main line*, to wit, on the 10th day of February, 1908."

Prior to March, 1889, the lines of the railway of the Woodland Avenue & West Side Street Railway Company were operated by horse power, and there came a demand for more rapid means of transit afforded by electrical equipment, and on March the 22d, 1889, and, it is alleged, to secure such means of transit, the city granted to the consolidated company the right to use electricity in operating its entire line of street railroad, as the same then existed, with any and all extensions that might thereafter be made thereto. It was provided that the grant should be in force from the time of its legal publication and written acceptance by the company. The ordinance recited that "said company shall have the right to maintain and operate its present line and any and all extensions until the expiration of the present grant of said company, to wit, the 10th of February, 1908." The written acceptance was filed, and, it is alleged, through and by compliance with its terms the consolidated company, and the Cleveland Electric Railway Company as its successor, acquired the absolute right by contract to continue to maintain and operate its line of road as it then existed and all extensions thereof up to the 10th day of February, 1908. This is denied. It is alleged that the appellee expended not less than the sum of $700,000 in equipping its road with electricity as a motive power.

On June 20, 1892, the city passed an ordinance authorizing the consolidated company to lay an additional track on Kinsman street, thereby making its line on said street a double-track railway. The point of beginning was designated to be "at the intersection of its *main tracks*." There was a provision for termination on the 10th of February, 1908, as in the *other ordinances. [534] And there was the same provision in an ordinance passed August 1, 1892, authorizing an extension of tracks on Lorain street. Again, in an ordinance of the 22d of August, authorizing the construction and maintenance of a suitable and necessary line of feed wires upon certain streets. An ordinance of October 17, 1892, empowering the company to lay an additional track on Woodland avenue between certain streets, contained the same provision. On July 17, 1893, an ordinance was passed authorizing the Cleveland City Railway Company, which had become the owner of the rights of the Woodland Avenue & West Side Street Railroad Company, to lay an additional track upon South Woodland avenue. This ordinance contained a provision as to the operation of the tracks in connection with the other lines, the kind and number of cars to be used and the manner of running and intervals of time to be run, and the sprinkling of tracks. The grant was to remain in force until the 26th of January, 1910. February 19, 1894, an ordinance was passed granting permission to the Cleveland Electric Railway and the Cleveland City Railway Company to build a cross-town road on Willson avenue. It was provided that the

grant was to continue in force until the 1st day of July, 1914.

Of this ordinance the bill alleges:

"This grant shall be in force until the first day of July, 1914.

"Your orator shows that the grant under which the Cleveland Electric Railway Company was, at the time of the passage of the last-mentioned ordinance, operating, as to several of its lines, expires on the first of July, 1914, and that the obligations imposed upon the Cleveland City Railway Company by virtue of said ordinance, in this paragraph set forth, are continuing obligations, requiring of your orator the performance of all and singular the conditions of said ordinance, including the issuing of transfers from its other lines and accepting transfers from its said Willson avenue line, up to the first day of July, 1914, whereby your orator submits that the council thereby not only granted, but required, of said the Cleveland [535] City Railway Company, *operation of its entire system of railway up to the first day of July, 1914.

"Your orator further shows that Willson avenue and the lines of road therein constructed are intersected by both Kinsman street and Woodland avenue (formerly Kinsman street)."

Mr. **Newton D. Baker** argued the cause and filed a brief for appellants:

A course of procedure imposed by statute for the exercise of powers conferred by the state is of the substance of the powers themselves when those powers relate to the transactions of a municipal corporation in its public, as distinguished from its private or proprietary, character.

1 Dill. Mun. Corp. § 307, note.

Municipal corporations are subordinate agencies of the state, of strictly delegated and strictly construed powers.

1 Dill. Mun. Corp. § 89; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Bloom* v. *Xenia*, 32 Ohio St. 461; *Ravenna* v. *Pennsylvania Co.* 45 Ohio St. 118, 12 N. E. 445; *Minturn* v. *Larue*, 23 How. 435, 436, 16 L. ed. 574, 575; *Thomas* v. *Richmond*, 12 Wall. 353, 20 L. ed. 455; *Ottawa* v. *Carey*, 108 U. S. 121, 27 L. ed. 674, 2 Sup. Ct. Rep. 361; *Charles River Bridge* v. *Warren Bridge*, *supra*; *Detroit* v. *Detroit City R. Co.* 60 Fed. 161; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Grand Rapids Electric Light & P. Co.* v. *Grand Rapids Edison Electric Light & Fuel Gas Co.* 33 Fed. 659; *Freeport Water Co.* v. *Freeport*, 180 U. S. 598, 45 L. ed. 688, 45 Sup. Ct. Rep. 493.

Persons dealing with municipal corporations take with notice of the limitations upon corporate powers, and are bound thereby.

Cleveland v. *State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445; *McCloud* v. *Columbus*, 54 Ohio St. 439, 44 N. E. 95; *Thomas* v. *Richmond*, 12 Wall. 356, 20 L. ed. 457; *Stone* v. *Bank of Commerce*, 174 U. S. 424, 43 L. ed. 1032, 19 Sup. Ct. Rep. 747; Booth, Street Railways, §§ 33, 43; *New Orleans & C. R. Co.* v. *New Orleans*, 34 La. Ann. 429.

An attempt by argument to deduce from the consent of the city to the running of through cars an exercise of the high power of the municipality in the matter of granting rights in derogation of the public interest in its streets is too remote to be tolerated.

Pennsylvania R. Co. v. *Canal Comrs.* 21 Pa. 9; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666, 24 L. ed. 1038.

The misrecital of the date in these ordinances cannot control the fact which is made the primary test of the date of expiration. This is the uniform construction of instruments in which there is a conflict between the precedent matter and that which follows a *videlicet*.

Sullivan v. *State*, 67 Miss. 346, 7 So. 275; *Gleason* v. *M'Vickar*, 7 Cow. 42; *Com.* v. *Quinlan*, 153 Mass. 483, 27 N. E. 8; *Buck* v. *Lewis*, 9 Minn. 314, Gil. 298; *Stukeley* v. *Butler*, Hobart, 175; *Cotton* v. *Ward*, 3 T. B. Mon. 310.

Mr. **D. C. Westenhaver** also argued the cause, and, with *Messrs. Garfield, Howe, & Westenhaver*, filed a brief for appellants:

Franchises are special privileges conferred by the government on individuals, but which do not belong to the citizens of a country generally of common right.

Bank of Augusta v. *Earle*, 13 Pet. 519, 10 L. ed. 274; *State ex rel. Atty. Gen.* v. *Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Lake Shore & M. S. R. Co.* v. *Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *People's Pass. R. Co.* v. *Memphis City R. Co.* 10 Wall. 38, 19 L. ed. 844.

As against the rights of the public, it is well settled that nothing is to be conceded but what is set down in express words or which results from an implication as clear and as cogent as an express declaration. The affirmative must be shown by language free from doubt or uncertainty. An ordinance of a city of a later date, enlarging rights conferred by an earlier ordinance, will not be taken as repealing or enlarging the provisions of the earlier one unless the intention so to do is expressly declared in apt language.

Booth, Street Railways, § 43; *Western Paving & Supply Co.* v. *Citizens' Street R. Co.* 128 Ind. 525, 10 L.R.A. 770, 25 Am. St.

Rep. 462, 26 N. E. 188, 28 N. E. 88; Cooley, Const. Lim. p. 294; *Pennsylvania R. Co.* v. *Canal Comrs.* 21 Pa. 9; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666, 24 L. ed. 1038; *New Orleans & C. R. Co.* v. *New Orleans*, 34 La. Ann. 429; *McCool* v. *Smith*, 1 Black, 459, 17 L. ed. 218; *Henderson's Tobacco* (*United States* v. *356 Caddies of Tobacco*) 11 Wall. 652, 20 L. ed. 235; *New Orleans & C. R. Co.* v. *New Orleans*, 34 La. Ann. 447; *Cleveland Electric R. Co.* v. *Cleveland*, 137 Fed. 124; Sedgw. Stat. & Const. L. p. 98.

Messrs. **Andrew Squire** and **John W. Warrington** argued the cause, and, with *Mr. William B. Sanders*, filed a brief for appellee:

This case is controlled by prior decisions of this court.

Cleveland v. *Cleveland City R. Co.* 194 U. S. 517, 538, 48 L. ed. 1102, 1109, 24 Sup. Ct. Rep. 756.

Mr. Justice **McKenna** delivered the opinion of the court:

The system of railways operated by the appellee comprises about 236 miles of track. The lines in controversy are but 7 miles of this aggregate, and rest for their initial grant on the ordinance of the 25th of August, 1879, to the Kinsman Street Railroad
[538] Company. This *grant expired on the 20th of September, 1904, unless extended by subsequent ordinances. That it was so extended is the contention of the appellee, and that it has the right to operate its railways on the streets in controversy until February, 1908, under the contracts constituted by those ordinances and their acceptance. A special reliance is based on the ordinance authorizing a change to electricity as a motive power, in compliance with which it is alleged that the appellee expended a sum not less than $700,000. The city takes issue with these contentions. It asserts that the original grant to the Kinsman Company was not extended as a matter of fact and could not be extended as a matter of law, the city not having the power to prolong the life of the original grant. The argument advanced is somewhat roundabout. Its ultimate reliance is upon certain sections of the Revised Statutes of Ohio, from which it is deduced that it was incompetent for the council to authorize an extension to expire at a different time from the main grant. To hold otherwise, it is said, would be to hold that the council would have power to grant extensions in perpetuity, while by § 2502 of the Revised Statutes of Ohio there can be no grant or a renewal of a grant for a greater period than twenty-five years.

Ordinarily it would be more orderly to consider the power of the city before considering its exercise or the intention to exercise it. For our purposes, however, it becomes convenient to consider first the intention of the city by the ordinances in question.

The purpose of the ordinances, we think, presents no insolvable doubts. Indeed, we think it is clear that the city intended to secure, and did secure, for its citizens, valuable transportation facilities, and intended to extend that part of the system of railways consisting of the Kinsman street line and its extension until February, 1908. There can be no other reasonable meaning of what the city did or of the language it used. It recognized a main line, not in one ordinance, but many ordinances, and the purpose was to join the initial grant and its *extensions together, and continue it and [539] those combined until 1908. There could have been no mistake in the language used or misunderstanding of it. We might suppose a mistake in one ordinance, but we cannot suppose a mistake in four ordinances. The matters dealt with were important, and it is a reasonable presumption that no provision concerning them escaped attention or was misunderstood. The situation must be kept in mind. The Woodland Avenue Railway Company (successor to the right of the Kinsman Street Company) operated a road on the west side of the Cuyahoga river; the West Side Street Railroad Company operated on the east side. They were independent companies, and the interchange of traffic between them was obviously a public advantage. This was accomplished by the consolidation of the companies and the ordinance fixing the terms and conditions of the consolidation. By that ordinance through cars were provided for and a single fare was established "from any point to any point on the lines and branches of the consolidated road." This imposed duties on the companies and it also secured to them rights. The grants of the constituent companies expired at different times, respectively 1904 and 1908, and it is contended that by the mere union of the lines the duties and rights of the companies continued for the longer term. This, however, we are not required to determine.

In April, 1887, an ordinance was passed to authorize the consolidated company to lay a double track in Franklin avenue. In this ordinance the words upon which the controversy turns as to the extension of the grant to 1908 occur for the first time. The grant was on the express condition that no

increase of fare should be charged by the company "on any part of its *main line* or said extension, so that but one fare, not to exceed 5 cents, shall be charged between points on said company's *main line* or extension . . . and the right herein shall terminate with the present grant of the *main line*, to wit, on the 10th day of February, 1908." This language is substantially repeated in the three other ordinances.

[540] We think there can be *no doubt of its purpose, and if it were any part of our function to pass upon the wisdom of actions we might say it was a wise purpose, certainly had much reason to commend it. Why break up, or risk the breaking up, of a union of lines and the interchange of their traffic in a continuous carriage of passengers at one rate of fare? The extension was not for an unreasonable time. One of the grants did not expire until 1908, and it was reasonable to continue the other till that time. What policy or purpose could be urged against it? The suggestion of counsel for appellants does not commend itself. The suggestion is that possibly it was the purpose of the city to preserve different dates for the expiration of the grants, so that, the company coming to the city with its line in fragments, the city could consider whether concessions in the public interest might not be required as a condition of the renewal of rights. To adopt the suggestion we must suppose a situation more difficult than that presented. Forethought of the public interests must be attributed to the city council when it passed the consolidation and other ordinances. There was an immediate public benefit to be considered, and the time of extension was not so long as to cause a dread of unforeseen conditions or to make necessary a provision for them. Besides, inducement to the company had to be offered and secured. However, a discussion of policies is unnecessary. We find the ordinances plainly written, and we turn to the construction of the power of the city to grant the extension.

The question of the intention of the ordinances being settled, the question of the power of the city council is settled, in so far as this case can be distinguished from *Cleveland* v. *Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756. In the latter case we had occasion to consider the power of the city to pass the ordinances relied on by the appellee in the case at bar, and their effect as contracts between the city and the companies. The suit was brought to enjoin the enforcement of an ordinance passed October 17, 1898, reducing the fare on the Kinsman Street Railroad to 4 cents,

[541] under a right reserved to "increase *or diminish the rate of fare on said road as the city might "deem justifiable and expedient." The Cleveland City Railway Company, successor of the Kinsman Street Company, contended that the power had been given up in subsequent ordinances, and the decision sustained the contention. The sections of the Revised Statutes of Ohio were quoted and by them it was said "there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed." This extract leaves nothing to be said as to the power of the city, and the rest of the opinion leaves little to be said as to the question of the ordinances constituting contracts with the company. All the considerations which could be urged against them as such were discussed and passed on, and the ordinances involved were those relied on by the appellee in the present case, to wit, the ordinance making the grant to the Kinsman Street Company of August, 1879, the ordinance consolidating the West Side Railroad Company and the Woodland Avenue Railroad Company, and the ordinances of April 8, 1887, and August 12, 1887. There was a reference to the provision of the ordinance of April 8 and its repetition in the ordinance of August 12, making the time of the termination of the grants that "of the *main line*, to wit, on the 10th day of February, 1908." The reference was not casual. The provision was regarded as an element in the purpose of the extension of the roads and as a means of securing the public advantages of the union of the lines and one rate of fare over all of them.

Another contention was noticed which was pressed there and it is again pressed here, based on § 2502 of the Revised Statutes of Ohio, that a municipal corporation could not, during the term of the grant or the renewal thereof, release the grantee from any obligation or liability imposed by the grant. *This provision was urged as preventing a [542] surrender by the city of the power reserved in the grant to the Kinsman Street Railway Company, because the reservation was an obligation and liability imposed upon the railroad corporation. Section 2501 was urged as precluding any attempt to treat the consent of the city to extensions, consolidations, or change of motive power as of renewals of the rights renewed by the ordinance of 1879, because it was contended that the positive provisions of that section

permitted such renewals only at the expiration of original grants. Both contentions were rejected. Of § 2502 it was said that the laws of Ohio permitted a modification of a contract between a municipality and the owner of a street railroad, and § 2501 had been held to authorize renewals to be made before the expiration of the original grant. To support the latter conclusion we cited *State ex rel. Hadden* v. *East Cleveland R. Co.* 6 Ohio C. C. 318, affirmed by the supreme court of Ohio. Appellants concede the authority of that case, but say the ordinance it passed upon left no doubt of the intention of the city, whereas in the case at bar, considering the provisions of the statutes and the ordinances, all intendments must be held to be against an intention to renew the original grant. In other words, the contention is that while "no set form of words is necessary," it is yet urged that "such result can only be effected by apt words evincing a plain and unmistakable purpose to make a renewal." It is not a question of power, therefore, to pass the ordinances, but of the intention of the city in passing them, and the latter we have sufficiently considered. It is only necessary to add that we do not find uncertainty in them, and cannot, therefore, yield to the conclusion deduced from its supposed existence. The situation was plain and the city council met it with a definite and reasonable plan. It must not be overlooked that if the city gave rights it secured benefits, and that the rights could not be exercised without large expenditures of money, or be of any value unless assured of stability. Seven hundred thousand dollars, the appellee urges, it ex-
[543] pended on the change to electrical *power, and the allegation is hardly made doubtful by the answer. We cannot believe that the expenditure of that sum was unworthy of consideration by the city, or that the city intended to exact it as an obligation that could be imposed on the company, or regarded it as anything but a benefit to the city, to be recompensed and secured by the ordinance which was passed.

It is urged by the appellee that the roads operated by it constituted a unified system, and by virtue of the ordinance of July 17, 1893, fixing the time of the expiration of the grant thereby made the 26th of January, 1910, and the ordinance of February, 1894, in which the date of the expiration of the grant there provided for was the 1st day of July, 1914, extended the time of all the grants composing the system until 1914. We do not think this question properly arises on the record, and we, therefore, do not pass upon it.

Decree affirmed.

PERRY F. POWERS, as Auditor General of the State of Michigan, *Appt.*,

v.

DETROIT, GRAND HAVEN, & MILWAUKEE RAILWAY COMPANY.

(See S. C. Reporter's ed. 543–562.)

1. **Courts—following decisions of state courts—validity of state legislation.**—The decision of the highest state court that a state statute which is claimed to create a contract is valid will be followed by the Supreme Court of the United States in determining whether any contract obligations have been impaired by subsequent legislation.

2. **Constitutional law—impairment of contract obligations—exemptions from taxation.**—A contract between a state and a railway company, which prevented the subjection of the property of the company to any other than the tax prescribed in Mich. Laws, 1855, p. 305, § 9, was created by the provisions of that section that the company shall pay an annual tax of 1 per cent on the capital stock of said company, paid in, which tax shall be in lieu of all other taxes except for penalties imposed on said company, and shall be estimated upon its last annual report, the statute being a special one, having reference only to the company in question, which formally accepted the taxation provision, and made large expenditures, and completed an unfinished railway [illegible] which was the motive for the enactment.

[No. 394.]

Argued February 26, 1906. Decided April 16, 1906.

APPEAL from the Circuit Court of the United States for the Western District of Michigan to review a decree enjoining the enforcement of a statute of that state taxing railroad property as against a railroad company asserting the existence of a contract exemption from such taxation. *Affirmed.*

See same case below, 138 Fed. 264.

NOTE.—*As to state decisions and laws as rules of decision in Federal courts*—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Eimendorf v. Taylor, 6 L. ed. U. S. 290; Jackson *ex dem.* St. John v. Chew, 6 L. ed. U. S. 583; Butz v. Muscatine (United States *ex rel.* Butz v. Muscatine) 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

On corporate taxation as affected by the contract clause in the Federal Constitution—see notes to Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33; Providence Bank v. Billings, 7 L. ed. U. S. 939; and Tucker v. Ferguson, 22 L. ed. U. S. 805.

Statement by Mr. Justice **Brewer:**

This case, which is a suit brought by the appellee in the circuit court of the United States for the western district of Michigan, while involving the validity of the railroad tax law of the state of Michigan (Acts 1901, chap. 173, p. 236), recently considered by this court (*ante*, page 744) involves the further question of the existence and scope of an alleged contract in respect to taxation. The Detroit & Pontiac Railroad Company was chartered by the legislature of the territory of Michigan, March 7, 1834, the Oakland & Ottawa Railroad Company by the legislature of the state of Michigan, April 3, 1848 (Laws 1848, p. 351). By an act of February 13, 1855 (Laws of 1855, p. 305), the Detroit & Pontiac Railroad was authorized to change its name to the Detroit & Milwaukee Railway Company, to purchase all the rights, property, and franchises of the Oakland & Ottawa Railroad Company for the building and operating a continuous line of road from Detroit to Lake Michigan, and the purchase and sale thus provided for was duly effected. Section 9 of this act provided that—

"the said company shall, on or before the first day of July, pay the state treasurer an annual tax of 1 per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for pen-
[545] alties imposed upon said company *by its act of incorporation, or any other law of this state. The said tax shall be estimated upon the last annual report of said corporation."

Since 1850 the state Constitution has contained these provisions:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed. But the legislature may, by a vote of two thirds of the members elected to each house, create a single bank with branches." Art. 15, § 1.

"The legislature shall pass no law altering or amending any act of incorporation heretofore granted, without the assent of two thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations." Art. 15, § 8.

In 1860 certain mortgages on the road were foreclosed and the company reorganized, and again in 1878 the road with its appurtenances and franchises was sold upon mortgage foreclosure and again reorganized as the Detroit, Grand Haven, & Milwaukee Railway Company. These foreclosures and reorganizations took place under the authority of act No. 96 (Laws of 1859, p. 252).

On the hearing in the circuit court it was held that § 9, above quoted, created a contract between the state and the company which prevented the enforcement against it of the railroad tax law, and a decree was entered accordingly (138 Fed. 264) from which decree the state auditor appealed directly to this court.

Mr. **Timothy E. Tarsney** argued the cause, and, with *Mr. John E. Bird*, filed a brief for appellant:

This court will decide for itself, independently of the state courts, whether there is a contract, or whether its obligation is impaired.

Jefferson Branch Bank v. *Skelly*, 1 Black, 436, 17 L. ed. 173; *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558.

There must be no doubt or ambiguity in the language used upon which the claim to exemption is founded.

Phœnix F. & M. Ins. Co. v. *Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Chicago, B. & K. C. R. Co.* v. *Guffey*, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693.

The capital stock is not the same thing as the property of the corporation.

Farrington v. *Tennessee*, 95 U. S. 687, 24 L. ed. 560; *Van Allen* v. *Assessors* (*Churchill* v. *Utica*) 3 Wall. 573, 18 L. ed. 229; *New York* v. *Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *Burrall* v. *Bushwick R. Co.* 75 N. Y. 211; *Barry* v. *Merchants' Exch. Co.* 1 Sandf. Ch. 280; *State, Canfield, Prosecutor*, v. *Morristown Fire Asso.* 23 N. J. L. 195; *Bailey* v. *Clark*, 21 Wall. 286, 22 L. ed. 652; *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Commercial F. Ins. Co.* v. *Board of Revenue*, 99 Ala. 4, 42 Am. St. Rep. 17, 14 So. 490; *Henderson Bridge Co.* v. *Com.* 99 Ky. 623, 29 L.R.A. 73, 31 S. W. 486; Beach, Priv. Corp. 426; *Central R. & Bkg. Co.* v. *Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80; *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Quincy R. Bridge Co.* v. *Adams County*, 88 Ill. 621; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Shelby County* v. *Union & Plant-*

ers' Bank, supra; State v. *Parker*, 35 N. J. L. 578; *State Mutual Ben. L. Ins. Co., Prosecutors,* v. *Utter*, 34 N. J. L. 489; *State, Trenton Iron Co., Prosecutor,* v. *Yard*, 42 N. J. L. 359.

The property of a corporation fluctuates, and may be greater or less than the original capital invested, according as the business has resulted in a profit or a loss. But the capital stock remains fixed and unaffected by the accidents of business.

Farrington v. *Tennessee*, 95 U. S. 686, 24 L. ed. 560; *Commercial F. Ins. Co.* v. *Board of Revenue, State, Canfield, Prosecutor,* v. *Morristown Fire Asso., Barry* v. *Merchants' Exch. Co.* and *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co. supra.*

The sum total of all the assets of a corporation is sometimes said to constitute a capital, but the term "capital" is here used in its economic sense, as "wealth in use," and not as synonymous with "capital stock," in which sense it is also sometimes used.

Bank of Commerce v. *Tennessee*, 104 U. S. 495, 26 L. ed. 811; *State* v. *Norwich & W. R. Co.* 30 Conn. 290; *Ohio & M. R. Co.* v. *Weber*, 96 Ill. 443; *Pacific Hotel Co.* v. *Lieb*, 83 Ill. 602; *Traders & M. Ins. Co.* v. *Brown*, 142 Mass. 403, 8 N. E. 134; *People ex rel. Singer Mfg. Co.* v. *Wemple*, 78 Hun, 67, 29 N. Y. Supp. 99; *People ex rel. Lackawanna Transp. Co.* v. *Knight*, 75 App. Div. 164, 77 N. Y. Supp. 398; *Howland* v. *Edmonds*, 24 N. Y. 315; *People ex rel. Bank of the Commonwealth* v. *Tax & A. Comrs.* 23 N. Y. 219; *State* v. *Cheraw & C. R. Co.* 16 S. C. 528; *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co. supra; State Bank* v. *Milwaukee*, 18 Wis. 284.

Undivided profits or surplus form no part of the capital stock, though they do form part of the general capital or assets of the corporation.

Farrington v. *Tennessee, supra; Hightower* v. *Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *People ex rel. Singer Mfg. Co.* v. *Wemple*, 78 Hun, 63, 29 N. Y. Supp. 99; *Barry* v. *Merchants' Exch. Co. supra; Williams* v. *Western U. Teleg. Co.* 93 N. Y. 187; *Sun Mut. Ins. Co.* v. *New York*, 8 N. Y. 241; *State* v. *Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993; *State Bank* v. *Milwaukee, supra.*

Money borrowed by the corporation forms no part of its capital stock.

State v. *Cheraw & C. R. Co. supra.*

The franchise of the corporation constitutes no part or element of its capital stock.

People ex rel. Union Trust Co. v. *Coleman*, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818.

A corporation is not limited in its ownership of property to the amount fixed as its capital stock.

State, Canfield, Prosecutor, v. *Morristown Fire Asso.* and *Barry* v. *Merchants' Exch. Co. supra.*

Upon the other hand, the amount of capital stock is limited to the amount actually subscribed for and issued, and is not necessarily the amount named in the articles of association, which latter is merely the authorized capital stock.

Fisk v. *Chicago, R. I. & P. R. Co.* 36 How. Pr. 22; *Pratt* v. *Munson*, 17 Hun, 475; *Green Point Sugar Co.* v. *Whitin*, 69 N. Y. 338; *Com.* v. *Lehigh Ave. R. Co. (Lehigh Ave. R. Co.'s Appeal)* 129 Pa. 414, 5 L.R.A. 367, 18 Atl. 414, 498; *Philadelphia* v. *Ridge Ave. Pass. R. Co.* 102 Pa. 190; *Philadelphia* v. *Philadelphia & G. Ferry Pass. R. Co.* 52 Pa. 177.

Messrs. Roger Irving Wykes, John E. Bird, Charles A. Blair, and *Loyal E. Knappen* also filed a brief for appellant:

The contract of exemption from legislative authority with regard to taxation will not be construed to exist unless it appears affirmatively and clearly and positively that the power was intended to be relinquished.

Erie R. Co. v. *Pennsylvania*, 21 Wall. 489, 492, 22 L. ed. 595; *Tucker* v. *Ferguson*, 22 Wall. 575, 22 L. ed. 816; *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *Newton* v. *Mahoning County*, 100 U. S. 561, 25 L. ed. 712; *Gilman* v. *Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 185, 33 L. ed. 306, 10 Sup. Ct. Rep. 68; *Southwestern R. Co.* v. *Wright*, 116 U. S. 236, 29 L. ed. 628, 6 Sup. Ct. Rep. 375; *Memphis Gaslight Co.* v. *Taxing District*, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *New York ex rel. Sehurz* v. *Cook*, 148 U. S. 409, 37 L. ed. 502, 13 Sup. Ct. Rep. 645; *Chicago, B. & K. C. R. Co.* v. *Guffey*, 120 U. S. 569, 575, 30 L. ed. 732, 734, 7 Sup. Ct. Rep. 693; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 22, 45 L. ed. 407, 21 Sup. Ct. Rep. 240; *Citizens' Bank* v. *Parker*, 192 U. S. 87, 48 L. ed. 356, 24 Sup. Ct. Rep. 181.

In a number of cases where the statute expressly provided that the corporation should have the authority to fix its own rates and charges, it has been held that this was intended to confer upon it the authority to fix its rates and charges, subject to legislative supervision with regard to reasonable rates, and that the legislature might declare the maximum which

would be taken to be reasonable. This rule has gone so far as to apply to cases where the act claimed to constitute the contract, not only gave the corporation authority to fix its own rates, but also fixed maximum rates above which the corporation could not charge.

Stone v. *Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 328, 29 L. ed. 636, 643, 6 Sup. Ct. Rep. 334; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47, 70 Ga. 699; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Ruggles* v. *Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832, 91 Ill. 263; *Minneapolis Eastern R. Co.* v. *Minnesota*, 134 U. S. 481, 482, 33 L. ed. 990, 991, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473; *Atlantic & P. R. Co.* v. *United States*, 76 Fed. 186.

The grant claimed was a mere gratuity, unaccompanied with consideration, which could not amount to a contract.

Wisconsin & M. R. Co. v. *Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *West Wisconsin R. Co.* v. *Trempealeau County*, 93 U. S. 595, 23 L. ed. 814.

The exemption is limited to the shares of stock.

Farrington v. *Tennessee*, 95 U. S. 690, 692, 24 L. ed. 561, 562; *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Tennessee* v. *Whitworth*, 117 U. S. 138, 29 L. ed. 832, 6 Sup. Ct. Rep. 645; *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 154, 40 L. ed. 653, 16 Sup. Ct. Rep. 558; *Bank of Commerce* v. *Tennessee*, 104 U. S. 493, 26 L. ed. 810; *State* v. *Hernando Ins. Co.* 97 Tenn. 92, 36 S. W. 721; *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 149, 161, 40 L. ed. 650, 655, 16 Sup. Ct. Rep. 558; *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 98 U. S. 560, 25 L. ed. 222; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Central R. & Bkg. Co.* v. *Wright*, 164 U. S. 330, 333, 41 L. ed. 455, 456, 17 Sup. Ct. Rep. 80; *New Orleans* v. *Citizens' Bank*, 167 U. S. 372, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Tennessee* v. *Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Citizens' Bank* v. *Parker*, 192 U. S. 76, 48 L. ed. 348, 24 Sup. Ct. Rep. 181; *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 681, 43 L. ed. 857, 19 Sup. Ct. Rep. 537.

Messrs. **H. Geer** and **L. C. Stanley** argued the cause and filed a brief for appellee:

The charter is a contract, protected by the Constitutions both of the United States and of the state.

Greenwood v. *Union Freight R. Co.* 105 U. S. 13, 20, 26 L. ed. 961, 964.

A distinction between an exemption from taxation, contained in a special charter, and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in —

East Saginaw Salt Mfg. Co. v. *East Saginaw*, 13 Wall. 373, 20 L. ed. 611; *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

The test of a covenant is that the consideration should purport to be the motive for the promise, and the promise must purport to be the motive for the consideration.

Wisconsin & M. R. Co. v. *Powers*, *supra*.

This test is met and satisfied in this case at bar.

New Jersey v. *Yard*, 95 U. S. 114, 24 L. ed. 354.

The requirement of acceptance is a strong indication of a contract.

New Jersey v. *Yard*, 95 U. S. 104, 115, 24 L. ed. 352, 354.

The state court has upheld the special act of 1855.

Atty. Gen. v. *Joy*, 55 Mich. 94, 20 N. W. 806.

And the Federal courts choose to be bound by such decision.

Pennsylvania College Cases (*Jefferson College* v. *Washington & J. College*) 13 Wall. 190, 20 L. ed. 550; *Cromwell* v. *Sac County*, 94 U. S. 359, 365, 24 L. ed. 200, 202; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Burgess* v. *Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10.

The statute increasing the rate of tax impairs the obligation of the contract.

Pingree v. *Michigan C. R. Co.* 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635.

The position of this appellee is made stronger by the fact that, so far as it is concerned, the contract or charter is executed.

Pearsall v. *Great Northern R. Co.* 161 U. S. 663, 40 L. ed. 844, 16 Sup. Ct. Rep. 705.

The words "in lieu of all other taxes" are sufficient to express the covenant that no other or higher taxes shall afterwards be imposed.

New Jersey v. *Yard*, *supra*; *Farrington* v. *Tennessee*, 95 U. S. 679, 24 L. ed. 558.

If the contract when made was valid by the laws of the state, as then expounded by

all of the departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts altering the construction of the law. The same principle applies when there is a change of judicial decision as to the constitutional power of the legislature to enact a law.

Gelpcke v. *Dubuque*, 1 Wall. 175, 206, 17 L. ed. 520, 525.

The settled judicial construction of a constitutional provision, as well as of a statute, is regarded as incorporated into and becoming a part of the instrument itself.

Southern P. R. Co. v. *Orton*, 32 Fed. 478.

The exposition of both Constitution and statute belongs to the judicial department of the government of the state, and its decision is final and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution; and this court receives such settled construction as a part of the fundamental law of the state.

Webster v. *Cooper*, 14 How. 504, 14 L. ed. 517.

The term "capital stock paid in," as used in the charter tax limit, extends to and means the corporate property in which that stock is invested.

Memphis & C. R. Co. v. *Gaines*, 97 U. S. 697, 707, 24 L. ed. 1091, 1093; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 354, 49 L. ed. 1082, 25 Sup. Ct. Rep. 669.

The provision relative to taxation continues during the life of the corporation, that being the plain intent of the law.

Home of the Friendless v. *Rouse*, 8 Wall. 437, 19 L. ed. 497.

[555] *Mr. Justice **Brewer** delivered the opinion of the court:

Many questions which might otherwise be perplexing are settled by the decision of the supreme court of Michigan in *Atty. Gen.* v. *Joy*, 55 Mich. 94, 20 N. W. 806. That was an information brought by the attorney general in the supreme court of the state, charging the defendants with claiming and usurping the corporate rights and franchises of the Detroit, Grand Haven, & Milwaukee Railway Company. The act of 1855 was sustained, notwithstanding some alleged defects in its passage, and it was decided that it did not create a new corporation, but simply authorized the old territorial corporation, the Detroit & Pontiac Railroad Company, to change its name and extend its line of road, and, further, that this act in no respect conflicted with §§ 1 and 8, article 15, of the state Constitution. The court also sustained the act of 1859, under which the foreclosures took place, and held that by them no new company was chartered, that there was simply a reorganization and continuance of the old company.

The latter act provides that upon certain conditions new stock shall be issued in lieu of the old stock, the old officers of the company superseded, "and the new stockholders and officers shall, in the law, be deemed and taken to be the stockholders and officers of said corporation, the charter and all laws appertaining thereto continuing to be the charter and laws regulating and governing said corporation, except that it may be known and called, and sue and be sued, and may contract and do all acts which in the law it could have done in its old name, in and by the name set forth in the declaration aforesaid." (P. 253.)

The testimony in this case shows compliance with these conditions. Compliance was also shown in *Cook* v. *Detroit, G. H. & M. R. Co.* 43 Mich. 349, 5 N. W. 390, and in that case the validity of the new organization as a continuance of the old corporation was recognized.

*We thus come to the question of the effect **[556]** of § 9 of the act of 1855. It has been often decided by this court, so often that a citation of authorities is unnecessary, that the legislature of a state may, in the absence of special restrictions in its Constitution, make a valid contract with a corporation in respect to taxation, and that such contract can be enforced against the state at the instance of the corporation. It is said that we are not concluded by a decision of the supreme court of a state in reference to the matter of contract; that while the rule is to accept the construction placed by that court upon its statutes, an exception is made in case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. It is in order to uphold the provision of the Federal Constitution that no state shall pass a law impairing the obligation of a contract that this duty of independent judgment is cast upon this court. But here the supreme court of the state has ruled in favor of the continued existence of a corporation and the applicability of certain statutes, and when, upon the face of such statutes, a valid contract appears, we accept the ruling that the statutes are valid and applicable enactments. In other words, the supreme court of the state having sustained the validity

of a statute from which a contract is claimed, this court follows that decision, and starts with the question, What contract is shown by statute?

The particular section which it is claimed creates the contract (§ 9 of the act of 1855) provides that the company shall pay an "annual tax of 1 per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation, or any other law of this state." It is contended in the first place that this is a mere gratuity, which can be withdrawn at any time,—a statute in respect to taxation subject to change like [557] other revenue statutes; and *Wisconsin & *M. R. Co.* v. *Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107, is cited as authority. But the difference between that case and this is obvious. That arose on a general law in respect to taxation; this, on a provision in a special act having reference to a particular corporation,—an act which called for and received acceptance by the corporation. It was said in the opinion in that case (p. 385, L. ed. p. 230, Sup. Ct. Rep. p. 108):

"A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise is pointed out in *East Saginaw Salt Mfg. Co.* v. *East Saginaw*, 13 Wall. 373, 20 L. ed. 611, 19 Mich. 259, 2 Am. Rep. 82. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Christ Church* v. *Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Tucker* v. *Ferguson*, 22 Wall. 527, 12 L. ed. 805; *Grand Lodge, F. & A. M.* v. *New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523. . . . The presence or absence of consideration is an aid to construction in doubtful cases,—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope, but not amounting to a covenant."

That there was ample consideration for a contract in this case, if consideration be necessary, is shown by the opinion of the supreme court in *Atty. Gen.* v. *Joy*, *supra*, when it says (p. 101, N. W. p. 809):

"The act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the state itself was largely concerned, and expected to accomplish important public purposes by means of it. Twenty years before that time the state had planned for the construction of several parallel lines of railroad across the state from east to west, one of which was to be north of the line of the Michigan Central Railroad, and was expected to be of very high value, not only *to all that part of [558] the state through which it would run, but to the whole state. Much disappointment had come from the road not being constructed; and when the Detroit & Pontiac Railroad Company, which already had near 30 miles of road in successful operation, and could command means for the construction of more, proposed, on certain terms which were expressed in the act of 1855, to purchase the rights and franchises of the Oakland & Ottawa Company, and to extend their own road to Lake Michigan, there is no reason for doubting that the people of the state at large looked upon this as a favorable opportunity for accomplishing a desire which twenty years before had found expression in the legislation of the state, and which ever since had been kept constantly in view."

. . . . . .

"It has already been seen that the important public purpose which the state had in view in assenting to the act of 1855 has been accomplished; the railroad from Pontiac to Lake Michigan has been constructed and for many years operated, and the state has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit & Milwaukee Railway Company upon the market as well in Europe as in this country; the state recognized the necessity, and by its legislation provided for facilitating sales. The bonds and shares were sold to the amount of very many millions; and every purchaser of one of them made the purchase in reliance upon legislation of this state which appeared to sanction if not to invite it." P. 104, N. W. p. 811.

See further, *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 436, 19 L. ed. 495, 497, in which we said:

"It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

"There is no necessity of looking for the consideration for a *legislative contract out- [559] side of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it."

Surely no clearer case of contract can be

presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road whose completion is deemed of great public importance, and where the special provision is, as required, formally accepted, the expenditures made, and the road completed.

It is suggested that this provision is not in terms made perpetual. A sufficient answer to this is found in *Home of the Friendless* v. *Rouse*, 8 Wall. 437, 19 L. ed. 497:

"Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation' are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could at its will resume the power of taxation."

It is further contended that the contract provided in § 9 is one relating to the property of the shareholders, and not to that of the corporation. The terms "share," "stock," "capital," "capital stock," are of frequent and not uniform use, and we have often to turn to the context to see what is intended by their use in a particular case. That a distinction exists between that which is the property of the shareholder, and subject to
560] taxation as other property belonging *to them, and that which is the property of the collective incorporated person we call a corporation, and subject to taxation as such, has been repeatedly pointed out. See *Farrington* v. *Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697, 24 L. ed. 1091; *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 98 U. S. 559, 25 L. ed. 222; *Bank of Commeree* v. *Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Tennessee* v. *Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Shelby County* v. *Union & P. Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Central R. & Bkg. Co.* v. *Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *Citizens' Bank* v. *Parker*, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

In the first of these cases a bank's charter provided that the company "shall pay to the state an annual tax of ½ of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes," and it was held that that was a contract in reference to the property of the shareholders, and prevented further taxation upon their separate property. In the opinion it was said (pp. 686, 687, L. ed. p. 560):

"The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. . . . The capital stock and the shares may both be taxed, and it is not double taxation."

In the second is this ruling (p. 707, L. ed p. 1093):

"In general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of the corporation, comes to represent the capital."

And in *Tennessee* v. *Whitworth*, 117 U. S. 136, 29 L. ed. 832, 6 Sup. Ct. Rep. 647, this description of separable elements of value was given:

"In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each *of these is, [561]
under some circumstances, an appropriate subject of taxation."

In several of the cases attention is called to the qualifying words which show an intent on the part of the legislature of something other than that generally embraced within the term "capital stock." But it is unnecessary to review these cases in detail.

By § 9 the tax is "on the capital stock of said company paid in." Clearly that refers to the property which the corporation has received and presumably holds. It is not the individual property of the shareholders which is contemplated, but that which is in the treasury of the corporation, or included among its assets. This, as we have seen from the quotations, is the ordinary meaning of the term "capital stock." Further, we find that this tax is to be "in

lieu of all other taxes, except for penalties imposed upon said company." In other words, the tax upon the company of 1 per cent may be increased by any penalties imposed upon the company, and in no other way. Again, the tax is to "be estimated upon the last annual report of said corporation." While such report might be expected to include not merely the property belonging to the corporation but also the number and names of the stockholders and the number of shares held by each, and possibly also the amount paid in by each, yet the word "estimated" carries with it the idea of valuation rather than of mathematical apportionment. It apparently suggests that the property reported by the corporation is to be the basis upon which the assessors shall make their valuation, so that the tax is "estimated" upon that property rather than fixed by the mere process of multiplication or division. That the tax is to be paid by the company is of course not conclusive on the question, but it is in harmony with all the other provisions of the section. Still further, we have the practical construction placed by the authorities for a long series of years, continued up to the year 1898. Under those circumstances we are of opinion that the tax provided for
[562] by § 9 is a tax upon the property *of the corporation, and not a tax upon the shares of stock held by the shareholders. There was, therefore, a contract between the state and the corporation which prevented the subjection of the property of the corporation to any other than the tax prescribed in the statute.

The decree of the Circuit Court is affirmed.

Mr. Justice **White** dissented.

JOHN W. HADDOCK, *Plff. in Err.*,
v.
HARRIET HADDOCK.

(See S. C. Reporter's ed. 562-633.)

Judgment—full faith and credit—enforcement of divorce decree in other state.—The mere domicil within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action.

[No. 119.]

Argued December 11, 1905. Decided April 16, 1906.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to an order of the Court of Appeals of that state affirming a judgment of the Appellate Division of the Supreme Court for the First Department, which in turn affirmed the judgment of the Supreme Court in and for the County of New York, entered upon the report of a referee, decreeing a separation from bed and board, together with an award of alimony. *Affirmed.*

See same case below, 178 N. Y. 557, 70 N. E. 1099.

The facts are stated in the opinion.

Mr. **Abram J. Rose** argued the cause, and, with *Messrs. William H. Willits* and *Alfred C. Petté*, filed a brief for plaintiff in error.

Mr. **Henry Willis Smith** argued the cause, and, with *Messrs. William T. Tomlinson* and *William W. Smith*, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **White** delivered the opinion of the court:

The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the state of New York, sued the husband in that state in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its

NOTE.—*As to full faith and credit to be given to state records and judicial proceedings*—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

On the validity of a decree of divorce obtained on publication or service out of the state, where the defendant did not appear—see note to Butler v. Washington, 19 L.R.A. 814.

On the conflict of laws on the subject of divorce—see note to Benton's Succession, 59 L. R.A. 135.

[565] celebration was procured by the *fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights, and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the state of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, *viz.*, desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the state of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband, without justifiable cause, abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of $780 a year from the date of the judgment. The action of the referee was sustained by the supreme court of the state of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the court of appeals. As, by the law of the state of New York, after the affirmance by the court of appeals the record was remitted to the supreme court, this writ of error to that court was prosecuted.

The Federal question is, Did the court below violate the Constitution of the United [566] States by refusing to give to the *decree of divorce rendered in the state of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the Federal issue, we are concerned not with the mere form of proceeding by which the Federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determined what effect it would give to it, instead of excluding the record, and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicil in Connecticut, sued the wife in that state as a person whose residence was unknown, but whose last known place of residence was in the state of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the state of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required *to be [567] borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. *Harding* v. *Harding*, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679.

Second. Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the 14th Amendment, void as

against the nonresident, even in the state where rendered; and, therefore, such nonresident, in virtue of rights granted by the Constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565. The facts in that case were these: Neff, who was a resident of a state other than Oregon, owned a tract of land in Oregon. Mitchell, resident of Oregon, brought a suit in a court of that state upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a nonresident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the state of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by
[568] *Pennoyer. Neff sued in the circuit court of the United States for the district of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon, under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of the United States. The ruling was based on the proposition that a court of one state could not acquire jurisdiction to render personal judgment against a nonresident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that, under the statutes of the state in which the suit against the nonresident was brought, the sending of a copy of the summons and complaint to the postoffice address in another state of the defendant was required and complied with. The court said (p. 727, L. ed. p. 570):

"Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability."

And the doctrine thus stated but expressed a general principle expounded in previous decisions. *Bischoff* v. *Wethered*, 9 Wall. 812, 19 L. ed. 829. In that case, speaking of a money judgment recovered in the common pleas of Westminster hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court, said (p. 814, L. ed. p. 830):

"It is enough to say [of this proceeding] that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a prima facie character. It is simply null."

*Third. The principles, however, stated in [569]
the previous proposition, are controlling only as to judgments *in personam*, and do not relate to proceedings *in rem*. That is to say, in consequence of the authority which government possesses over things within its borders, there is jurisdiction in a court of a state by a proceeding *in rem*, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer* v. *Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state, through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicil in the territory of Washington. Being there so domiciled, an act of the legislature of the territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the territory of Washing-

ton to recover real estate situated in the territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs.
[570] *Maynard had no notice, and that she was not a resident of the territory when the act was passed. From a decree of the supreme court of the territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divoree to a citizen of the territory, was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the territory committed no error in giving effect within the territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause, to enter a decree of divoree which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicil has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause. *Cheever* v. *Wilson*, 9 Wall. 108, 19 L. ed. 604.

Sixth. Where the domicil of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated
[571] as the actual or constructive *domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226, where it was said (p. 595, L. ed. p. 230):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers."

And the same doctrine was expressly upheld in *Cheever* v. *Wilson*, *supra*, where the court said (9 Wall. 123, 19 L. ed. 608):

"It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicil of a husband is in a particular state, and that state is also the domicil of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the state of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the *full faith [572] and credit clause. *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

Coming to apply these settled propositions to the case before us, three things are beyond dispute: *a*. In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divoree rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that state. *b*. As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. *c*. As then there can be no question that the wife was not constructively present in Con-

necticut by virtue of a martimonial domicil in that state, and was not there individually domiciled, and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the state or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the husband in that state, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other states in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether, to enforce in another jurisdiction the Connecticut decree, would not be to enforce in one state a personal judgment rendered in another state against a defendant over whom the court of the state rendering the judgment had not acquired jurisdiction? Otherwise stated, the ques-
[573] tion is this: Is a proceeding for divorce *of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but, on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrine stated in the third or fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject-matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. *National Exch. Bank* v. *Wiley*, 195 U. S. 259, 269, 49 L. ed. 184, 190, 25 Sup. Ct. Rep. 70, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicil within one state of one party to the marriage gives to such a state jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other states by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens, has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government, in virtue of its authority over marriage, may dissolve the tie as to citizens of another *government, other gov- [574]
ernments would have a similar power; hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the state of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the state of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the state of New York as to the party to the marriage there domiciled, it would follow that the power of the state of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that state to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the states whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other states. In other words, any person who was married in one state and who wished to violate the marital obligations, would be able, by following the lines of least resistance, to go into the state whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and the public policy of the other states. Thus the argument comes necessarily to this,—that to preserve the lawful authority of all the states over marriage it is essential to decide that all the states have such authority only at the sufferance of the other

states. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard* v. *Hill*, referred to in the fourth proposition, which was at the
[575] outset stated. For in that case *the sole question was the effect within the territory of Washington of a legislative divorce granted in the territory to a citizen thereof. The upholding of the divorce within the territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other states to whom the jurisdiction of the territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced,—that is, the full faith and credit clause of the Constitution. No one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the states would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the states over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the states over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the states over the marriage
[576] relation. *And as the government of the United States has no delegated authority on the subject, that government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the states nor the national government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicil within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other states to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the state of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing, and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject-matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory, then, upon which the proposition proceeds, must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens *of that state, it must be admitted [577] under the hypothesis stated, that before the husband deserted the wife in New York the *res* was in New York, and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage

relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another state. As illustrating this conception, we notice the case of *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485, 17 L. ed. 311. The facts in that case were these: A bill was filed in a district court of the United States for the district of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi river, dividing the states of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States circuit court for the district of Iowa exercised the same jurisdiction that a state court of Iowa could exercise, and no more, said (p. 494, L. ed. p. 315):

"The district court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case."

Nor is the conclusive force of the view which we have stated met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and
[578] wholly in New York, *for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that state had the power to determine the status of the nonresident wife by a decree which had obligatory force outside of the state of Connecticut. Here, again, the argument comes to this,—that, because the state of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that state also had the authority to oust the state of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that state.

III. It is urged that whilst marriage is, in one aspect, a contract, it is nevertheless a contract in which society is deeply interested, and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen, but as to a citizen of New York who was not subject to the jurisdiction of the state of Connecticut. The proposition involves in another form of statement the *non sequitur* which we have previously pointed out; that is, that because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without, at the same time, saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that state. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that because, in the exercise of its power over its own citizens, a state may determine to dissolve the marriage tie by a decree which is efficacious *within its borders, [579]
therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a state may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another state. The distinction was clearly pointed out in *Blackinton* v. *Blackinton*, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicil in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicil of the husband was not the domicil of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling, and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517, where it was said (p. 527):

"When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be

respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority."

IV. The contention that if the power of [580] one state to decree *a dissolution of a marriage which would be compulsory upon the other states be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one state must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a state should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each state is given the power of overshadowing the authority of all the other states, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one state over one party alone was the test of the right to dissolve the marriage tie as to the other party, although domiciled in another state, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one state would have a right to acquire a domicil in a different state and there institute proceedings for divorce. It would hence necessarily arise that domicil would be no longer the determinative criterion, but the mere race of diligence between [581] the parties in seeking different *forums in other states or the celerity by which in such states judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy, but also to protect the individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective states just as that clause operates upon other rights,—that is, it compels all the states to recognize and enforce a judgment of divorce rendered in other states where both parties were subject to the jurisdiction of the state in which the decree was rendered, and it enables the states rendering such decrees to take into view, for the purpose of the exercise of their authority, the existence of a matrimonial domicil from which the presence of a party not physically present within the borders of a state may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the state of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the *question for consideration. [582] The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and

divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicil ever existed, had power to render a decree dissolving a marriage, which, on principles of international law, was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. 1 Wharton, Confl. L. 3d ed. § 209, p. 441, and notes.

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. *Shaw* v. *Gould*, L. R. 3 H. L. 55; *Harvey* v. *Farnie*, L. R. 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions, that exceptional cases might arise which perhaps would justify a relaxation of the rigor of a presumption that the domicil of the husband was the domicil of the wife (*per* Lords Eldon and Redesdale, in *Tovey* v. *Lindsay*, 1 Dow, P. C. 133, 140; *per* Lord Westbury, in *Pitt* v. *Pitt*, 4 Macq. H. L. Cas. 640; *per* Brett, L. J., in *Niboyet* v. *Niboyet*, L. R. 4 Prob. Div. 14; *Briggs* v. *Briggs*, L. R. 5 Prob. Div. 165; and *per* James and Cotton, L. JJ., in *Harvey* v. *Farnie*, L. R. 6 Prob. Div. 47, 49), the courts of England, in cases where the jurisdiction was dependent upon
[583] domicil, have enforced *the presumption, and treated the wife as being within the jurisdiction where the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course, the rigor of the English rule as to the domicil of the husband being the domicil of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicil. *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226; *Cheever* v. *Wilson*, 9 Wall. 108, 19 L. ed. 604; *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

And even in Scotland, where residence, as distinguished from domicil, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. 1 Wharton, Confl. L. § 215, p. 447; *per* Lord Westbury, in *Shaw* v. *Gould*, L. R. 3 H. L. 88.

As respects the decisions of this court: We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding (*a*) that where the domicil of a plaintiff in a divorce cause is in the state where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other states to recognition under the full faith and credit clause (*Cheever* v. *Wilson*, *supra*); (*b*) that, as distinguished from legal domicil, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a nonresident defendant. *Andrews* v. *Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *Streitwolf* v. *Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553; *Bell* v. *Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551. This brings us to again consider *a [584]
case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, *viz.*, *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion, at page 171, L. ed. at page 803, and Sup. Ct. Rep. at page 550:

"This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been

given as was required by the statutes of Kentucky."

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the *Atherton Case* are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicil at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicil and went to New York. The husband sued her in Ken-
[585] tucky for a divorce. Before the *Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicil in that state, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective states at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree, and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicil of the parties, since upon that hypothesis, even if the efficacy of the individual domicil had been admitted, no solution would have been thereby afforded of the problem which would have risen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicil, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicil which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision.

It is contended that an overwhelming preponderance of the decisions of state courts enforce the doctrine that it is the duty of the states, by virtue of the full faith and credit clause, to give within their borders the full effect required by that clause to decrees of divorce rendered in other states, where there was jurisdiction alone by virtue of the domicil of one of the parties. Whilst we may not avoid the duty of interpreting for ourselves the Constitution of the United States, in view of the persuasive force that would result if an overwhelming *line of [586] state decisions held the asserted doctrine, we come to consider that subject. To examine in detail the many decisions of state courts of last resort, most of which are referred to in the margin, † would expand this opinion to undue length. To avoid so doing, if possible, we propose to more particularly direct our attention to the cases in state courts which are specially relied on. In doing so we shall add cases in several of the states not particularly counted on in the argument. We shall do this for the purpose of evolving, if possible, from the state cases thus to be referred to, some classification typical of all the state decisions, hence enabling all the cases to which we do not specially refer to be brought within the appropriate class to which they pertain, without the necessity of reviewing them in detail. We shall not confine ourselves to the particular state decisions relied on, but shall consider such decisions in the light of the general rule obtaining in the particular state.

*The cases specially relied on are *Thompson* v. *State*, 28 Ala. 12; *Harding* v. *Alden*, 9 Me. 140, 23 Am. Dec. 549; *Ditson* v. *Ditson*, 4 R. I. 87; *Burlen* v. *Shannon*, 115 Mass. 438, and *Felt* v. *Felt*, 59 N. J. Eq. 606, 47 L. R. A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 [587]

†Cases relating to the validity and extraterritorial effect of a decree of divorce rendered upon constructive notice:

Turner v. Turner, 44 Ala. 437; Re James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Field v. Field, 215 Ill. 496, 74 N. E. 443; Hood v. State, 56 Ind. 263, 270, 26 Am. Rep. 21; Hilbish v. Hattle, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20; Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47; 10 N. W. 825; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779; Maguire v. Maguire, 7 Dana, 181; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Edwards v. Green, 9 La. Ann. 317; Smith v. Smith, 43 La. Ann. 1140, 10 So. 248; Butler v. Washington, 45 La. Ann. 279, 19 L. R. A. 814, 12 So. 356; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Stilphen v. Stilphen, 58 Me. 508, 4 Am. Rep. 305; Stilphen v. Houdlette, 60 Me. 447; Garner v. Garner, 56 Md. 127; Lyon v. Lyon. 2

Atl. 1071, to which we shall add, for the purposes above stated, cases on the same subject decided in New York, Ohio, Wisconsin, Indiana, and Missouri.

NEW YORK.—It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within the state, which shall be operative in that state, even although the defendant is a nonresident and is proceeded against by constructive service.

Borden v. *Fitch*, 15 Johns. 121, 8 Am. Dec. 225, and *Bradshaw* v. *Heath*, 13 Wend. 407, were decided, respectively, in the years 1818 and 1835. These cases, as declared by the court of appeals of New York in *People* v. *Baker*, 76 N. Y. 78, 82, 32 Am. Rep. 274, upheld the principle that a court of another state could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other state or voluntarily appeared in the cause. The doctrine that an action of divorce is one *inter partes* was thus clearly reiterated by Andrews, J., in *Jones* v. *Jones*, 108 N. Y. 415, 424, 2 Am. St. Rep. 447, 451, 15 N. E. 707, 709.

"The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

That the principle referred to is still enforced by the New York court is shown by recent cases, *viz.*, *Lynde* v. *Lynde*, 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, 56 N. E. 979; *Winston* v. *Winston*, 165 N. Y. 553, 59 N. E. 273, and the case at bar. And it is indubitable that under this doctrine [588]the *courts of New York have invariably refused, as they have done in the case at bar, to treat a divorce rendered in another state, under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the Constitution of the United States; and, indeed, have refused generally to give effect to such decrees even by state comity.

MASSACHUSETTS.—*Barber* v. *Root*, 10 Mass. 260; *Hanover* v. *Turner*, 14 Mass. 227, 7 Am. Dec. 203, and *Harteau* v. *Harteau*, 14 Pick. 181, 25 Am. Dec. 372, were decided, respectively, in 1813, 1817, and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that state, following a section forbidding the recognition of divorces obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: "In all other cases, a divorce decreed in another state or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this state." And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Massachusetts statutes, was accompanied by the following comment (Rept. Comrs., pt. 1, p. 123): "This is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be."

In *Lyon* v. *Lyon* (1854) 2 Gray, 367, the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to a marriage against the other, who was domiciled in Massachusetts. The court refused to give extraterritorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw it was declared that the three cases which we have previously referred to sustained the doctrine, based upon general principles of law, that a decree of divorce rendered in another state without jurisdiction of both of the parties possessed no extraterritorial force.

In *Hood* v. *Hood* (1865) 11 Allen, 196, 87 Am. Dec. 709, the controversy was *this: The [589]parties were married in Massachusetts, and,

Gray, 367; Wright v. Wright, 24 Mich. 180; Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N. W. 154; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Gould v. Crow, 57 Mo. 200; Anthony v. Rice, 110 Mo. 233, 19 S. W. 423; Smith v. Smith, 19 Neb. 706, 28 N. W. 296; Leith v. Leith, 39 N. H. 20; Doughty v. Doughty, 28 N. J. Eq. 581; Flower v. Flower, 42 N. J. Eq. 152, 7 Atl. 669; Felt v. Felt, 59 N. J. Eq. 606, 47 L. R. A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071; Wallace v. Wallace, 62 N. J. Eq. 509, 50 Atl. 788; Lynde v. Lynde, 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, 56 N. E. 979; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273; Irby v. Wilson, 21 N. C. (1 Dev. & B. Eq.) 568; Harris v. Harris, 115 N. C. 587, 44 Am. St. Rep. 471, 20 S. E. 187; Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 58; Cox v. Cox, 16 Ohio St. 502, 2 Am. Rep. 415; Doerr v. Forsythe, 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055; Colvin v. Reed, 55 Pa. 375; Reel v. Elder, 62 Pa. 308, 1 Am. Rep. 414; Ditson v. Ditson, 4 R. I. 87; McCreery v. Davis, 44 S. C. 195, 28 L. R. A. 655, 51 Am. St. Rep. 794, 22 S. E. 178; Thoms v. King, 95 Tenn. 60, 31 S. W. 983; Prosser v. Warner, 47 Vt. 667, 673, 19 Am. Rep. 132; Cook v. Cook, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443.

after a residence in that state, moved together to Illinois. The wife left the domicil of the husband in Illinois and returned to Massachusetts. Thereafter, in Illinois, the husband sued the wife for a divorce on the ground of her desertion, obtained a decree, and married again. The case decided in Massachusetts was a suit brought in that state by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extraterritorial effect in Massachusetts depended, under the rule announced in the previous cases, upon whether both the husband and wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband, in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicil was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicil of the husband was the domicil of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the Illinois court. Applying this legal principle to the facts in the case before it, the court held that as there was no evidence showing that the wife had justifiable cause for leaving her husband, the legal presumption that the domicil of the husband was the domicil of the wife prevailed, and that the Illinois decree was entitled to extraterritorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties.

In *Shaw* v. *Shaw* (1867) 98 Mass. 158, the facts were these: The parties were married in Massachusetts, lived there, and left together for the purpose of settling in
[590] Colorado. *On the journey, at Philadelphia, the wife was forced by the extreme cruelty of the husband to leave him. She returned to Massachusetts, while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court, in the most explicit terms, recognized that a decree of divorce, to have extraterritorial effect, must be rendered with jurisdiction over both parties. It said (p. 159): "For the purposes of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicil of both parties, and there valid, is good everywhere." The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts, which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife in Massachusetts, and where one of them lived in that state when the cause for divorce occurred. It was held that as at the time of the commission of the cruelty in Philadelphia charged against the husband the domicil of the parties in Massachusetts had not been lost, and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicil by the husband in Colorado did not make such domicil that of the wife, there was jurisdiction, and the divorce was granted.

Hood v. *Hood* (1872) 110 Mass. 463, was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, 87 Am. Dec. 709, because it was found that both the husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be *res judicata* as to all persons, and to foreclose further inquiry into the validity of the Illinois decree of divorce.

In *Burlen* v. *Shannon* (1874) 115 Mass. 438, the facts leading up to the controversy and those involved therein were as follows: Shannon and his wife lived together in Massachusetts, *where she left him. Without [591]
stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it suffices to say that Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained. 3 Gray, 387. Shannon went to Indiana in 1855 and took up his domicil in that state, where, in 1856, he obtained a decree of divorce upon constructive service. Subsequently, in Massachusetts, Mrs. Burlen again sued Shannon for necessaries furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce, and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extraterritorial effect in Massachusetts. The court, in effect, after reiterating the previous rulings and referring

to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another state was sought to be given effect in Massachusetts, also reiterated the previous ruling that the wife might acquire a separate domicil from the husband if she lived separate from him for justifiable cause. The court was brought, therefore, to consider whether Mr. and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicil of the husband was the domicil of the wife. The solution of this question depended as it had depended in *Hood* v. *Hood*, 11 Allen, 196, 87 Am. Dec. 709, upon whether the wife was absent from the husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, and therefore, under the legal presumption that the domicil of the husband was the
[592] domicil of the wife, both *the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgment in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce, leading to the implication that that decree was held to be conclusive, even if only one of the parties was domiciled in the state where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit, if not the letter, of the state statute without the slightest intimation to that effect.

In *Cummington* v. *Belchertown*, 149 Mass. 223, 4 L. R. A. 131, 21 N. E. 435, the facts were these: The parties to a marriage, celebrated in Massachusetts, lived together in that state until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicil in New York, there brought suit on the ground of fraud for the annulment of the marriage, and obtained a decree. The wife was only constructively served with process, did not appear, and was not represented. The Massachusetts court held, upon the authority of the *Blackinton Case*, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830, to which we have already referred, that if the decree was to be recognized in Massachusetts, it could only be on grounds of comity. And in concluding its opinion the court said:

"Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which by the Massachusetts law it cannot be avoided, we are of opinion that it should not be enforced here, and that *no principle of interstate comity [593] requires that we should give it effect."

True it is the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But, as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in the one class, it is of necessity also essential in the other.

MAINE.—In *Harding* v. *Alden* (1832) 9 Me. 140, 23 Am. Dec. 549, the facts were these: While living together in Maine a husband deserted his wife. He went to North Carolina, where he pretended to marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of the adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband, during the coverture, owned and alienated real estate in Maine, and a statute of that state provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the state of Maine. Considering the opinion in its entirety, it is plain that the Rhode Island divorce was given recognition from considerations of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both states and that divorces were granted in Maine against nonresidents, and it was observed that "there would be great inconvenience in holding" that divorces ought not to be recognized in other states when granted in the state where the *injured party* *resided, against one who [594]

had established his domicil in another state and there committed adultery.

True it is in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was, by the decree of the Maine court, expressly limited to the dissolution of the marriage (P. 151.) How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will, we think, be made clear by what follows.

Harding v. *Alden* was decided at the July term, 1832. Less than two years afterward, on March 5, 1834 (1 Maine Laws, chap. 71, § 4), the statute of Maine regulating divorces was supplemented by various provisions, one such being the following: "Sec. 2. Be it further enacted, That in all cases where one party has been or shall be divorced from the bonds of matrimony, the court granting the same may, upon application therefor, grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable." This provision was carried into the Revised Statutes of 1841, chap. 89, § 2, and although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits. *Stilphen* v. *Stilphen*, 58 Me. 508, 4 Am. Rep. 305. In the cited case, although a husband had already obtained an absolute divorce, a like divorce was granted to the wife, and the court allowed to her certain articles of personal property and the sum of $500. In overruling exceptions to the decree the appellate court adopted the theory that the second decree in nowise impugned the first, and was "important only [595] as enabling the court to make *such ancillary decrees concerning the property as justice may seem to require." (P. 517, Am. Rep. p. 309.) In the course of the opinion the court said (p. 516, Am. Rep. p. 308):

"There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth, as *ex parte* divorce suits. The notice is often imperfect, so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses, testifying in the presence of one of the parties, and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present, each is sure to put the other in the wrong; and, *a fortiori* is this true when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise, the grossest injustice is liable to be done."

In the light of this decision it cannot be assumed that the courts of Maine would give to a citizen of that state against whom a divorce had been obtained in a foreign jurisdiction, upon constructive service, a less degree of relief than they afford as to a decree rendered in Maine, both parties being present and bound by the decree.

RHODE ISLAND.—*Ditson* v. *Ditson* (1856) 4 R. I. 87, was a suit for divorce on the grounds of desertion, extreme cruelty, and nonsupport, brought by a wife domiciled in Rhode Island against the husband, who had never resided in Rhode Island, and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of *Lyon* v. *Lyon*, 2 Gray, 367, in which case, as we have previously *shown, the Massachusetts court re- [596] fused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the *Ditson Case*) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extraterritorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding *in rem*, and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties, and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the Constitution and have binding efficacy in every other state.

NEW JERSEY.—Whilst the courts of New

Jersey have exercised the power to grant a divorce from a nonresident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other states, when sought to be enforced in New Jersey against citizens of that state, a rule like the one prevailing in New York; that is, they decline to enforce them even upon the principles of comity. *Doughty* v. *Doughty*, 28 N. J. Eq. 581, 586; *Flower* v. *Flower*, 42 N. J. Eq. 152, 7 Atl. 669. Recently, however, it has been decided (*Felt* v. *Felt*, 59 N. J. Eq. 606, 47 L. R. A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071) that where a decree of divorce was rendered in another state, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been personally served outside of the jurisdiction with notice of the pendency of the divorce proceeding, and was afforded reasonable opportunity to make defense, and did not avail of the opportunity, effect would be given to such decree in New Jersey, upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New
[597] Jersey *recognized as a sufficient cause for divorce. In *Wallace* v. *Wallace*, 62 N. J. Eq. 509, 50 Atl. 788, the subject is quite fully reviewed.

OHIO.—In *Cooper* v. *Cooper* (1836) 7 Ohio, pt. 2, p. 238, without citation of authority, a divorce granted in Indiana, from a resident of Ohio, upon constructive service, was held to bar an application for divorce and alimony in Ohio. In *Mansfield* v. *McIntyre* (1840) 10 Ohio, 27, despite a divorce obtained in Kentucky by a husband, upon constructive service, the divorced wife was regarded in Ohio as the widow of her former husband after his decease, and as such widow entitled to dower.

In *Cox* v. *Cox*, 19 Ohio St. 502, 2 Am. Rep. 415, decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana, and there obtained a divorce, upon constructive service. The wife remained in Ohio, and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a divorce and alimony. The husband appealed, but as such an appeal, under the statutes of Ohio, did not affect the decree as to the divorce, the district court considered only the question of alimony, and rendered a new decree for alimony against the defendant. The case was then taken to the supreme court of the state. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over nonresidents in divorce cases, and reference was made to various authorities as tending to show that public policy required the recognition of the validity of such decrees in other states as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled under the laws of Ohio to either divorce or alimony, or both, at her election, and alluding to the Indiana decree, the court said (p. 512, Am. Rep. p. 417):

"The question, therefore, is whether the *ex parte* decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony *which the statute, [598]
upon the facts as they exist in regard to the husband's desertion, intended to provide for her.

"We think the decree ought not to have such effect.

"In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign, and one rendered in a domestic, forum.

"In either case, to give to a decree thus obtained the effect claimed for it would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy,—the only grounds upon which *ex parte* decrees of divorce are authorized and supported.

"It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the court of common pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

The following cases were cited by the court as sustaining the right of the wife to maintain an independent proceeding for alimony, even after the husband had obtained a divorce: *Richardson* v. *Wilson*, 8 Yerg. 67; *Crane* v. *Meginnis*, 1 Gill & J. 464, 19 Am. Dec. 237; and *Shotwell* v. *Shotwell*, Smedes & M. Ch. 51.

In *Doerr* v. *Forsythe* (1893) 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055, an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in lands

in Ohio owned during coverture by the husband.

ALABAMA.—In *Thompson* v. *State* (1856) 28 Ala. 12, the facts were these: Thompson deserted his family in Mississippi, went to Arkansas, and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and, after the [599] divorce, the husband also went to *Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set aside, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a bona fide domicil in Arkansas during the pendency of the proceedings for divorce. *Harding* v. *Alden*, 9 Me. 140, 23 Am. Dec. 549, was cited as authority.

In a subsequent case, however (*Turner* v. *Turner* [1870] 44 Ala. 437), the supreme court of Alabama strictly limited, as against a citizen of Alabama, the effect of divorce rendered in another state upon constructive service. The parties were married in Alabama, where the husband deserted the wife, and located in Indiana, where he obtained a divorce upon constructive service. The wife remained in Alabama, and, after the granting of the divorce to the husband, she sued him in Alabama for a divorce and alimony. The husband pleaded the Indiana decree in bar. The trial court, however, held that the wife was entitled to maintain her suit, and entered a decree for divorce and alimony. In affirming the decree the supreme court of Alabama, upon the authority of *Thompson* v. *State, supra,* said that the decree of divorce obtained by the husband in Indiana might protect him against prosecution for bigamy should he marry again in Alabama. Referring to that decree it further said (p. 450):

"But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state, in the event she should survive him, nor any other interest of a pecuniary character she may have against him. . . . It is the duty of the state to protect its own citizens, [600] within its own borders. This is the *natural compensation for allegiance. This high duty extends to all the pecuniary rights of the citizens, as well as to the rights of security of person. . . . No obligation of comity is paramount to this duty. Without a constant and effective exertion of it, citizenship would become a farce. . . . The wife is as much the citizen of the state as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction. It would be a scandal to justice to imperil her, and sacrifice her most important and cherished rights upon a mere technicality,—a technicality that often contradicts the truth. When her protection requires it, it would be cruelly unjust for the state of her actual residence and domicil to repudiate its own right of jurisdiction to give her aid. I therefore think that the better opinion is that she has the right to file her bill here, and to all the relief that the court could give her, notwithstanding her husband might not be domiciled in this state at the commencement and during the whole pendency of her litigation with him. . . .

"Then, if the state courts have competent jurisdiction in such a case, as undoubtedly they have, they may go on and exercise that jurisdiction in the manner and to the extent prescribed by their own laws.

"Under the laws of this state, by the contract and consummation of a marriage, the wife, if she has no separate estate, becomes entitled to dower in the husband's lands, and a certain distributive interest in his personal estate, if she survives him, and to temporary and permanent alimony out of his estate, upon a separation by divorce in her favor. These are rights that she cannot legally be deprived of without her consent or her fault. . . . If this were not so, then these important statutory provisions in favor of the wife would be repealed or rendered null by a foreign divorce, of which she had no notice and no knowledge, during its whole progress through the forms of a foreign court. To sue in her own domicil is necessary for the protection of the wife. It, therefore, *overrides the technical rule [601] that the husband's domicil is also the domicil of the wife. . . . Here the testimony shows that the wife has no separate estate. The witnesses for the defendants say when she was married she 'brought nothing with her.' It also appears that during her connection with the defendant, Matthew Turner, as his wife she was a chaste, industrious, economical, faithful, useful, and obedient wife; and that the husband's property is very considerable, worth possibly not less than $100,000. It is also shown that his three children by a former marriage are already sufficiently provided for.

"Under such a state of facts the sum of $30,000 was not an unreasonable sum for permanent alimony to be allowed to the

wife, nor the sum of $800 too large for temporary alimony."

INDIANA.—In *Tolen* v. *Tolen* (1831) 2 Blackf. 407, 20 Am. Dec. 742, the facts were these: A wife, on being deserted in Kentucky, removed to and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the nonresident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be *valid in Indiana*, and decided it had such power, but expressly reserved passing on the question whether the decree would have extraterritorial force.

In *Hood* v. *State* (1877) 56 Ind. 263, 271, 26 Am. Rep. 21, it was declared that as an *ex parte* divorce in favor of one domiciled within the jurisdiction of a state, and against a nonresident, although founded upon constructive service, was valid as to the plaintiff, "*public policy* demands that it should be held valid as to both parties."

In *Hilbish* v. *Hattle* (1896) 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20, certain sections of the Indiana Revised Statutes, wherein it was provided that the divorce of one party to a marriage should dissolve the contract as to both, and that a divorce decreed in another state by a court having jurisdiction of the cause should have full effect in Indiana, were held to be applicable to a decree of
[602] *divorce granted in nother state, in favor of a husband, upon constructive service, and the same effect was given to the decree, as to the rights of the wife in the property of the husband in Indiana, as if the divorce had been rendered in Indiana.

MISSOURI.—In *Gould* v. *Crow*, 57 Mo. 200, a decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. *Harding* v. *Alden*, *supra*, was relied upon as authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other states, and whether obtained on personal service or by order of publication. The doctrine of *Gould* v. *Crow* was reaffirmed and applied in *Anthony* v. *Rice*, 110 Mo. 233, 19 S. W. 423.

WISCONSIN. — In *Shafer* v. *Bushnell* (1869) 24 Wis. 372, an *ex parte* divorce granted a wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the grounds of comity to be conclusive in Wisconsin in respect to the status or domestic and social condition of the wife. The decree was held to bar an action for criminal intercourse against the person whom the complainant in the divorce suit married after the granting of the divorce.

In *Cook* v. *Cook* (1882) 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443, however, in an elaborate opinion, an *ex parte* divorce obtained in Michigan upon constructive serviee merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin, nor to bar her from suing in Wisconsin for divorce, alimony, allowance, and a division of the property of such husband situated within Wisconsin.

Deducing the law of the several states from the rulings of their courts of last resort which we have just reviewed, and ignoring mere minor differences, the law of such states is embraced within one or the other of the following headings:

*a. States where the power to decree a di-[603] vorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the state, wholly irrespective of any force which may be given such decree in other states. Under this heading all of the states are embraced with the possible exception of Rhode Island.

b. States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other states, when the court rendering the same had jurisdiction over only one of the parties. Under this heading are embraced Massachusetts, New Jersey (with the qualification made by the decision in 59 N. J. Eq. 606, 47 L. R. A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071), and New York.

c. States which, whilst giving some effect to decrees of divorce rendered against its citizens in other states where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes the states of Alabama, Maine, Ohio, and Wisconsin.

d. Cases which, although not actually so deciding, yet lend themselves to the view that *ex parte* decrees of divorce rendered in other states would receive recognition by virtue of the due faith and credit clause.

And this class embraces Missouri and Rhode Island.

Coming to consider, for the purpose of classification, the decided cases in other states than those previously reviewed, which have been called to our attention, the law of such states may he said to come under one or the other of the foregoing headings, as follows:

Proposition *a* embraces the law of all the states, since in the decision of no state is there an intimation expressing the exception
[604] *found in the Rhode Island case which caused us to exclude that state from this classification.

Under proposition *b* comes the law of the states of Pennsylvania, Vermont, and South Carolina. A line of decisions of the state of North Carolina would also cause us to embrace the law of that state within this classification, but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made hy the North Carolina court in the opinion in *Bidwell* v. *Bidwell*, 139 N. C. 402, 52 S. E. 58.

Proposition *c* embraces the law of Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, and New Hampshire. And it is pertinent here to remark that in Michigan (3 Mich. Comp. Laws [1897] ¶ 8617, chap. 232, § 2) the obtaining of a divorce in another state from a citizen of Michigan is made cause for the granting of a divorce in Michigan to its citizen. A like provision is also in the statutes of Florida. Fla. Rev. Stat. (1902) § 1480.

Under proposition *d* we embrace the remaining states, although as to several the classification may admit of doubt, *viz.*, California, Illinois, Iowa, Kentucky, and Tennessee.

It induhitably, therefore, follows from the special review we have made of cases in certain states, and the classification just made of the remaining state cases which were called to our attention and which we have previously cited in the margin, that the contention is without foundation, that such cases establish by an overwhelming preponderance that, by the law of the several states, decrecs of divorce obtained in a state with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clausc of the Constitution, entitled to he enforced in another state as against citizens of such state. Indeed, the analysis and classification which we have made serves conclusively to demonstrate that the limited recognition which is given in most of the states to such *ex parte* decrees of divorce rendered in other states is wholly inconsistent with the theory that such limited recognition is based *upon the operation of the full faith and [605]
credit clause of the Constitution of the United States, and, on the contrary, is consistent only with the conception that such limited recognition as is given is based upon state comity. No clearer demonstration can be made of the accuracy of this statement than the obvious consequence that if the full faith and credit clause were now to be held applicable to the enforcement in the states generally of decrees of divorce of the character of the one here involved it would follow that the law of nearly all of the states would he overthrown, and thus it would come to pass that the decisions which were relied upon as establishing that the due faith and credit clause applies to such decrees would be overruled by the adoption of the proposition which it is insisted those decisions maintain. The only escape from this conclusion would be to say that the law of the states as shown by the decisions in question would remain unaffected by the ruling of the full faith and credit clause, because not repugnant to that clause. This would be, however, hut to assert that the full faith and credit clause required not that full faith and credit be given in one state to the decrees of another state, hut that only a limited and restricted enforcement of a decree of one state in another would fulfil the requirements of that provision of the Constitution. To so decide would be to destroy the true import of the full faith and credit clause, as pointed out in the outset of this opinion. Thus, in its ultimate aspect, the proposition relied upon reduces itself to this,—either that the settled law of most of the states of the Union as to divorce decrees rendered in one state, where the court rendering the decree had jurisdiction only of the plaintiff, must be held to be invalid, or that an important provision of the Constitution of the United States must he shorn of its rightful meaning.

Without questioning the power of the state of Connecticut to enforce within its own horders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character *rendered in Connecticut, within the borders [606]
of the state of New York and as to its own citizens, such efficacy as it may he entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to ohligatory enforcement in the state of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of

the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, *affirmed.*

Mr. Justice **Brown,** with whom were Mr. Justice **Harlan,** Mr. Justice **Brewer,** and Mr. Justice **Holmes,** dissenting:

Marriage between these parties was solemnized June 4, 1868. They separated the same day, without a consummation, and have never lived together since. No matrimonial domicil was ever established in New York or elsewhere. Defendant left New York soon after the wedding, drifted about the country for several years, and finally settled in Connecticut in 1877; remained there twelve years, during which time, and in 1881, he obtained a divorce in the superior court of Litchfield county, which he now sets up in defense of this action.

Plaintiff took no steps for twenty-six years to obtain legal separation or maintenance, when, in July, 1894, she applied to the superior court of the state of New York for a summons by publication. The defendant did not appear, and a decree was rendered against him by default, separating the parties and granting alimony of $1,500 a year. This decree appears to have been abortive, so far as respects alimony, at least, probably for lack of personal service on the defendant. Meantime, and in 1891, defendant had inherited a considerable property from his father.

This action was begun by a summons dated June 3, 1899, thirty-one years after the marriage; was served upon the defendant, [607]*who answered December 18, 1899, setting up, amongst other things, the decree of the superior court of Litchfield county, dissolving the marriage, the validity of which presents the only Federal question in this case.

1. This decree is attacked upon the ground that the Connecticut court acted without jurisdiction of the parties lawfully obtained. The record in that case shows that notice of the pendency of the petition was ordered to be published in a Litchfield paper, and also that a copy of the petition be sent to the respondent by mail, postage paid, at Tarrytown, New York. While there is no affidavit of the publication of the notice, there is a recital in the decree "that said complaint and writ have been duly served upon the defendant pursuant to an order of notice made thereon by the clerk of this court." This is sufficient prima facie evidence of the publication to entitle the record to be received. *Applegate* v. *Lexington & C. County Min. Co.* 117 U. S. 255, 268, 29 L. ed. 892, 896, 6 Sup. Ct. Rep. 742, wherein it was said by the court that "while it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on nonresidents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless, indeed, the statute, expressly or by implication, requires it. . . . Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. . . . It is to be presumed that the court, before making its decree, took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed."

As the record was rejected for reasons appearing only upon its face, it is unnecessary to decide where the recitals in the decree can be contradicted. Possibly the New York court might have assailed its validity by showing that, notwithstanding the recitals in the record, the court acquired no jurisdiction of the defendant by failure to comply with the order of the court with reference to the publication of notice in a newspaper, *or in sending a copy of the petition [608] and complaint to the defendant by mail at Tarrytown, New York, the last known place of residence. The fact that the referee refused to admit the record, even as prima facie evidence, foreclosed any defense founded upon the actual failure to obtain jurisdiction over the defendant.

There is no doubt of the proposition that a decree of divorce may be lawfully obtained at the matrimonial domicil, notwithstanding that the defendant may have taken up his or her residence separate from the other party in another state, providing that the law of the domicil with respect to the personal service or publication be scrupulously observed. *Atherton* v. *Atherton,* 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

Doubtless the jurisdiction of the court granting the divorce may be inquired into, and if it appear that the plaintiff had not acquired a bona fide domicil in that state at the time of instituting proceedings, the decree is open to a collateral attack (*Bell* v. *Bell,* 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551), and a recital in the proceedings of a fact necessary to show jurisdiction may be contradicted (*Thompson* v. *Whitman,* 18 Wall. 457, 21 L. ed. 897; *Streitwolf* v. *Streitwolf,* 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 550; *Andrews* v. *Andrews,* 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237).

Subject to these conditions, each state has the right to regulate the marital status of its citizens, at least so far as to determine in what manner and by whom

marriages may be solemnized, what shall be deemed the age of consent, what obligations are assumed, what property rights are created, for what causes divorces shall be granted, for what length of time the domicil of plaintiff shall have been acquired prior to the institution of the proceedings, and in what manner notice shall be given to the defendant. Nor is the power of the legislature in this connection ousted by the fact that the other party to the contract resides in another state, provided that in case of proceedings adverse to such party he or she shall be given such notice as due process of law requires. If such proceedings be *in rem* or quasi *in rem*, notice by publication is ordinarily deemed sufficient. But in case of [609] actions *in personam* *for the recovery of damages, personal service within the jurisdiction is vital to the proceedings. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Huling* v. *Kaw Valley R. & Improv Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603.

By the laws of Connecticut of 1878 (chap. 71, p. 305) exclusive jurisdiction is given to the superior courts to grant divorces for several causes, among which are "wilful desertion for three years with total neglect of duty," with a further provision (Rev. Stat. § 4555) that plaintiff shall have continuously resided in the state three years next before the date of the complaint, with certain exceptions not material to be noticed. A further provision, § 4553, that, "where the adverse party resides out of, or is absent from, the state, or the whereabouts of the adverse party is unknown to the plaintiff, any judge or clerk of the supreme court of errors, or of the superior court, or any county commissioner, may make such order of notice as he may deem reasonable, and such notice having been given and duly proved to the court, it may hear such complaint; if it finds that the defendant has actually received notice that the complaint is pending, and if it shall not appear that the defendant has had such notice, the court may hear such case, or, if it see cause, order such further notice to be given as it may deem reasonable, and continue the complaint until the order is complied with."

The complaint alleged a wilful desertion of the plaintiff for more than three years, and the court found this to be the fact.

2. The case turns upon the question whether the superior court of Litchfield county gained jurisdiction by a residence of the plaintiff within the state for more than three years. The testimony also showed that the defendant had acquired a separate domicil in New York, and had been living there for about thirteen years.

In discussing this question two propositions may be admitted at once, and discarded as having no relevancy to the case:

1. That a judgment for damages in an action *in personam* is valid only when personal service has been made upon the *de- [610] fendant within the jurisdiction of the court rendering the judgment. This disposes at once of the cases of *Pennoyer* v. *Neff*, *supra*; and of *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485, 17 L. ed. 311, where an Iowa court had undertaken to abate a nuisance on the Illinois side of the Mississippi river; and of *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 342, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669, where a state had attempted to tax property having a permanent situs in another state.

2. That the courts of one state may not grant a divorce against an absent defendant to any person who has not acquired a bona fide domicil in that state. The same rule applies if he has removed thither solely for the purpose of acquiring a domicil and obtaining a divorce for a cause which would have been insufficient in the state from which he removed. *Andrews* v. *Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237.

The jurisdiction of the Connecticut court in this case is shown not by the facts as they appear in this case, but from the record in that case, and primarily from the petition, which, under the practice in that state, is incorporated with the summons. The allegations are:

"On the first day of January, 1869, the defendant wilfully deserted the plaintiff, and has continued said desertion, with total neglect of all the duties of the marriage on her part to be performed to the date of this writ, being for more than three years, and during the plaintiff's residence in this state."

It is conceded that such desertion is good ground for a divorce in Connecticut, which may be granted to a plaintiff who has continuously resided in the state three years next before the date of the complaint. The complaint obviously made a case for divorce under the statute. The court found that the complaint and writ had been duly served on the defendant, pursuant to an order of notice made thereon by the clerk; that the allegations of the complaint had been sustained, and a divorce was granted.

The case then resolves itself into the single question whether a divorce granted to a plaintiff lawfully domiciled within a *state [611] as against a defendant domiciled in another state, who has been served by publication or letter only, is a valid defense to a suit by the latter for a separation and alimony.

Certain cases in this court tend strongly to support the proceedings in Connecticut. *Strader* v. *Graham*, 10 How. 82, 13 L. ed. 337, was an action to recover the value of certain slaves carried into Ohio, a free state. The case was dismissed, as involving a question of the local law of Kentucky, the court remarking: "Every state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory, . . . and . . . it was exclusively in the power of Kentucky [wherein the suit was brought] to determine for itself whether their employment in another state should or should not make them free on their return."

In *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226, a New York court decreed a separation and alimony to the wife. The husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, and there obtained a divorce *a vinculo* upon the ground of abandonment. The sole question raised by the record was: "Whether a wife divorced *a mensa et thoro* can acquire another domiciliation in a state of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States, having equity jurisdiction, to recover from him alimony due, and which he refuses to make arrangements to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case."

It was a suit to recover upon a judgment obtained in New York before proceedings instituted in Wisconsin, and was sustained. Obviously, the Wisconsin divorce was no defense, but its validity was not impugned.

Cheever v. *Wilson*, 9 Wall. 109, 19 L. ed. 604, turned upon certain rights of property, and incidentally upon a divorce obtained in Indiana, in a suit in which the defendant appeared. The case, however, is valuable for two questions decided: First, that a decree of divorce, valid and effectual by the [612] laws of the state *in which it was obtained, is valid and effectual in all other states; second, that a wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil; and on such a domicil, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicil nor have been the domicil of the parties at the time of the marriage, or of the offense.

Of course, it follows that if the wife may obtain a new domicil, her husband may do likewise, as was done in this case, after the separation or abandonment had taken place. In delivering the opinion, Mr. Justice Swayne observed: "The decree [of divorce] was valid and effectual according to the law and adjudications in Indiana."

The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. "'If a judgment is conclusive in the state where it is rendered, it is equally conclusive everywhere,' in the courts of the United States."

In *Cheely* v. *Clayton*, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328, a divorce obtained in a territorial court, upon notice by publication insufficient under the laws of the territory, was held to be of no effect. The court, however, observing: "If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicil, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that state," citing *Burlen* v. *Shannon*, 115 Mass. 439, and *Hunt* v. *Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

In *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723, a legislative divorce was upheld, and it was said that the fact that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. It was further said that though the conduct of the husband merited the strongest reprobation, his abandonment of his wife, his loose *morals, and shameless [613] conduct could have no bearing upon the power of the assembly to pass the act.

Four recent decisions in this court are too important to pass unnoticed. In *Bell* v. *Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551, and in *Streitwolf* v. *Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 550, it was held that a divorce obtained in a state in which neither party was domiciled, upon service by publication, and in another state, was entitled to no faith and credit. These decisions were unanimous. And in *Andrews* v. *Andrews*, *supra*, that a divorce obtained by one who had gone into another state to procure a divorce, in fraud of the law of the domicil, was also invalid.

There remains the case of *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, a divorce obtained by a husband in Kentucky, which had been the matrimonial domicil, though the wife had been absent from the state for several months, and apparently had attempted to acquire a new domicil in New York. The court took care to confine the case to the one point decided, namely, the validity of a divorce obtained at the matrimonial

domicil. The court, out of abundant caution, expressly disclaimed that the case involved the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. "In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

While the *Atherton Case*, as already stated, was confined to a divorce obtained at the matrimonial domicil, the cases cited by Mr. Justice Gray in his opinion relate to divorces obtained in a state which was the domicil only of the complaining party, and are practically the same as those cited by him in his opinion as chief justice of Massachusetts in *Burlen* v. *Shannon*, 115 Mass. 438. In reading the two cases together one [614]is *strongly impressed with the idea that in the *Atherton Case* he had the former case in mind, and gave it such approval as the facts in the latter case would warrant. Not only had the court of appeals of Kentucky decided that a wife residing in that state was entitled to obtain a decree of divorce against her husband who had left the state (*Rhyms* v. *Rhyms*, 7 Bush, 316; *Perzel* v. *Perzel*, 91 Ky. 634, 15 S. W. 658), but a number of cases from other states were cited holding to the same principle.

The opinion of the court in the present case admits that where the domicil of the husband is also the domicil of matrimony, the courts of that domicil may disregard an unjustifiable absence of the wife therefrom, and treat her as having her domicil there for the purpose of dissolving the marriage as to both parties, and that such dissolution would be recognized in all other states by virtue of the full faith and credit clause, citing to this effect *Atherton* v. *Atherton, supra*, and, as a corollary therefrom, it is admitted that no question can arise concerning the right of the state of Connecticut to give effect to a decree of divorce rendered in favor of the husband while domiciled in that state. The question is, undoubtedly, as stated, whether the Connecticut court, in virtue of the domicil of the husband in that state, had jurisdiction to render a decree against the wife which was entitled to be enforced in other states, under the full faith and credit clause.

I deny, however, that the final question is whether this would be enforcing a *personal* judgment rendered in another state against the defendant, over whom the court rendering the judgment had not acquired jurisdiction. A proceeding for divorce is not *in personam* nor of an exceptional character, except so far as all proceedings *in rem* are governed by a different rule from that applicable to proceedings *in personam*. The validity of the latter class depends upon personal service of the defendant being obtained within the jurisdiction. The validity of the former depends upon the jurisdiction of the court over the *res*—in this case the marriage relation, the domicil of the plaintiff, and such jurisdiction over the defendant as as is consonant *with the general principles [615] of the Constitution with regard to due process of law.

The propositions of the opinion, as we understand it, may be summarized as follows:

That, if one government, by virtue of its authority over marriage, may dissolve the tie as to citizens of another government, that other government would have a similar power, and hence the right of every government over its own citizens might be rendered nugatory by the exercise of the power which every other government possesses. To illustrate by the present case: That, if the husband may desert his original domicil in New York, go to the state of Connecticut, acquire a domicil there, and procure a divorce which would be binding in New York as to the party there domiciled, it would follow that the power of the state of New York as to the dissolution of the marriage, as to its domiciled citizen, would be of no practical avail. The opinion, however, fails to state the logical result of this proposition, *viz.*, that no divorce would be possible in either state without a personal service upon the other within the state. If the husband, having his domicil in Connecticut, could not obtain a divorce against his wife domiciled in New York without a personal service, it follows that the wife, domiciled in New York, could not obtain a divorce against her husband in that state without a personal service there.

Undoubtedly the laws of some states are more liberal upon the subject of divorce than those of other states, but that does not affect the question. If the complaining party has acquired a domicil in the state in which he institutes proceedings, he is entitled to the benefit of the laws of that state with respect to the causes of divorce.

It is argued that, as the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce, yet, if the validity of the Con-

necticut divorce in this case be sustained, it follows that the destruction of the power of the states over the dissolution of marriage of its own citizens would be brought [616] about by the full faith and credit *clause of the Constitution. But this was the very point decided in the *Atherton Case*, where a divorce obtained in Kentucky by publication was held good in New York, as against a proceeding by the wife for a divorce in that state. It is true that the matrimonial domicil was in Kentucky. But this does not affect the proposition asserted in the opinion, that the decree did work a dissolution of the marriage, as to her, by the operation of the full faith and credit clause of the Constitution, and to that extent it did work a destruction of the power of the state of New York over the dissolution of the marriage. But the argument to that effect was not considered by this court to be sound. It does undoubtedly follow that the *res*, that is, the marriage relation, was as much in the state of New York as it was in the state of Connecticut, but it does not follow that the action of the Connecticut court with respect to that *res* is not as much obligatory in New York as in Connecticut. It is of the very essence of proceedings *in rem* that the decree of a court with respect to the *res*, whether it be a vessel, a tract of land, or the marriage relation, is entitled to be respected in every other state or country. The status fixed by the adjudication in the state of the former is operative everywhere. Indeed, the proposition is so elementary as not to need the citation of an authority.

The conclusion of the argument is that the courts of New York, having the same power to decree a dissolution of the marriage at the suit of the wife that the courts of Connecticut would have to make a similar decree at the suit of the husband, it would become a mere race of diligence between the parties in seeking different forums in other states; or the celerity by which in such states judgments of divorce might be procured would have to be considered in order to decide which forum was controlling. Granting this to be the case, does not every plea of *res judicata* presuppose a prior judgment, and is it a defense to such plea that such judgment was obtained by superiority in a race of diligence? The whole doctrine is founded, if not upon the doctrine [617] of superior diligence, at least upon the *theory of a prior judgment, which fixes irrevocably the rights of the parties whenever and wherever these rights may come in question. Nor is the rule less operative where suits are in different states and the laws applicable to the questions therein arising are different. To illustrate: Suppose a note and mortgage were given for usurious interest, and the mortgage was sought to be foreclosed in a state where, by statute, usury would invalidate both principal and interest, and a decree were obtained dismissing the bill,—can it be doubted that if the note were sued upon in another state where usury did not invalidate the security the plea of *res judicata*, would be sustained upon the ground that the rights of the parties had been definitely fixed in the suit for the foreclosure of the mortgage? It seems to me the same rule applies in this case. So long as no proceedings are taken, the marriage would remain valid both by the laws of Connecticut and of New York. But if a suit be instituted by either party, by the husband for a divorce or by the wife for a maintenance, and the question of marriage or no marriage be made an issue, and decided in the case first brought, that decree is forever binding upon both parties. Had the wife in this case brought suit to dissolve the marriage, or for a maintenance in affirmation of the marriage, the decree of the court in New York would have been as binding upon the court in Connecticut as the decree obtained in Connecticut ought to be upon the wife in New York.

The cases in the state courts, with a few exceptions, hereinafter noted, overwhelmingly preponderate in holding that where the plaintiff has acquired a bona fide domicil in a particular state he may lawfully appeal to the courts of that state for a dissolution of the marriage tie, for the causes permitted by its statutes, and may call in the nonresident defendant by publication. To abstract all these cases would unduly prolong this opinion.

In many of them the full faith and credit clause of the Constitution does not seem to have been called to the attention of the court, and the case was disposed of upon principles of comity, *which give to the court [618] a certain latitude of discretion, whereas, under the full faith and credit clause, the consideration given to a decree in the state where it is rendered is obligatory in every other state.

One of the earliest of these cases is that of *Harding* v. *Aldcn*, 9 Me. 140, 23 Am. Dec. 549, in which the parties separated, the husband going to North Carolina and the wife to Rhode Island. She began proceedings there, which culminated in a divorce for adultery committed in North Carolina, the husband having been personally cited to appear, but refusing to do so. The divorce was held to be valid, the court observing that "the protection of innocent parties and the purity of public morals require that divorces lawfully pronounced in one

jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere," in the absence of fraud or collusion. The ruling was that the wife was entitled to dower in lands of which the husband was seised during coverture, the statute expressly giving the right where divorce was decreed for the cause of adultery, as if the husband were dead.

In *Barber* v. *Root*, 10 Mass. 260, the parties, originally domiciled in Massachusetts, removed to Vermont, and established a permanent domicil there. The court, while repudiating the idea that a divorce could be granted to a person who was not domiciled in Vermont, held the divorce to be good.

In *Hood* v. *Hood*, 11 Allen, 196, 87 Am. Dec. 709, a divorce obtained in Illinois by the husband for desertion, upon notice by publication in a newspaper, was held to be valid as against the wife, although she was then living in Massachusetts under an agreement on his part to pay her a certain sum per week; and although she had no actual notice of the proceedings, and was not in Illinois during the pendency thereof. It was further held that she could not, in a libel for divorce brought by her in Massachusetts, offer evidence that the Illinois decree was obtained by fraud, and upon facts which would not entitle her to a divorce in Massachusetts. In a subsequent case between the
[619] same parties *(110 Mass. 463) the court again decided that the Illinois decree could not be impeached, and that she was not entitled to dower in any lands of which the husband was seised during the coverture.

The whole subject was very carefully considered in *Burlen* v. *Shannon*, 115 Mass. 438, which was an action against the husband for board furnished the wife. The husband, whose wife was living apart from him without justifiable cause, removed to Indiana, acquired a domicil there, and obtained a decree of divorce by publication, and by leaving a summons at her abode in Massachusetts. The divorce was held to be valid in Massachusetts as to all persons, although the wife had never been in Indiana, never appeared in the suit there, had no knowledge that her husband contemplated going to that state, or had left Massachusetts, until after he had filed his libel for divorce. The authorities are reviewed by Mr. Justice Gray, and the conclusion reached that the divorce in Indiana was valid.

Cummington v. *Belchertown*, 149 Mass. 223, 4 L. R. A. 131, 21 N. E. 435, was an action to recover expenses incurred by the plaintiff for the support of an insane pauper. The husband had removed to another state and procured a decree annulling the marriage on the ground of fraud in concealing from him the fact of insanity before their marriage. Notice of the proceedings was served upon her, but she was not represented, and it was held that the decree was insufficient to annul her marriage in Massachusetts. It was held, under the familiar rule that the jurisdiction of the foreign court may be inquired into, that the wife, when the proceedings were commenced and concluded, was utterly insane, and that the record of the New York courts showed her to have been so, and that no guardian was appointed. The case was disposed of as one over which the New York court had acquired no jurisdiction. It does not qualify in any way the previous case of *Burlen* v. *Shannon*.

The case of *Ditson* v. *Ditson*, 4 R. I. 87, is directly in point, and I understand it to be so admitted. It was held that a *divorce [620] in Rhode Island on the ground of desertion was valid, though the husband had never been within the jurisdiction of Rhode Island, and only constructive notice of the pendency of the petition had been given him.

The rule in Kentucky is settled in *Rhyms* v. *Rhyms*, 7 Bush, 316, in which a wife proceeded against her husband as a nonresident by a warning order, and it was held that the court had jurisdiction to grant her a divorce, Chief Justice Robertson remarking: "It would be a reproach to our legislation if a faithless husband in Kentucky could by leaving the state, deprive his abandoned wife of the power of obtaining a divorce at home." In *Hawkins* v. *Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483, it was held that a divorce obtained by the husband in Indiana by constructive service determined the status of the party in Kentucky, and under the statutes of that state it barred all claim to curtesy or dower in Kentucky lands. To the same effect is *Perzel* v. *Perzel*, 91 Ky. 634, 15 S. W. 658.

The law of California is settled in *Re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887, to the effect that a suit for divorce, so far as it affects the status of the parties and the custody of their children, is a proceeding *in rem*, and service by publication on a nonresident defendant is good. This ruling was repeated in *Re James*, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122, where it is declared that such decree is equally valid in other states.

Nowhere is the rule more strongly asserted than in Tennessee, where a decree obtained in Illinois by publication was sustained in *Thoms* v. *King*, 95 Tenn. 60, 31 S. W. 983, and where it seems to have been held that the decree could not be impeached,

even by showing the absence of necessary residence.

In *Cooper* v. *Cooper*, 7 Ohio, pt. 2, p. 238, it was held that a divorce granted in Indiana precluded an application for a divorce and alimony in Ohio. In *Cox* v. *Cox*, 19 Ohio St. 502, 2 Am. Rep. 415, the validity of a foreign decree of divorce obtained by constructive service, except so far as regarded the question of alimony, was sustained. The same ruling was made in *Doerr* v. *Forsythe*, 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055, holding that while the Indi-
[621] ana divorce was good, *it did not affect the property rights of the wife in the state of Ohio.

The rule in Missouri is stated in *Gould* v. *Crow*, 57 Mo. 200, that a divorce regularly obtained by the husband in Indiana on an order of publication operates as a divorce in his favor in Missouri, so as to prevent his wife from claiming dower in lands owned by him in that state. The decree so pronounced is a judgment *in rem* and is valid everywhere under the Constitution and laws of the United States. A like ruling was made in *Anthony* v. *Rice*, 110 Mo. 223, 19 S. W. 423.

The law in Kansas is settled in *Rodgers* v. *Rodgers*, 56 Kan. 483, 43 Pac. 779, to the effect that the courts of a sister state may dissolve a marriage relation between a husband domiciled there and a wife domiciled in Kansas, by publication, although unknown to her; but that such courts have no power to settle the title of lands in Kansas or control the custody of children residing there. But it was also decided in *Chapman* v. *Chapman*, 48 Kan. 636, 29 Pac. 1071, that a wife having obtained a divorce in Ohio upon service by publication, was not entitled to dower in lands in Kansas fraudulently conveyed by her husband in fraud of her or others.

In *Smith* v. *Smith*, 43 La. Ann. 1140, 10 So. 248, it is held that a wife may acquire a separate domicil from that of her husband, where his conduct has been such as to furnish ground for divorce, and her marriage status becomes subject to the jurisdiction of that domicil, and that the courts thereof may grant a divorce upon actual or constructive notice. The rights of the Louisiana courts to decree a divorce against an absentee by means of substituted service is again affirmed in *Butler* v. *Washington*, 45 La. Ann. 279, 19 L. R. A. 814, 12 So. 356.

The law of Wisconsin is the same. *Shafer* v. *Bushnell*, 24 Wis. 372: *Cook* v. *Cook*, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443, though in the latter case the right of the wife to an interest in her husband's lands in Wisconsin was preserved.

In *Thompson* v. *State*, 28 Ala. 12, the right of the husband to emigrate and acquire a new domicil, and procure a *divorce upon [622]
publication in the state of his domicil was also affirmed. See also *Turner* v. *Turner*, 44 Ala. 437. In the latter case it is indicated that a foreign divorce did not settle the rights of the wife to dower in his lands, or any other interests of a pecuniary character.

In *Kline* v. *Kline*, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, a decree rendered in another state on service by publication was recognized, except so far as it attempted to fix the custody of the minor children. In *Van Orsdal* v. *Van Orsdal*, 67 Iowa, 35, 24 N. W. 579, the property rights of the wife were recognized, but this right was limited to property within the state, and which the husband owned at the time of the divorce, and not to what he subsequently acquired. In this case it was said; "The divorce was granted . . . in May, 1880. In November, 1881, the defendant's father died in this state, possessed of certain property which the defendant inherited. Now, while it may be that the plaintiff might be entitled to alimony if the defendant had owned property in the state at the time the divorce was procured in Nebraska, she cannot be so entitled because he has subsequently acquired property. The plaintiff, if entitled to alimony, was so entitled at the time the divorce was granted. The relation of husband and wife then ceased, and neither party is entitled to any share or interest in property which may be subsequently acquired."

In Indiana the right of a wife domiciled there to a divorce against the husband who never resided in that state, and upon whom service was only obtained by publication, is recognized in *Tolen* v. *Tolen*, 2 Blackf. 407, 20 Am. Dec. 742; *Hood* v. *State*, 56 Ind. 263, 26 Am. Rep. 21; and in *Hilbish* v. *Hattle*, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20, it was held that the wife had no rights in his property by virtue of her marriage relations with the husband, though the court did not, in the divorce proceedings, adjudicate the property rights of the parties.

In *Garner* v. *Garner*, 56 Md. 127, the power to grant a divorce against a nonresident, upon whom process had not been served, was recognized, but the right to a decree that the nonresident should not marry again was denied.

*In *Thurston* v. *Thurston*, 58 Minn. 279, [623]
59 N. W. 1017, the divorce was recognized, though process was served outside of the state. But it was held that the question of alimony was not *res judicata* by reason of

the judgment. The wife was allowed alimony out of the property in Minnesota.

The validity of foreign divorces obtained without personal service is recognized in Illinois, in *Knowlton* v. *Knowlton*, 155 Ill. 158, 39 N. E. 595, and in *Dunham* v. *Dunham*, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841.

The law in New Jersey appeared at one time to favor the contention of the wife in this case. The gist of the decisions seemed to be that a foreign decree is enforceable in another state only on the ground of comity. This was indicated in *Doughty* v. *Doughty*, 28 N. J. Eq. 581, though the decree in that case was held to have been obtained by fraud. It was admitted that the decree obtained by the husband in Illinois was lawful and binding there, but it was held that it did not change the status of the wife in New Jersey, her citizenship there being admitted. The case was properly decided on the ground that the husband went to Illinois to obtain a divorce, and acquired no bona fide domicil there. The same rule was recognized in *Flower* v. *Flower*, 42 N. J. Eq. 152, 7 Atl. 669. These cases, however, seem to have been overruled in *Felt* v. *Felt*, 59 N. J. Eq. 606, 47 L. R. A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071, where it was held that the domicil of the complainant in a foreign state was sufficient to give jurisdiction, notwithstanding the defendant had not been served with process there. The chief justice remarked in this case: "A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous as they happen to be within the limits of one state or another is not to be tolerated any further than is plainly required by public policy." This case evidently puts New Jersey in line with the vast majority of other states.

The cases of New York upon this subject are numerous and perhaps not wholly reconcilable, but we think that the law, as summarized in the last case of *Winston* v. *Winston*, 165 N. Y. 553, 59 N. E. 273, is adverse to the validity of a divorce obtained in another state without service of process [624] within the jurisdiction. Of *the same tenor are the cases in Pennsylvania: *Colvin* v. *Reed*, 55 Pa. 375; *Reel* v. *Elder*, 62 Pa. 308, 1 Am. Rep. 414. North Carolina: *Irby* v. *Wilson*, 21 N. C. (1 Dev. & B. Eq.) 568; *Harris* v. *Harris*, 115 N. C. 587, 44 Am. St. Rep. 471, 20 S. E. 187. South Carolina: *McCreery* v. *Davis*, 44 S. C. 195, 28 L. R. A. 655, 51 Am. St. Rep. 794, 22 S. E. 178.

The law in this country, then, may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisiana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois, and New Jersey, the validity of a divorce obtained in another state by a party there domiciled, in a proceeding where constructive service upon the defendant only is obtained, is fully recognized. In Ohio, Iowa, and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and to dower is preserved. But the very cases which limit the effect of the divorce, so far as property rights are concerned, restrict such rights to dower in lands of which the husband was seised during coverture, and inferentially, at least, to alimony from such property. It is also limited to property within the state where suit is brought. That her rights in her husband's property should extend to property acquired by him long after the divorce is nowhere indicated.

The only states in which it is held that a party domiciled in another state may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.

A proceeding for divorce is a suit *in rem*, with which is often incorporated a suit *in personam*. The *res* is aptly stated in *Ellison* v. *Martin*, 53 Mo. 575, as "the status of the plaintiff *in relation to the defendant*, to be acted on by the court. This relation being before the court in the person of the plaintiff, the court acts on it, and dissolves it by a judgment of divorce." The fact subsequently ascertained, that it may have been procured by fraud or false testimony, is wholly beside the question, as we shall hereafter show. The fact that the husband changed his domicil to another state, after the cause of action *arose, is also immaterial. [625] The status of the husband in this case was irrevocably fixed by the decree. It is unnecessary to consider how far it affected the status of the wife in New York, which, in respect to other questions, may be subject to the local law; but her relations as against her husband are controlled by the decree which fixed *his status*. Indeed, it would be a reproach to our jurisprudence if an injured party residing in one state could not obtain a decree from the other party, without pursuing the offending party into another and distant state, where he or she may have chosen to establish a domicil.

In this case the referee reported that the defendant abandoned the plaintiff without cause or justification. An exception was taken to this report, and the testimony was sent up, which shows that the parties separated on the day of their marriage and have never lived together since. The testimony leaves it doubtful whether it was a case of abandonment or of separation by mutual consent. It does, however, show that

plaintiff took no steps to assert her marital rights for twenty-six years after her marriage. Her husband having in the meantime inherited a large amount of property from his father, she began suit for divorce *a mensa et thoro* and an allowance of alimony. This suit, however, was ineffectual so far as respects the alimony, as no personal service was obtained. She waited again for five years and began this proceeding both for a separation, which she had already obtained, and for alimony.

We think the defendant may lawfully reply this: "You are pursuing me as your husband for a separation *de jure* which has existed for thirty-one years *de facto*, and since 1894 *de jure*, and for an alimony which is obviously the sole object of your proceeding. Your only claim against me is as your husband. I am not your husband. Twenty-three years ago the superior court of Litchfield county, Connecticut, in which state I had an actual and bona fide domicil, and which had had sole jurisdiction over my marital status for twelve years, liberated me from the bonds of matrimony and pronounced me a free man. In the meantime I have married another woman, and if your [626] *position be a sound one, I am, at least in the state of New York, a bigamist, and my wife an adulteress." It is difficult to conceive of a case calling more loudly for the application of the general doctrine.

As no question is made as to the validity of the Connecticut decree and its legal effect in that state, and as this court has repeatedly decided that, under the full faith and credit clause of the Constitution, a judgment conclusive in the state where it is rendered is equally conclusive everywhere in the courts of the United States (*Cheever* v. *Wilson*, 9 Wall. 108, 19 L. ed. 604; *Mills* v. *Duryee*, 7 Cranch, 483, 3 L. ed. 412; *D'Arcy* v. *Ketchum*, 11 How. 165, 13 L. ed. 648), I do not understand how this decree can be denied the same effect in New York that it has in Connecticut without disregarding the constitutional provision in question. The result is that the husband, freed from the bonds of matrimony in Connecticut, was at liberty to contract another marriage there, while the wife cannot, even at this late day, contract another marriage in New York without being guilty of adultery.

3. It is insisted, however, that the decree of the Connecticut court was obtained by the fraud of Haddock, in stating in his complaint that his wife had deserted him, when, in the present case, it appears from his own testimony that he, in fact, abandoned and refused to live with her, or that they separated by mutual consent.

The evidence upon which the Connecticut decree was granted does not appear in the record, and it is possible that the case was made out by the testimony of other witnesses. But, however that may be, this decree cannot be impeached by evidence that it was obtained by false testimony, even though it be testimony of the plaintiff in that proceeding and the defendant in this. *Hood* v. *Hood*, 11 Allen, 196, 87 Am. Dec. 709, in which it was held that both parties had their domicil in Illinois, and were subject to the jurisdiction of its courts, and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to *contradict it on a libel filed by her [627] afterwards in Massachusetts. See same case, 110 Mass. 463.

The rule is well settled that while a judgment or decree may sometimes be impeached for fraud, it can only be for a fraud extrinsic to the cause,—as, that the judgment was collusively obtained to defraud some other person; and that it cannot be impeached by either of the parties thereto by reason of false testimony given at the time, or which must have been given to establish the plaintiff's case, or even by perjury of one of the parties thereto. Granting that the testimony shows the absence of good faith, and even perjury, on the part of the husband, in the Connecticut suit, the decree cannot be opened for that reason, or for any reason, which would not logically involve a re-examination of the entire facts upon which the decree is obtained. *Christmas* v. *Russell*, 5 Wall. 290, 18 L. ed. 475; *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Simms* v. *Slacum*, 3 Cranch, 300, 2 L. ed. 446; *Ammidon* v. *Smith*, 1 Wheat. 447, 4 L. ed. 132; *Smith* v. *Lewis*, 3 Johns. 157, 3 Am. Dec. 469; *Marriot* v. *Hampton*, 7 T. R. 269; *Demerit* v. *Lyford*, 27 N. H. 541, 546; *Peck* v. *Woodbridge*, 3 Day, 30; *Dilling* v. *Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Homer* v. *Fish*, 1 Pick. 435, 11 Am. Dec. 218; *Lewis* v. *Rogers*, 16 Pa. 18; *Sidensparker* v. *Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Boston & W. R. Corp.* v. *Sparhawk*, 1 Allen, 448, 79 Am. Dec. 750; *Damport* v. *Sympson*, Cro. Eliz. pt. 2, p. 520; *Eyres* v. *Sedgewicke*, Cro. Jac. 601; *Mason* v. *Messenger*, 17 Iowa, 261, 272; *Walker* v. *Ames*, 2 Cow. 428; *White* v. *Merritt*, 7 N. Y. 352, 57 Am. Dec. 527.

When it is considered that the status of the defendant was fixed by the decree of the Connecticut court in 1881, in a proceeding of which his wife had due notice, that upon the faith of this decree he remarried the following year, and that the plaintiff made no move to establish her conjugal rights for thirteen years thereafter, and for twenty-

six years after her marriage, the injustice of holding all these proceedings to be null and void, even upon the assumption of perjury committed by the defendant, becomes the more manifest. We think that at least the record should have been received.

I regret that the court in this case has [628] taken what seems to *me a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede.

Mr. Justice **Holmes,** with whom concurred Mr. Justice **Harlan,** Mr. Justice **Brewer,** and Mr. Justice **Brown,** dissenting:

I do not suppose that civilization will come to an end whichever way this case is decided. But as the reasoning which prevails in the mind of the majority does not convince me, and as I think that the decision not only reverses a previous well-considered decision of this court, but is likely to cause considerable disaster to innocent persons, and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views. Generally stated, the issue is whether, when a husband sues in the court of his domicil for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case. If the wife did desert her husband in fact, or if she was served with process, I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another state, on a retrial of the merits, finds them to have been decided rightly, its duty will be to declare the decree a bar to its inquiry. The first form of the question is whether it has a right to inquire into the merits at all. But I think that it will appear directly that the issue is narrower even than that.

In *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, a divorce was granted, on the ground of desertion, to a husband in Kentucky against a wife who had established herself in New York. She did not appear in the suit and the only notice to her was by mail. Before the decree was made she sued in New York for a divorce from bed and board, but pending the latter proceedings the Kentucky suit was brought to its end. The husband [629] appeared *in New York and set up the Kentucky decree. The New York court found that the wife left her husband because of his cruel and abusive treatment, without fault on her part, held that the Kentucky decree was no bar, and granted the wife her divorce from bed and board. The New York decree, after being affirmed by the court of appeals, was reversed by this court on the ground that it did not give to the Kentucky decree the faith and credit which it had by law in Kentucky. Of course, if the wife left her husband because of his cruelty, and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open, but was conclusively settled by the Kentucky decree.

There is no difference, so far as I can see, between *Atherton* v. *Atherton* and the present case, except that in *Atherton* v. *Atherton* the forum of the first decree was that of the matrimonial domicil, whereas in this the court was that of a domicil afterwards acquired. After that decision any general objection to the effect of the Connecticut decree on the ground of the wife's absence from the state comes too late. So does any general objection on the ground that to give it effect invites a race of diligence. I therefore pass such arguments without discussion, although they seem to me easy to answer. Moreover, *Atherton* v. *Atherton* decides that the jurisdiction of the matrimonial domicil, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if her husband's cruelty has driven her out of the state, and she has acquired a separate domicil elsewhere, upon the principles which we all agree are recognized by this court.

I can see no ground for giving a less effect to the decree when the husband changes his domicil after the separation has taken place. The question whether such a decree should have a less effect is the only question open, and the issue is narrowed to that. No one denies that the husband may sue for divorce in his new domicil, or, as I have said, that if he gets a decree when *he really has been deserted, it will be [630] binding everywhere. *Hawkins* v. *Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483, cited 181 U. S. 162, 45 L. ed. 799, 21 Sup. Ct. Rep. 544; *Cheely* v. *Clayton*, 110 U. S. 701, 705, 28 L. ed. 298, 299, 4 Sup. Ct. Rep. 328. It is unnecessary to add more cases. The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted, his power over the matrimonial domicil remains so that the domicil of the wife accompanies him wherever he goes, whereas if he is the deserter he

has no such power. Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicil, he is equally powerless to keep her domicil there, if she moves into another state. The truth is that jurisdiction no more depends upon both parties having their domicil within the state, than it does upon the presence of the defendant there, as is shown not only by *Atherton* v. *Atherton*, but by the rights of the wife in the matrimonial domicil when the husband deserts.

There is no question that a husband may establish a new domicil for himself, even if he has deserted his wife. Yet in these days of equality I do not suppose that it would be doubted that the jurisdiction of the court of the matrimonial domicil to grant a divorce for the desertion remained for her, as it would for him in the converse case. See *Cheever* v. *Wilson*, 9 Wall. 108, 19 L. ed. 604. Indeed, in *Ditson* v. *Ditson*, 4 R. I. 87, which, after a quotation of Judge Cooley's praise of it, is stated and relied upon as one of the pillars for the decision of *Atherton* v. *Atherton*, a wife was granted a divorce, without personal service, in the state of a domicil acquired by her after separation, on the sole ground that in the opinion of the court its decree would be binding everywhere. If that is the law it disposes of the case of a husband under similar circumstances,—that is to say, of the present case, *a fortiori;* for I suppose that the notion that a wife can have a separate domicil from her husband is a modern idea. At least *Ditson* v. *Ditson* confirms the assumption that jurisdiction is not dependent [631] on the wife's actually residing in *the same state as her husband, which has been established by this court. *Atherton* v. *Atherton*, *supra;* *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; *Cheever* v. *Wilson*, *supra*. When that assumption is out of the way, I repeat that I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicil and that, admitted to exist to some extent, in a domicil later acquired. I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicil because the domicil of the wife does not follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicil if, in consequence of her husband's conduct, the wife has left the state. But *Atherton* v. *Atherton* decides that it does not.

It is important to bear in mind that the present decision purports to respect, and not to overrule, *Atherton* v. *Atherton*. For that reason, among others, I spend no time in justifying that case. And yet it appears to me that the whole argument which prevails with the majority of the court is simply an argument that *Atherton* v. *Atherton* is wrong. I have tried in vain to discover anything tending to show a distinction between that case and this. It is true that in *Atherton* v. *Atherton*, Mr. Justice Gray confined the decision to the case before the court. Evidently, I should say, from internal evidence, in deference to scruples which he did not share. But a court, by announcing that its decision is confined to the facts before it, does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is *a little nearer than the nearest [632] opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (Rev. Laws, chap. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicil when the married pair happens to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, article 4, § 1, the notion of a judgment being valid and binding in the state where it is rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of those states. No doubt some color for such a notion may be found in state decisions. State courts do not always have the Constitution of the United States vividly present to their minds. I am responsible

for language treating what seems to me the fallacy as open, in *Blackinton* v. *Blackinton*, 141 Mass. 432, 436, 55 Am. Rep. 484, 5 N. E. 830. But there is no exception in the words of the Constitution. "If the judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere." *Christmas* v. *Russell*, 5 Wall. 290, 302, 18 L. ed. 475, 478. Marshall, Ch. J., in *Hampton* v. *M'Connel*, 3 Wheat. 234, 4 L. ed. 378; *Mills* v. *Duryee*, 7 Cranch, 481, 485, 3 L. ed. 411, 413; Story, Const. § 1313. See also *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 644, 645, 44 L. ed. 619, 621, 622, 20 Sup. Ct. Rep. 506. I find no qualification of the rule in *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. That merely decided, with regard to a case not within the words of the Constitution, that a state judgment could not be sued upon when the facts which it established were not a cause of action outside the state. It did not decide or even [633] remotely suggest that the judgment *would not be conclusive as to the facts if in any way those facts came in question. It is decided as well as admitted that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the state where it is rendered. *Maynard* v. *Hill*, *supra*. I think it enough to read that case in order to be convinced that at that time the court had no thought of the divorce being confined in its effects to the territory where it was granted, and enough to read *Atherton* v. *Atherton* to see that its whole drift and tendency now are reversed and its necessary consequences denied.

FREDERICK ST. JOHN, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 633–638.)

Constitutional law—equal protection of the laws—discrimination.—Nonproducing venders of milk are not denied the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution because they are not given the privilege accorded to producing venders of exempting themselves from actions or penalties for violations of the provisions of the New York agricultural law to prevent the sale of adulterated milk by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer.

[No. 210.]

Argued March 14, 1906. Decided April 16, 1906.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, affirming the judgment of the Appellate Division of the Supreme Court, Fourth Department, which, overruling exceptions ordered to be heard in that court in the first instance, entered judgment on a verdict directed in favor of plaintiffs at a trial term of the Supreme Court, held in and for the county of Erie, in that state, in an action to recover a penalty for selling adulterated milk. *Affirmed.*

See same case below, 178 N. Y. 617, 70 N. E. 1104.

The facts are stated in the opinion.

Mr. **William Brennan, Jr.,** argued the cause and filed a brief for plaintiff in error:

The statute in question places burdens and obligations upon nonproducing venders of milk that producing venders do not have to bear.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *State* v. *Haun*, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340.

It makes all evidence of intent immaterial in the case of the nonproducing vender of milk, and material in the case of the producing vender of that commodity.

People v. *Laesser*, 79 App. Div. 394, 79 N. Y. Supp. 470; *Missouri* v. *Lewis* (*Bowman* v. *Lewis*) 101 U. S. 22, 25 L. ed. 989; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Cooley, Const. Lim. 5th ed. pp. 484–486.

It makes the same act a crime if done by one person, and a blameless act if done by another person.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Mr. **Horace McGuire** argued the cause, and, with *Mr. Julius M. Mayer*, filed a brief for defendant in error:

The act in question was intended to secure the general comfort, health, and prosperity of the state, and was within its police powers.

People v. *Cipperly*, 101 N. Y. 634, 4

NOTE.—*As to the validity of class legislation*—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

N. E. 107; *People* v. *West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *People* v. *Kibler*, 106 N. Y. 321, 12 N. E. 795; *Austin* v. *Tennessee*, 179 U. S. 349, 45 L. ed. 228, 21 Sup. Ct. Rep. 132; *People* v. *Laesser*, 79 App. Div. 384, 79 N. Y. Supp. 470.

The statute in question does not violate § 1 of the 14th Amendment of the Constitution of the United States.

Jacobson v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; *Jones* v. *Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error is a nonproducing wholesale and retail milk dealer in the city of
[634] Buffalo, New York. In February, 1903, *he exposed for sale and sold a quantity of milk in violation of §§ 20 and 22 of chapter 338 of the laws of New York for the year 1893, and its amendments and supplements, in that the said milk contained more than 88 per cent of water and less than 12 per cent of milk solids, to wit, 89.24 per cent of water and 10.36 per cent of milk solids.

The commissioner of agriculture of the state, in pursuance of said laws, filed a complaint against plaintiff in error in the supreme court of the state, charging him with the violation of the laws, and that it was his second offense. Judgment was prayed for the sum of $200, in pursuance of § 37. Plaintiff in error admitted the charge, but alleged in defense that the laws were in contravention of § 1 of the 14th Amendment of the Constitution of the United States; also of the Constitution of New York.

At the trial he offered to show that the milk from which the sample exhibited in the case was taken was in the same condition when the sample was taken as it was when it left the herd of the producer. The testimony was rejected and plaintiff in error excepted. The court directed the jury to find a verdict against him for $100 and costs, which was done. He excepted to the ruling. Under the procedure in New York the court ordered the exceptions to be heard in the appellate division. In that court the exceptions were overruled, a motion for a new trial was denied, and judgment entered on the verdict. On appeal, the court of appeals affirmed the judgment, and the record and proceedings were remanded to the supreme court, where judgment was entered in accordance with the remittitur from the court of appeals. This writ of error was then sued out.

The purpose of the law which is assailed is to prevent the sale of adulterated and unwholesome milk. Section 20† defines *what [635] milk shall be deemed adulterated, and it gives a very comprehensive meaning to the word. Section 22 prohibits the sale or offering for sale of such milk, or "any unclean, impure, unhealthy, or unwholesome milk." Section 7 makes intention immaterial. Section 37 provides for the forfeiture to the people of the state of New York of not less than $50 for the first violation of the law, and increased sums for second and subsequent violations, and also makes violations of the law misdemeanors. Section 12 is the one which is especially complained of. It was added to the original law in 1898, and is (omitting matter not necessary to quote) as follows:

"Sec. 12. Inspection, how conducted. . . . In taking samples of milk for analysis at a creamery, factory, platform, or other place where the same is delivered by the producer for manufacture, sale, or shipment, or from a milk vender who produces the milk which he sells, with a view of prosecuting the producer of such milk for delivering, selling, or offering for sale adulterated milk, the said commissioner of agriculture or assistant or his agent or agents shall, within ten days thereafter, with the consent of the said producer, take a sample in a like manner of the mixed milk of the herd of cows from which the milk first sampled was drawn, and shall deliver the dupli-

†Sec. 20. Definitions. . . .

The term "adulterated milk," when so used, means:

1. Milk containing more than 88 per centum of water or fluids.

2. Milk containing less than 12 per centum of milk solids.

3. Milk containing less than 3 per centum of fat.

4. Milk drawn from cows within fifteen days before and five days after parturition.

5. Milk drawn from animals fed on distillery waste or any substance in a state of fermentation or putrefaction, or any unhealthy food.

6. Milk drawn from cows kept in a crowded or unhealthy condition.

7. Milk from which any part of the cream has been removed.

8. Milk which has been diluted with water or any other fluid, or to which has been added or into which has been introduced any foreign substance whatever.

All adulterated milk shall be deemed unclean, unhealthy, impure, and unwholesome.

Sec. 22. Prohibition of the sale of adulterated milk.—No person shall sell or exchange, or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated, or unwholesome milk. . . .

cate sample to the said producer, and shall cause the sample taken by himself or his [636] agent to be analyzed. If the sample of *milk last taken by the commissioner of agriculture or his agent or agents shall, upon analysis, prove to contain no higher percentage of milk solids or no higher percentage of fat than as the sample taken at the creamery, factory, platform, or other place, then no action shall lie against the said producer for violation of subdivisions 1, 2, 3, 7, and 8 of § 20 of the agricultural law. In taking a second sample, as above set forth, from the mixed milk of the herd, it shall be the duty of the commissioner of agriculture to have an assistant, agent, or agents present during the entire time in which the said cattle are being milked, to observe closely so as to be sure that the milk thus to be sampled is not adulterated, and to see that it is thoroughly mixed, so that the sample taken shall be a fair sample of the average quality of the mixed milk of the entire dairy or herd of cows of said producer. If, however, the said producer refuses to allow such examination of the milk produced by his dairy, then he shall be precluded from offering any evidence whatever tending to show that the milk delivered by him at the said creamery, factory, platform, or other place was just as it came from the cow. If the said producer does permit such examination, the commissioner of agriculture shall, upon receiving application therefor, send to said producer a copy of the analysis of each of the samples of milk so taken and analyzed as above provided." [N. Y. Laws 1898, chap. 557, § 1.]

The contention of plaintiff in error is that nonproducing venders are discriminated against, and hence denied the equal protection of the laws, contrary to the provisions of the 14th Amendment of the Constitution of the United States, in that they may not, as producing venders may, exempt themselves from actions or penalties for violations of subdivisions 1, 2, 3, 7, and 8 of § 20 by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer.

It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediate- [637] ly to consider *whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose.

By referring to § 20 it will be observed that adulterated milk, as there defined, includes not only that to which something has been added, but milk from which the cream has been removed, or which is deficient naturally in certain substances, or taken from cows fed on certain things, or cows in certain conditions when milked. In other words, the purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. All other milk is declared to be "unclean, impure, unhealthy, adulterated, or unwholesome."

It is not contended that such purpose is not within the power of the state, but it is contended that the power is not exercised on all alike who stand in the same relation to the purpose, and quite dramatic illustrations are used to show discrimination. A picture is exhibited of producing and nonproducing venders selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted, the act of the other prohibited or penalized. If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated; but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration,—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and *its penalties adjusted. As the standard es- [638] tablished can be proved in the hands of a producing vender, he is exempt from the penalty; as it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt. In the one case the source of milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances. We cannot see that any particular hardship results. The nonproducing vender must exercise care in his purchases, and good all around may be accomplished. Through penalty on the nonproducing vender the producer is ultimately reached, though he may seem to be indulged. He will have to raise the standard of the milk of his herd if he would keep or extend his trade as anything but a mere retailer of his product.

Judgment affirmed.

J. G. RAWLINS, Milton Rawlins, Leonard Rawlins, and Jesse Rawlins, *Plffs. in Err.*,

v.

STATE OF GEORGIA.

(See S. C. Reporter's ed. 638-640.)

Constitutional law—due process of law in criminal proceedings—excluding persons from jury service.—Excluding lawyers, ministers, doctors, dentists, and railway engineers and firemen from serving on either the grand or petit juries does not deny a person convicted of crime in a state court the due process of law guaranteed by the 14th Amendment to the Federal Constitution.

[No. 547.]

Argued April 6, 1906. Decided April 16, 1906.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a conviction of murder in the Superior Court of Lowndes County, in that state. *Affirmed.*

See same case below (Ga.) 52 S. E. 1.

The facts are stated in the opinion.

Mr. **John Randolph Cooper** argued the cause, and, with *Mr. Oscar M. Smith*, filed a brief for plaintiffs in error:

Trial and conviction on a bill of indictment found by an illegal grand jury and tried by an illegal petit jury are unconstitutional; and, if the accused is deprived of his life or liberty, he will be deprived of it contrary to the state's Constitution and the 14th Amendment of the Constitution of the United States.

State v. *Lawrence*, 12 Or. 297, 7 Pac. 116; *Wilson* v. *State*, 69 Ga. 236; *Rogers* v. *Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *Carter* v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Tarrance* v. *Florida*, 188 U. S. 519, 47 L. ed. 572, 23 Sup. Ct. Rep. 402; *Washington* v. *State*, 122 Ga. 736, 50 S. E. 920.

When a grand jury is not selected as required by law, or a selection is made of such persons as are not qualified to act as grand jurors, an indictment found by them is null and void, and should be quashed, and the prisoner indicted *de novo*.

State v. *Lawrence, supra; Finley* v. *State*, 61 Ala. 201; *Couch* v. *State*, 63 Ala. 163; *Clare* v. *State*, 30 Md. 165; *Wilburn* v. *State*, 21 Ark. 201; *Whitehead* v. *Com.* 19 Gratt. 640; *McQuillen* v. *State*, 8 Smedes & M. 587; *State* v. *Williams*, 5 Port. (Ala.) 130; *Dutell* v. *State*, 4 G. Greene, 125; *Doyle* v. *State*, 17 Ohio, 222; *Fitzgerald* v. *State*, 4 Wis. 398; *Vanhook* v. *State*, 12 Tex. 252; *Crowley* v. *United States*, 194 U. S. 472, 48 L. ed. 1081, 24 Sup. Ct. Rep. 731; *Rodriguez* v. *United States*, 198 U. S. 164, 49 L. ed. 997, 25 Sup. Ct. Rep. 617; Thompson & M. Juries, § 140, pp. 118, 119.

An indictment found by a grand jury organized under an unconstitutional law should be quashed and a judgment of conviction founded thereon reversed.

State v. *Lawrence, supra.*

The prisoners in this case did not get due process of law granted to them. Due process of law is process of law according to the law of the land.

French v. *Barber Asphalt Paving Co.* 181 U. S. 330, 331, 334, 335, 45 L. ed. 884, 886, 21 Sup. Ct. Rep. 625; *Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Yick Wo* v. *Hopkins*, 118 U. S. 369, 374, 30 L. ed. 226, 227, 6 Sup. Ct. Rep. 1064; *Davidson* v. *New Orleans*, 96 U. S. 102, 24 L. ed. 618; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Cooley's Const. Lim. 351; *Mallett* v. *North Carolina*, 181 U. S. 599, 45 L. ed. 1020, 21 Sup. Ct. Rep. 730.

The prisoners were denied the equal protection of the general laws prevailing in the state enjoyed by other persons and other classes in the same place and under like circumstances.

Gardner v. *Michigan*, 199 U. S. 334, *ante*, 217, 26 Sup. Ct. Rep. 106.

The court declined to hear *Mr. John C. Hart* on behalf of defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

The plaintiffs in error were indicted for murder, tried, and found guilty. Leonard Rawlins was sentenced to the penitentiary for life, and the others were sentenced to be hanged. When the grand jury was organized each of the accused filed a written challenge to the array, on the ground that "while there are in Lowndes county many lawyers, many preachers, ministers, many doctors, many engineers and firemen of railroad trains, and many dentists, as many as ten of each class named, or other large number of each of said class, all citizens and residents of said county, and being competent and qualified jurors, as to age and uprightness, experience and intelligence, and as to all the legal qualifications of a juror, yet each and every one of these classes of citizens, and each and every member thereof in the county, is

NOTE.—*As to what constitutes due process of law*—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; *Re* Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

expressly and purposely excluded from the grand jury service by the commissioners failing and refusing to put any of said names in the box, so that, not being in the box, they cannot be legally drawn for service." The challenge was repeated as a plea in abatement, and the petit jury was challenged on the same ground. Rights under the 14th Amendment were specially set up and claimed. The challenges and pleas were overruled, subject to exceptions. The exceptions were overruled by the supreme court of the state (52 S. E. 1), and a writ of error was taken out to bring the case to this court.

At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the state Constitution and laws into the 14th Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the state Constitu-
[640] tion and laws as construed *by the state court are consistent with the 14th Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms.

When the question is narrowed to its proper form the answer does not need much discussion. The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission, no doubt, was that pointed out by the state court,—that the business of the persons omitted was such that either they would have been entitled to claim exemption, or that probably they would have been excused. Even when persons liable to jury duty under the state law are excluded, it is no ground for challenge to the array, if a sufficient number of unexceptional persons are present. *People* v. *Jewett*, 3 Wend. 314. But if the state law itself should exclude certain classes on the bona fide ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the 14th Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains—in short, substantially the exemption complained of—is of old standing, and not uncommon in the United States. It could not be denied that the state properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case.

Judgment affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

VALENTINE HUBER, *Plaintiff in Error, v.* JENNINGS-HEYWOOD OIL SYNDICATE *et al.* [No. 30.]

(See S. C. Reporter's ed. 641.)

In Error to the Supreme Court of the State of Louisiana.

See same case below, 111 La. 747, 35 So. 889.

Messrs. Branch K. Miller, H. G. Dufour and *D. Caffery, Jr.*, for plaintiff in error.

Mr. Gilbert L. Dupré for defendants in error.

March 5, 1906. *Dismissed* for want of jurisdiction. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Brown* v. *New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Turner* v. *Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Mutual L. Ins. Co.* v. *McGrew*, 188 U. S. 308, 47 L. ed. 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375; *Texas & P. R. Co.* v. *Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10.

PEOPLE'S NATIONAL BANK OF CHARLOTTESVILLE, VIRGINIA, *et al. Appellants, v.* JAMES H. SAVILLE *et al.* [No. 218.]

(See S. C. Reporter's ed. 641.)

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 25 App. D. C. 139.

Mr. D. W. Baker for appellants.

Messrs. John Ridout and *Fulton Lewis* for appellees.

March 19, 1906. *Dismissed* for the want of jurisdiction. *Ballard Paving Co.* v. *Mulford*, 100 U. S. 147, 25 L. ed. 591; *Gibson* v. *Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Walter* v. *Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Chamberlin* v. *Browning*, 177 U. S. 605, 44 L. ed. 906, 20 Sup. Ct. Rep. 820; *Hale* v. *Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244.

Application for Writ of Certiorari denied.

EX PARTE: IN THE MATTER OF COLUMBIA GEORGE AND TOY TOY, *Petitioners.* [No. —, Original.]

(See S. C. Reporter's ed. 641.)

Motion for Leave to File Petition for a Writ of Habeas Corpus.

Messrs. A. E. Crane and *F. T. Woodburn* for petitioners.

No opposition.

March 5, 1906. ***Denied.***

SKANEATELES PAPER COMPANY *et al., Plaintiffs in Error, v.* CITY OF SYRACUSE. [No. 69.]

(See S. C. Reporter's ed. 642.)

In Error to the Supreme Court of the State of New York.

See same case below, in Appellate Division, 45 App. Div. 249, 61 N. Y. Supp. 165; in Court of Appeals, 169 N. Y. 231, 62 N. E. 354.

Messrs. Martin Conboy, John W. Griggs, Arthur J. Baldwin, and *Charles W. Tooke* for plaintiffs in error.

Messrs. Walter W. Magee and *Charles L. Stone* for defendant in error.

April 16, 1906. *Dismissed* for the want of jurisdiction. *Chicago, I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; *Scudder* v. *Comptroller* (*Scudder* v. *Coler*) 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Eastern Bldg. & L. Asso.* v. *Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531.

ALBERT K. HISCOCK, Trustee, etc., *Petitioner, v.* JACOB M. MERTENS. [No. 602.]

(See S. C. Reporter's ed. 642.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Will B. Crowley for petitioner.

Mr. Dorr Raymond Cobb for respondent.

March 5, 1906. *Granted.*

J. N. SEALE, *Plaintiff in Error*, *v.* STATE OF GEORGIA. [No. 219.]

(See S. C. Reporter's ed. 642.)

In Error to the Supreme court of the State of Georgia.

See same case below, **121 Ga. 741, 49** S. E. 740.

Mr. J. J. Strickland for plaintiff in error.

Mr. John C. Hart for defendant in error.

April 16, 1906. *Dismissed* for the want of jurisdiction. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Harding* v. *Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; *Marvin* v. *Trout*, 199 U. S. 212, *ante*, 157, 26 Sup. Ct. Rep. 31; *Caro* v. *Davidson*, 197 U. S. 197, 49 L. ed. 723, 25 Sup. Ct. Rep. 428.

FANNIE D. GALBRAITH, *Petitioner*, v. ILLINOIS STEEL COMPANY. [No. 431.]

(See S. C. Reporter's ed. 643.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 2 L.R.A.(N.S.) 799, 66 C. C. A. 359, 133 Fed. 485.

Mr. Adams A. Goodrich for petitioner.

Mr. William Duff Haynie for respondent.

March 5, 1906. *Denied.*

HONG WING, *Petitioner*, *v.* UNITED STATES [No. 575]; WONG DING CHONG, *Petitioner*, *v.* UNITED STATES [No. 576]; DANG MING, *Petitioner*, *v.* UNITED STATES [No. 577]; WONG WAH, *Petitioner*, *v.* UNITED STATES [No. 578]; LAM LOY, *Petitioner*, *v.* UNITED STATES [No. 579].

(See S. C. Reporter's ed. 643.)

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 142 Fed. 128.

Mr. Francis J. Wing for petitioners.

The Attorney General and the *Solicitor General* for respondent.

March 5, 1906. *Denied.*

T. N. BARNSDALL, *Petitioner*, *v.* THOMAS S. WALTEMEYER. [No. 580.]

(See S. C. Reporter's ed. 643.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 142 Fed. 415.

Messrs. Charles S. Thomas and *W. H. Bryant* for petitioner.

Mr. T. Webster Hoyt for respondent.

March 5, 1906. *Denied.*

TAYLOR KNOLL, *Petitioner* *v.* UNITED STATES. [No. 598.]

(See S. C. Reporter's ed. 643.)

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 34 Wash. L. Rep. 94.

Mr. John C. Gittings for petitioner.

The Attorney General and the *Solicitor General* for respondent.

March 5, 1906. *Denied.*

ÆTNA INDEMNITY COMPANY, *Petitioner*, *v.* CITY OF HAVERHILL. [No. 600.]

(See S. C. Reporter's ed. 643.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 142 Fed. 124.

Mr. T. Tileston Wells for petitioner.

Mr. John J. Winn for respondent.

March 5, 1906. *Denied.*

TOWN OF FLETCHER, *Petitioner*, *v.* SAMUEL G. HICKMAN. [No. 601.]

(See S. C. Reporter's ed. 644.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 136 Fed. 568.

Messrs. Robert W. Bonynge and *Halsted L. Ritter* for petitioner.

Mr. Thomas K. Skinker for respondent.

March 5, 1906. *Denied.*

LIVERPOOL, BRAZIL, & RIVER PLATE STEAM NAVIGATION COMPANY, LIMITED, *et al. Petitioners*, *v.* THE STEAMSHIP "EAGLE POINT," etc. [No. 613.]

(See S. C. Reporter's ed. 644.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 142 Fed. 453.

Messrs. Harrington Putnam, Charles C. Burlingham, H. G. Ward, and *George H. Emerson* for petitioners.

Mr. Wilhelmus Mynderse for respondent.

March 12, 1906. *Denied.*

NATIONAL SALT COMPANY, *Petitioner*, *v.* GEORGE S. INGRAHAM. [No. 619.]

(See S. C. Reporter's ed. 644.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below on first appeal, 58 C. C. A. 356, 122 Fed. 40; on second appeal, 65 C. C. A. 54, 130 Fed. 676.

Messrs. Maxwell Evarts and *Henry B. Twombly* for petitioner.

Mr. George S. Ingraham for respondent.

March 19, 1906. *Denied.*

EDWIN S. HARTWELL LUMBER COMPANY, now known as Herman H. Hettler Lumber Co., *Petitioner*, *v.* UNITED STATES [No. 610.]; JOHN SPRY LUMBER COMPANY, *Petitioner*, *v.* UNITED STATES [No. 611].

(See S. C. Reporter's ed. 644.)

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 142 Fed. 432.

Messrs. Jacob Newman, Salmon O. Levinson, and *Benjamin V. Becker* for petitioners.

The Attorney General and the *Solicitor General* for respondent.

March 19, 1906. *Denied.*

UNITED STATES, *Petitioner*, *v.* NINETY-NINE DIAMONDS. [No. 616.]

(See S. C. Reporter's ed. 645.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 2 L.R.A.(N.S.) 185, 139 Fed. 961.

The Attorney General, the *Solicitor General*, and *Assistant Attorney General McReynolds* for petitioner.

Messrs. W. Wickham Smith and *John K. Maxwell* for respondent.

April 2, 1906. *Denied.*

GRAND TRUNK WESTERN RAILWAY COMPANY *et al.*, *Petitioners*, *v.* CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY. [No. 617.]

(See S. C. Reporter's ed. 645.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 141 Fed. 785.

Messrs. G. W. Kretzinger, Wells H. Blodgett, W. O. Johnson, and *Edgard A. Bancroft,* for petitioners.

Mr. W. H. Lyford for respondent.

April 2, 1906. *Denied.*

CHARLES HENRY DAVIS, Trustee, *Petitioner*, *v.* GEORGE W. BRAMBLET. [No. 624.]

(See S. C. Reporter's ed. 645.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 141 Fed. 776.

Messrs. D. W. Lindsey, Frank Chinn, and *Richard W. Hale* for petitioner.

Mr. Helm Bruce for respondent.

April 2, 1906. *Denied.*

WILLIAM NIXON *et al.*, *Petitioners*, *v.* JAMES H. HARRIS, Warden, etc. [No. 628.]

(See S. C. Reporter's ed. 645.)

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 27 App. D. C. 94.

Messrs. Armond W. Scott and *Marion T. Clinkscales* for petitioners.

No opposition.

April 2, 1906. *Denied.*

HITCHCOCK COUNTY, NEBRASKA, *Petitioner*, *v.* JAMES B. PLATT. [No. 605.]

(See S. C. Reporter's ed. 646.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 139 Fed. 929.

Mr. E. R. Duffie for petitioner.

Mr. Jesse B. Strode for respondent.

April 9, 1906. *Denied.*

HARRY DODD, Trustee, etc., *Petitioner*, *v.* A. SAMEL AND S. SAUL. [No. 630.]

(See S. C. Reporter's ed. 646.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 142 Fed. 68.

Messrs. Alex. C. King and *Benj. Z. Phillips* for petitioner.

Mr. Victor Smith for respondents.

April 9, 1906. *Denied.*

NEW AMSTERDAM CASUALTY COMPANY, *Petitioner*, *v.* EAST TENNESSEE TELEPHONE COMPANY *et al.* [No. 644.]

(See S. C. Reporter's ed. 646.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 139 Fed. 602.

Messrs. J. C. McReynolds and *Clarence T. Boyd* for petitioner.

Messrs. Wm. L. Granbery and *John J. Vertrees* for respondents.

April 9, 1906. *Denied.*

C. C. SLAUGHTER, *Petitioner*, *v.* MALLET LAND & CATTLE COMPANY. [No. 646.]

(See S. C. Reporter's ed. 646.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 141 Fed. 282.

Mr. C. A. Culberson for petitioner.

Mr. S. H. Cowan for respondent.

April 9, 1906. *Denied.*

JOSEPH H. SAVAGE, *Petitioner, v.* M. ADAH SAVAGE. [No. 654.]

(See S. C. Reporter's ed. 646.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 141 Fed. 346.

Mr. Holmes Conrad for petitioner.

Mr. R. T. Barton for respondent.

April 9, 1906. *Denied.*

W. K. NIVER COAL COMPANY, *Petitioner, v.* CHERONEA STEAMSHIP COMPANY, LIMITED [No. 655]; W. K. NIVER COAL COMPANY, *Petitioner, v.* URSULA BRIGHT STEAMSHIP COMPANY, LIMITED [No. 656]; W. K. NIVER COAL COMPANY, *Petitioner, v.* NEW RUPERRA STEAMSHIP COMPANY, LIMITED [No. 657]; W. K. NIVER COAL COMPANY, *Petitioner, v.* SIR ALFRED LEWIS JONES [No. 658].

(See S. C. Reporter's ed. 647.)

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 142 Fed. 402.

Messrs. John W. Griggs, B. L. M. Tower, and *Hugh W. Ogden* for petitioner.

Messrs. E. P. Carver and *E. E. Blodgett* for respondents.

April 9, 1906. *Denied.*

GENERAL FIRE EXTINGUISHER COMPANY, *Petitioner, v.* JOSEPH R. LAMAR, Trustee, *et al.* [No. 666.]

(See S. C. Reporter's ed. 647.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 141 Fed. 353.

Mr. Henry A. Alexander for petitioner.

Mr. Wm. K. Miller for respondents.

April 9, 1906. *Denied.*

A. KLIPSTEIN & Co., *Petitioner, v.* PETER G. GRANT, Trustee, *et al.* [No. 667.]

(See S. C. Reporter's ed. 647.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 141 Fed. 72.

Mr. Henry A. Alexander for petitioner.

Mr. Benj. Z. Phillips for respondents.

April 9, 1906. *Denied.*

NINTH NATIONAL BANK OF NEW YORK, *Petitioner, v.* MARCUS A. ADLER. [No. 661.]

(See S. C. Reporter's ed. 647.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 144 Fed. 659.

Mr. Nelson S. Spencer for petitioner.

Mr. Charles Strauss for respondent.

April 16, 1906. *Denied.*

GEORGE WESTINGHOUSE, JR., *et al., Petitioners, v.* NEW YORK AIR BRAKE COMPANY *et al.* [No. 662.]

(See S. C. Reporter's ed. 648.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 140 Fed. 545.

Messrs. George H. Christy and *Samuel R. Betts* for petitioners.

Messrs. Wm. A. Jenner and *Charles Neave* for respondents.

April 16, 1906. *Denied.*

DENNISON MANUFACTURING COMPANY, *Petitioner, v.* SCHARF TAG, LABEL & BOX COMPANY. [No. 663.]

(See S. C. Reporter's ed. 648.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 68 C. C. A. 263, 135 Fed. 625.

Messrs. Archibald Cox and *Chas. H. McDonald* for petitioner.

No opposition.

April 16, 1906. *Denied.*

CLINTON STEPHENS, JR., *Petitioner, v.* ESSEX COUNTY PARK COMMISSION. [No. 664.]

(See S. C. Reporter's ed. 648.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 143 Fed. 844.

Messrs. Andrew Wilson and *Noel W. Barksdale* for petitioner.

Messrs. Robert H. McCarter and *Alonzo Church* for respondent.

April 16, 1906. *Denied.*

CHARLES E. COOPER, Trustee, etc., *Petitioner, v.* MARTIN BURNS *et al.* [No. 669.]

(See S. C. Reporter's ed. 648.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 Fed. 273.

Mr. C. C. Flansburg for petitioner.

Mary Burns pro se.

April 16, 1906. *Denied.*

CONSOLIDATION COAL COMPANY, *Petitioner*, *v.* AMERICAN MAIL STEAMSHIP COMPANY, Claimant [No. 671]; CONSOLIDATION COAL COMPANY, Claimant, *Petitioner*, *v.* AMERICAN MAIL STEAMSHIP COMPANY [No. 672].

(See S. C. Reporter's ed. 648.)

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 65 C. C. A. 417, 131 Fed. 433; on rehearing, 142 Fed. 64.

Messrs. J. Walter Lord and *Edward S. Dodge* for petitioner.

Messrs. Wilhelmus Mynderse and *E. E. Blodgett* for respondent.

April 16, 1906. *Denied.*

A. M. HASTINGS, Administrator, *Petitioner*, *v.* SOUTHERN RAILWAY COMPANY. [No. 674.]

(See S. C. Reporter's ed. 649.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 143 Fed. 260.

Messrs. J. Altheus Johnson and *Jos. A. McCullough* for petitioner.

Messrs. George E. Hamilton and *M. J. Colbert* for respondent.

April 16, 1906. *Denied.*

GEORGE H. ALLEN *et al.*, *Petitioners*, *v.* NANNIE FIELD, Executrix, etc., *et al.* [No. 677.]

(See S. C. Reporter's ed. 649.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 144 Fed. 840.

Messrs. Levy Mayer, Alfred S. Austrian, and *Allan McCulloh* for petitioners.

Messrs. Wm. Lindsay and *J. Culbert Palmer* for respondents.

April 16, 1906. *Denied.*

EDWARD MORRIS, *Petitioner*, *v.* THIRD NATIONAL BANK OF SPRINGFIELD, MASSACHUSETTS. [No. 678.]

(See S. C. Reporter's ed. 649.)

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 142 Fed. 25.

Mr. Vinton Pike for petitioner.

No opposition.

April 16, 1906. *Denied.*

GEORGE B. CORTELYOU, Postmaster General, *Plaintiff in Error*, *v.* UNITED STATES *ex rel.* MARGARITO ROMERO, Mayor, etc., *et al.* [No. 612.]

(See S. C. Reporter's ed. 649.)

In Error to the Court of Appeals of the District of Columbia.

The Attorney General for the plaintiff in error.

No appearance for defendants in error.

March 5, 1906. *Dismissed* with costs, on motion of *Mr. Solicitor General Hoyt* for the plaintiff in error.

SIDNEY TURNER DYER, by Elisha Dyer, Jr., her next friend, *et al.*, *Appellants*, *v.* MAYOR AND CITY COUNCIL OF BALTIMORE *et al.* [No. 377.]

(See S. C. Reporter's ed. 650.)

Appeal from the Circuit Court of the United States for the District of Maryland.

Messrs. Arthur W. Machen and *Arthur W. Machen, Jr.* for appellants.

Mr. W. Cabell Bruce for appellees.

March 5, 1906. *Dismissed* at the cost of the appellees, per stipulation.

SIEBRAND H. NIEWENHOUS, *Plaintiff in Error*, *v.* NEW YORK & HARLEM RAILROAD COMPANY *et al.* [No. 568.]

(See S. C. Reporter's ed. 650.)

In error to the Supreme Court of the State of New York.

Mr. Edward S. Hatch for plaintiff in error.

Mr. Ira A. Place for defendants in error.

March 9, 1906. *Dismissed*, per stipulation, and mandate granted.

SIMON BURNS *et al.*, *Appellants*, *v.* JOHN W. HAYES *et al.* [No. 224.]

(See S. C. Reporter's ed. 650.)

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 25 App. D. C. 242.

Messrs. John Ridout and *R. Golden Donaldson* for appellants.

Mr. Henry E. Davis for appellees.

March 15, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

WALTER H. WREN, *Plaintiff in Error*, *v.* RICHARD RIGGS *et al.* [No. 635.]

(See S. C. Reporter's ed. 650.)

In Error to the Circuit Court of the United States for the Western District of Texas.

Mr. C. A. Culberson for defendants in error.

No opposition.

March 19, 1906. Docketed and *dismissed* with costs, on motion of *Mr. C. A. Culberson* for the defendants in error.

ELIZA L. POPE, *Plaintiff in Error*, *v.* ANNA CLARA FALK *et al.* [No. 301.]

(See S. C. Reporter's ed. 651.)

In Error to the Supreme Court of the State of Kansas.

Mr. L. F. Bird for plaintiff in error.

Messrs. James K. Polk, Andrew Wilson, and *Noel W. Barksdale* for defendants in error.

April 2, 1906. *Dismissed* with costs, on motion of counsel for plaintiff in error.

BENJAMIN C. CHOUTEAU, *Plaintiff in Error*, *v.* WILLIAM KLAPMEYER. [No. 369.]

(See S. C. Reporter's ed. 651.)

In Error to the Supreme Court of the State of Kansas.

Mr. L. F. Bird for plaintiff in error.

Messrs. James K. Polk, Andrew Wilson, and *Noel W. Barksdale* for defendant in error.

April 2, 1906. *Dismissed* with costs, on motion of counsel for plaintiff in error.

THOMAS J. BRESLIN *v.* JAMES G. CARROLL. [No. 232.]

(See S. C. Reporter's ed. 651.)

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Mr. Thomas E. French for Breslin.

No appearance for Carroll.

April 11, 1906. *Stricken from the docket.*

EX PARTE: IN THE MATTER OF ALONSO B. BOWERS AND BOWERS CALIFORNIA DREDGING COMPANY, *Petitioners.* [No. 6, Original.]

(See S. C. Reporter's ed. 651.)

Petition for an order to show cause why a Writ of Mandamus should not be issued to compel the judges of the United States Circuit Court of Appeals for the Ninth Circuit to vacate a decree directing the dismissal of a bill, and to proceed with a hearing on the merits, and, in the alternative, for a Writ of Certiorari to bring the case before the Supreme Court of the United States.

Mr. John H. Miller for petitioners.

No opposition.

April 16, 1906. *Dismissed* on authority of counsel for the petitioners.

STATE OF WASHINGTON, *Complainant*, *v.* NORTHERN SECURITIES COMPANY *et al.* [No. 9, Original.]

(See S. C. Reporter's ed. 651.)

Original bill filed by the State of Washington to enjoin the consolidation of competing and parallel railroads.

Messrs. W. B. Stratton and *W. B. Douglas* for complainant.

Messrs. Geo. B. Young, Jno. W. Griggs, M. D. Grover, and *C. W. Bunn* for defendants.

April 16, 1906. *Dismissed,* per stipulation.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1905.

Vol. 202.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1905.

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[1] *STATE OF LOUISIANA, *Complainant*,
v.
STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 1-59.)

1. **Controversy between states—original jurisdiction of Supreme Court.**—A conflict between the authorities of the states of Louisiana and Mississippi, arising out of the enforcement of the oyster legislation of those states, which involves a dispute respecting the true boundary line, creates a controversy between the states in their sovereign capacity, which is within the original jurisdiction of the Supreme Court of the United States.

2. **Congress — power to alter state boundaries.**—Congress, after the admission of Louisiana into the Union, could not take away any portion of that state in admitting Mississippi to the Union, and give it to the latter state.

3. **Statutes—construction—in pari materia.**—The doctrine *in pari materia* cannot be invoked to establish a preconcerted design by Congress, in the several enactments providing for the admission, respectively, to the Union, of the states of Louisiana, Mississippi, and Alabama, to equalize the water frontage of those states on the Gulf of Mexico,—especially in view of the fact that, when Louisiana was admitted into the Union, the territory now composing the coast counties of Mississippi was not actually a part of the Mississippi territory, but was in dispute between the United States and Spain.

4. **Boundaries between states—islands.**—The chain of sea-sand islands running from the west shore of Mobile bay, in the state of Alabama, westward to, and inclusive of, Cat island, in the state of Mississippi, and not the sea-marsh islands previously granted to the state of Louisiana, was meant by the provision in the Mississippi enabling act of March 1, 1817 (3 Stat. at L. 348, chap. 23, § 2), establishing the southern boundary of the proposed state as extending westwardly from the intersection of the eastern boundary with the Gulf of Mexico, "including all the islands within 6 leagues of the shore," to the most eastern junction of Pearl river with Lake Borgne.

5. **Boundaries between states—islands.**—All islands within 9 miles of the coast line of the Louisiana marshes at the eastern extremity of St. Bernard peninsula, except as restricted by the deep-water sailing channel, regarded as the boundary between the states of Mississippi and Louisiana, were granted to the latter state by the act of April 8, 1812 (2 Stat. at L. 701, chap. 50), admitting Louisiana into the Union, with a boundary described as extending along the middle of the Iberville river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico, and thence bounded by said gulf to the mouth of the Sabine river, "including all islands within 3 leagues of the coast."

6. **Boundaries between states—thalweg.**—The deep-water sailing channel or "thalweg" emerging from the most eastern mouth of Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand island, thence east and south through Mississippi sound, through South pass, between Cat island and Isle à Pitre to the Gulf of Mexico, is the true boundary line between the states of Mississippi and Louisiana, under the act of April 8, 1812, admitting Louisiana into the Union, with a boundary described as extending along the middle of the Iberville river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico, and thence bounded by the said gulf to the mouth of the Sabine river.

7. **Boundaries between states—effect of recognition and acquiescence.**—As between the states of the Union, long acquiescence in the assertion of a particular

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NOTE.—*On the judicial settlement of state boundary*—see note to Nebraska v. Iowa, 36 L. ed. U. S. 798.

On rivers and lakes as state boundaries—see note to Buck v. Elienboit, 15 L.R.A. 187.

boundary, and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule may be in respect to the acquisition by prescription of large tracts of country claimed by both states.

[No. 11, Original.]

Argued October 10, 11, 12, 1905. Decided March 5, 1906. Final decree entered, April 23, 1906.

ORIGINAL SUIT in equity to settle a disputed boundary line between the states of Mississippi and Louisiana in the waters of Lake Borgne and Mississippi sound. Boundary decreed as being the deep-water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne, and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand island, thence east and south through Mississippi sound, through South pass, between Cat island and Isle à Pitre, to the Gulf of Mexico.

Statement by Mr. Chief Justice **Fuller:**

The state of Louisiana, by leave of court, filed her bill against the state of Mississippi, October 27, 1902, to obtain a decree determining a boundary line between the two states, and requiring the state of Mississippi to recognize and observe the line so determined.

The bill alleged:

"1st. That the state of Louisiana was admitted into the Union of the United States of America by the act of Congress found in chapter 50 of the United States Statutes at Large, vol. 2, page 701, approved April 8th, 1812, and therein the boundaries of the said state of Louisiana, in the preamble of said act, were described as follows:—

'Whereas, the representatives of the people of all that part of the territory or country ceded under the name of "Louisiana," by the treaty made at Paris on the 30th day of April, 1803 [8 Stat. at L. 200], between the United States and France, contained within the following limits, that is [3] to say: Beginning at the mouth of the *river Sabine, thence by a line drawn along the middle of said river, including all islands to the 32d degree of latitude; thence due north to the northernmost part of the 33d degree of north latitude; thence along the said parallel of latitude to the River Mississippi; thence down the said river to the River Iberville, and from thence along the middle of said river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast,' etc.

"2nd. That according to the foregoing description, the eastern boundary of the state of Louisiana was formed by the Mississippi river, beginning at the northeast corner of said state and extending south to the junction of the said river with the River Iberville (now known as Bayou Manchac), and thence extending eastwardly through the lower end of the Amite river, through the middle of Lake Maurepas, Pass Manchac, and Lake Pontchartrain, and in order to reach the Gulf of Mexico its only course was through the Rigolets, into Lake Borgne, and thence by the deep-water channel through the upper corner of Lake Borgne, following said channel, north of Half Moon island, through Mississippi sound to the north of Isle à Pitre, through the Cat Island channel, southwest of Cat island, into the Gulf of Mexico, which said eastern boundary of the state of Louisiana is more fully shown on diagram No. 1, made part of this bill. [See *post.*]

"3rd. That by the act of Congress found in the United States Statutes at Large, vol. 2, p. 708, chap. 57, approved April 14th, 1812, additional territory was added to the then-existing state of Louisiana which additional territory was described in the following language:—

'Beginning at the junction of the Iberville with the River Mississippi; thence along the middle of the Iberville, the River Amite, and of the Lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl river; thence up the eastern branch of Pearl river to the 31st degree of north latitude; thence along the said degree of latitude to the River Mississippi; thence *down the said [4] river to the place of beginning, shall become and form a part of the said state of Louisiana.'

"4th. That the effect of this legislation, as to the eastern boundary of the state of Louisiana, was to retain the Mississippi river as the original eastern boundary, as far south as the 31st degree of north latitude. The change then moved the eastern boundary eastward along the 31st degree of north latitude to the Pearl river, whence it then ran south down the said river, through its eastern branch, till it entered the northern corner of Lake Borgne, where the state's eastern boundary then joined and followed the boundary line originally fixed in the act of April 8th, 1812, and followed, as heretofore stated, *the deep-water channel [5] through the upper corner of Lake Borgne, north of Half Moon island, eastward through the deep-water channel along the Mississippi sound till it reached the Cat island channel

north of Isle à Pitre, and southwest of Cat island, whence passing through Chandeleur sound, northeast of Chandeleur islands, it entered the Gulf of Mexico, and ran south around the delta of the Mississippi river and then north and westward to the point where the Sabine river enters the Gulf of Mexico, as will be more fully seen from the diagram No. 2, made part of this bill. [See *post.*]

"5th. That the territory lying adjacent to, and to the eastward of, the state of Louisiana, is the state of Mississippi, which
[6] *latter *state was admitted into the Union of the United States of America by the act of Congress found in the United States Statutes at Large, vol. 3, chap. 23, page 348, approved March 1st, 1817, whereby the inhabitants of the western part of the then Mississippi territory were authorized to form for themselves a state constitution and to be admitted into the Union, the boundaries of the then-to-be-created state being described as follows:—

'Beginning on the River Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the northwest corner of the county of Washington [Alabama]; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore to the most eastern junction of Pearl river with Lake Borgne; thence up said river to the 31st degree of north latitude; thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning.'

"6th. That by the said act, Congress intended that the southern boundary line of the state of Mississippi, beginning at the point dividing it from the state of Alabama, should run westwardly till it joined the Louisiana eastern boundary line, and that, in doing so, the said southern boundary would in effect start westward from a point 18 miles south of the coast line, and include in its westwardly direction the western end of Petit Bois island, all of Horn island, Ship island, and Cat island, and the smaller islands north of these, those islands being the ones contemplated in the act of Congress, as being within 18 miles of the southern coast line of Mississippi, and that the said southern boundary of Mississippi, extending in its westwardly direction through the Gulf of Mexico, would gradually approach the coast line, and meet the eastern boundary line of Louisiana, just as the said eastern boundary line of Louisiana emerges from the Cat Island channel into the Gulf of Mexico, and thence follow and
[7] become the same as the *Louisiana boundary line extending westwardly to the south of Cat island, through Mississippi sound to the north of Half Moon or Grand island to the most southern junction of the *east [8] branch of the Pearl river with Lake Borgne, being identical with the Louisiana eastern boundary, and thence extending up the channel of Pearl river.

"7th. That the islands included between the shore line and the southern boundary of the state of Mississippi are the islands heretofore described, *viz.:* the western end of Petit Bois island, with all of Horn island, Ship island, and Cat island, and the small islands north of them, those islands being large, and well known to Congress at the time of the passage of the act, all of which islands and the southern boundary of the state of Mississippi will more fully appear from the diagram No. 3, made a part of this bill. [See *post.*]

"8th. That the islands contemplated in the act of Congress of [April 8] 1812, creating the state of Louisiana, and intended to be embraced within the state of Louisiana, as provided by the clause, 'Thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast,' were all of the other islands, except those heretofore named as going to the state of Mississippi, as all other islands, and all other mainland, are south and west of the boundary line thus passing from Pearl river through the deep-water channels in Lake Borgne and Mississippi sound, through the deep-water channel southwest of Cat island to the eastward of the Chandeleur islands, and thence south, taking in the delta of the Mississippi river, and extending westward along the Gulf coast, including all islands along the coast, to the Sabine river, where the state of Louisiana is thence bounded on the westward by the state of Texas, all of which will more fully appear from diagram No. 2, heretofore referred to.

"9th. Now your orator avers that there has developed in recent years in the waters south of the state of Mississippi and east of the southern portion of the state of Louisiana a considerable growth of oysters, and an industry of large proportions, in the handling of said bivalves, either in their fresh or in a canned condition, has resulted therefrom.

"10th. That the state of Mississippi has by legislative *enactments regulated the oys- [9] ter industry in the waters of said state, and permits the dredging of oysters on the natural oyster reefs in waters of the said state, as will more fully appear from the statutes of said state to which reference is made.

"11th. That the state of Louisiana has,

by legislative enactments, regulated the oyster industry in the said state of Louisiana, and prohibits the dredging of oysters on the natural reefs in the waters of said state, as will more fully appear from the statutes of said state to which reference is made.

"12th. That the provisions of the laws of the said two states differ considerably in many other respects.

"13th. That the existence and location of the natural oyster reefs in the waters of the parish of St. Bernard, in the state of Louisiana, which adjoins the state of Mississippi, is shown by the map made from a reconnaissance by the United States Fish Commission steamer 'Fish Hawk,' in February, 1898, as will more fully appear from diagram No. 4, now made part of this bill. [See *post.*]

"14th. Now your orator avers that the boundary line dividing the two states in the waters thereof has been clearly defined by the acts of Congress creating the states of Louisiana and Mississippi, as will be seen from the diagram No. 5, made up from the boundary descriptions taken from the acts of Congress creating the said states of Louisiana and Mississippi, which diagram is also made part of this bill. [See *post.*]

"15th. That the said boundary line in the waters between said states has never been designated by buoys or marks of any kind by either state, nor designated in any manner, except by the United States government in so far as it has buoyed the deep-water channel, extending from the mouth of the Pearl river through the upper corner of Lake Borgne, north of Half Moon island, eastward to the Cat Island pass, north of Isle à Pitre, and southwest of Cat island, which buoys were placed by the Coast Survey of the United States government.

"16th. That owing to the differences in the laws of the states of Louisiana and Mississippi, regulating the oyster industry of
[10] *the respective states, the said statutes providing penalties for the violation thereof, much confusion has resulted, and a great public demand has arisen in Louisiana to definitely mark the boundary line dividing the two states in the waters thereof; that citizens of the state of Mississippi, in violation of the laws of the state of Louisiana,
[11] have been fishing oysters with dredges *on the natural reefs in the waters of the state of Louisiana, said fishermen claiming that they were in the waters of the state of Mississippi, and consequently not violating the laws of the state of Louisiana."

The bill then set forth that "to avoid an armed conflict between the sheriff and officers of the parish of St. Bernard, in the state of Louisiana, and the sheriff and officers of the county of Harrison in the state of Mississippi," a meeting of citizens of Louisiana was called by the governor of that state, which met in New Orleans, and resulted in the appointment by the governor of commissioners on the part of Louisiana "to consider the determination of the water boundary line between the two states, and arrange for its easy location and identification by a proper system of buoys," and the request that the governor of Mississippi appoint like commissioners on the part of that state, which appointment was made.

The joint commission met and considered the subject, and subsequently the Mississippi commission reported its inability to agree with the Louisiana commission, stating, among other things, "It is apparent that the only hope of settlement is a friendly suit in the Supreme Court of the United States, and we respectfully suggest that course."

The bill continued:

"24th. That the eastern water boundary line, as claimed by your orator, *viz.*, a line beginning at the most southern junction of the channel of the east branch of the Pearl river with Lake Borgne, and thence eastward, following the deep-water channel to the north of Half Moon island, through the Mississippi Sound channel, to Cat Island pass, northeast of Isle à Pitre into the Gulf of Mexico, thereby dividing the waters between the two states, agrees, and is in accord, with the acts of Congress creating respectively the state of Louisiana and the state of Mississippi, as already shown by diagram No. 5; that any other boundary than the deep-water channel as aforesaid would cause the limits of the two states to conflict and overlap, and that it is not to be presumed that the Congress of the United States *intended to, or would, establish,
[12] in its description, a boundary for the state of Mississippi, conflicting with the already-existing Louisiana eastern boundary, when there is a construction of the wording of the two acts, in fact, the only construction that suggests itself, that shows a boundary readily ascertained, harmonizing with the words of the acts as they now read, and clearly defining the limits of the two states in the waters between them.

"25th. Your orator further avers that the use of the word 'westwardly' in the description of the southern boundary of the state of Mississippi, as that southern boundary line extends westwardly from the Alabama state line to the Louisiana eastern boundary line, shows that it was not the intention of Congress to have it run direct or due west throughout the whole course, and that it was evidently the intention of Congress, in giving to the state of Missis-

sippi the islands north of that westwardly-drawn line, that the 18-mile limit shall gradually decrease as it approached the Louisiana line on the east, till it met and followed it to its source. If the Mississippi line ran parallel to the southern coast of Mississippi, at a distance of 18 miles from such coast line, following the meander of the coast, and thence joined at right angles a line emerging from the mouth of Pearl river, such line would not only include Grassy, Half Moon, Round, Le Petit Pass islands and Isle à Pitre, already belonging to Louisiana as being within 9 miles or 3 leagues of the Louisiana shore line, but such line would also include part of the mainland of the state of Louisiana, as will be seen from the following diagram (No. 6), made a part of this bill, and it certainly could not have been the intention of Congress to take away from the state of Louisiana any islands or mainland already belonging to it, and to give them to the state of Mississippi, as such a proceeding, without the consent of the legislature of the state of Louisiana, would be a violation of § 3 of art. 4 of the Constitution of the United States.

"26th. Your orator avers that the marsh [13] lands claimed by *the state of Mississippi to be islands are in truth, with the exception of the Isle à Pitre, Grassy, Half Moon, Round, and Le Petit Pass islands, low-lying marsh lands, forming part of the mainland of the state of Louisiana; that said swamp or marsh lands and islands have been known as and called, since time immemorial, 'the Louisiana marshes;' that they were approved to the state of Louisiana by the Commissioner of the General Land Office on May 6, 1852, as will appear from a certified copy of said record of approval from the United States Land Office, made a part of this bill, marked Exhibit (G) and, where not since sold by the state of Louisiana to private purchasers, have always stood on the books of the register of the Louisiana state land office as state lands, to be offered for sale, until recently transferred by the state of Louisiana to the board of commissioners for the Lake Borgne basin levee district by the provisions of act No. 14 of the legislature of the state of Louisiana for the year 1892, for the purpose of enabling the said levee board, by the proceeds of sale of said lands, to secure the funds to aid in the building of levees in that levee district, to protect the lands from overflow.

"27th. That parts of said disputed territory claimed by the state of Mississippi to be islands within 18 miles of its shore line are in fact part of the mainland of the state of Louisiana, and therefore belong to and form part of said state of Louisiana; but if your Honors should feel that any part of this disputed area was islands by reason of the presence of shallow water, then, as islands, they are within the 9-mile limit of distance from the shore line of the state of Louisiana, and therefore belong to and form part of the state of Louisiana by that second provision of the act of Congress giving Louisiana all islands within 3 leagues of its shore line.

"28th. Your orator further avers that where contiguous states or countries are separated by water it is, and always has been, the custom to regard the channel as establishing the boundary line of such states, and that the state of Mississippi has itself recognized this principle in the description of *its territorial limits, as found [14] in the 2d article of its own Constitution, adopted November, 1890, in the following words:

. . . . .

"29th. Your orator avers that, as heretofore stated, the Congress of the United States, as well as the various departments of the United States government having authority in the premises, have themselves recognized the boundary line contended for by the state of Louisiana by reason of the fact that the United States government has confirmed to the state of Louisiana the lands composing Half Moon island, which is just south of the deep-water channel" [by sections and townships as set forth] and also "the lands forming what is commonly known as Isle à Pitre" [by sections and townships, as stated], all of them "recognized as belonging to and forming part of the state of Louisiana by the said United States government, and have always heretofore been so recognized by the people of the said two states; that the lands forming the Isle à Pitre were sold by the state of Louisiana," etc., etc., "and said lands have been assessed on the assessment rolls of the parish of St. Bernard, state of Louisiana, and taxes thereon have been paid to the state of Louisiana for the past thirty-five years, and said lands have never been assessed on the rolls of, nor have any taxes ever been paid to, the state of Mississippi, and that this is the case with all other lands and islands now claimed by the state of Mississippi, but which in truth and fact belong to the state of Louisiana."

"30th. Your orator therefore further avers that all constituted authorities competent to create, adopt, or consider the said boundary line have declared the water boundary line claimed by the state of Louisiana, *viz.*, the deep-water channel running from the most southern junction of the eastern mouth of Pearl river, through Lake Borgne, north of Half Moon island,

through Mississippi sound, north of Isle à Pitre, and southwest of Cat island, through Cat Island pass, through Chandeleur sound northeast of Chandeleur islands
[15] to the Gulf *of Mexico, to be the true water boundary between the said states."

The bill prayed that it be adjudged and decreed "that the boundary line dividing the states of Louisiana and Mississippi, in the waters between the said states to the south of the state of Mississippi, and to the southeast of the state of Louisiana, is the deep-water channel, commencing at the most southern junction of the eastern mouth of Pearl river with Lake Borgne, thence by the deep-water channel through Lake Borgne, north of Half Moon island, through Mississippi sound, north of Isle à Pitre, through Cat Island Pass channel, southwest of Cat island, through Chandeleur Island sound, northeast of the Chandeleur islands, to the Gulf of Mexico, as is delineated on the original map submitted by the Louisiana boundary commission to the Mississippi boundary commission, and now made part of this bill, marked Exhibit 'E;' that the said deep-water channel be located throughout its course and permanently buoyed at the joint expense of the two states; that the state of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the state of Louisiana in the said land and water territory south and west of said boundary line," and for costs and general relief.

[Exhibit "E" is not reproduced in the printed record, but it to be found in the Louisiana Atlas of Maps, p. 60. It consists of coast survey charts Nos. 189, 190, and 191, showing the coast from Mobile to Lakes Borgne and Pontchartrain, with boundary lines added in red ink. The maps given in this statement are sufficient to supply the lack of this particular exhibit.]

The state of Mississippi, by leave, filed a demurrer to the bill, which was, by stipulation, submitted to the consideration of the court on printed arguments, and was subsequently overruled.

Thereupon the state of Mississippi, on leave, filed her answer and cross bill.

[16] *The state denied articulately nearly every material allegation of the bill, and therefore the accuracy of the diagrams or maps attached thereto, and asserted the true boundary to be as set forth in her cross bill. And while she admitted "that the deep-water channel out of the mouth of Pearl river, through the upper course of Lake Borgne, and on into the Gulf, as stated in the bill, has been marked by buoys by and under the direction of the United States government, for navigation and commercial purposes," she denied "that said marking of the deep-water channel was ever intended to fix in any manner whatsoever any part of the boundary line between said states," and further denied "the correctness of complainant's statement that where contiguous states or countries are separated by water, the channel of the waters dividing said states constitutes a boundary line, and defendant specifically denies that such rule is applicable to this case."

The cross bill averred that the southern boundary line of the state of Mississippi was fixed by the act of Congress, approved March 1, 1817, 3 Stat. at L. 348, chap. 23, § 2.

That by that act Mississippi was given "all lands under the waters south of her well-defined shore line to the distance of six leagues from said shore at every point between the Alabama line and the most eastern junction of Pearl river with Lake Borgne, including all islands within said limit," and "all territory within said limits, not being a part of the mainland of the state of Louisiana, became, was, and is a part of the territory of the state of Mississippi."

That the acts of 1812, creating the state of Louisiana, failed "to describe the water line from the most eastern mouth of Pearl river to the Gulf of Mexico," and hence Louisiana proposed, "without authority in law, to follow the deep-water channel from the mouth of Pearl river to the Gulf of Mexico,—that is, as far south as that point in the sea where the waters of Chandeleur sound merge into the waters of the Gulf of Mexico."

That the act creating the state of Mississippi was the organization *of a state gov-[17] ernment in the western part of Mississippi territory; that the southern part of the territory of Mississippi was added thereto by an act of Congress approved May 14, 1812, which provided: "That all that portion of territory lying east of Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby, annexed to the Mississippi territory; to be governed by the laws now in force therein, or which may hereafter be enacted, and the laws and ordinances of the United States, relative thereto, in like manner as if the same had originally formed a part of said territory; and until otherwise provided by law, the inhabitants of the said district, hereby annexed to the Mississippi territory, shall be entitled to one representative in the general assembly thereof." 2 Stat. at L. 734, chap. 84.

That this act and the act admitting the state of Mississippi "recognized the fact that the boundary line of the state of Louis-

iana embraced no island in the waters to the east of said state and to the south of the Mississippi mainland, or shore, and within 6 leagues of the Mississippi shore; that the said Louisiana acts are not in conflict with the aforesaid Mississippi acts, the boundaries of Louisiana only embracing such islands, as clearly shown by said acts creating and admitting her, as were within the Gulf of Mexico and also within 3 leagues of her gulf coast,—that is to say, within the Gulf of Mexico proper and to the south of said state of Louisiana, as contemplated by Congress; that the said line from the mouth of Pearl river to the Gulf of Mexico, dividing the territory of Mississippi from the state of Louisiana, was never defined until the passage of the act creating the state of Mississippi, when, for the first time, the southern boundary of the Mississippi territory, the western part of which was, by said act, made the state of Mississippi, was accurately defined and established, as herein stated; that the line above described and defined by the said Mississippi acts includes no islands which are within 3 leagues of the Louisiana mainland and also in the Gulf [18]of Mexico, as the limits *of the Gulf of Mexico are defined by the said state in her original bill herein."

That the state of Louisiana "claims title and sovereignty over some of the islands belonging to the state of Mississippi by virtue of certain alleged action of certain officers of the United States government and local officers of the state of Louisiana," but the claim "is not well founded because of the matters herein set forth, and because said islands and territory have not been susceptible to actual use and occupation, and because said claim is in violation of § 3, art. 4, of the Constitution of the United States . . ." But if the court should adjudge said islands and territory approved by the aforesaid officials to the state of Louisiana to belong to said state, then cross complainant prayed that the claim of title of Louisiana thereto "be restricted to the real lands or islands so lost to the state of Mississippi, and be in no case permitted to affect any lands under the waters, or any of the public oyster reefs thereunder."

It was then alleged that Mississippi had "exercised sovereignty and jurisdiction over said waters within 18 miles of her shore aforesaid," and that by her statutes, as codified in 1857, had asserted such jurisdiction.

And that, by the legislation of Congress and the state, the "'Mississippi sound' was recognized as a body of water, 6 leagues wide, wholly within the state of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from 'the Gulf of Mexico.'"

The cross bill further averred that Congress, "in the early history of the Republic, in dealing with the Gulf coast or shore," was not perfectly familiar with the line, and by several acts "creating the Gulf states, respectively, treated the said Gulf coast or shore as a line running generally from east to west," and said states were, in the contemplation of Congress, "so formed and bounded as to give to each state jurisdiction over the waters adjacent to its shore or coast for a certain specified distance southward from its mainland line; that it was *not intended to give to any state [19] jurisdiction over waters adjacent to and immediately south and in front of any other state or territory." But that the deep-water channel line contended for by Louisiana would take nearly all of the Hancock county water front, much of that of Harrison county, and possibly some of that of Jackson county, over all which Mississippi had exercised jurisdiction since her admission.

Reference was then made to the organization of Hancock and Jackson counties in December, 1812, and of Harrison county, in 1841; and to certain sections of the Revised Code of Mississippi of 1880 and a codification of 1892, making a general reference to islands within 6 leagues of the Mississippi shore; and it was charged that during all this time the government of the Mississippi territory and that of the state of Mississippi had exercised full and complete jurisdiction and sovereignty over the waters in the "Mississippi sound" as a part of the three counties aforesaid.

The prayer was that it be decreed "that the boundary line dividing the states of Mississippi and Louisiana is the line which, beginning at a point 6 leagues due south of that point on the shore where the Alabama and Mississippi line enters the Gulf of Mexico, runs westwardly with the meanderings of the shore 6 leagues always therefrom until said line reaches and touches the real mainland of Louisiana about 2 miles due west of the 'Indian mound' and 'Lake of the Mound,' and thence in an almost due northward direction along and on the high-tide mark of the said Louisiana mainland to Mississippi sound at or near Nine Mile bayou, and thence further along said mainland at the high-tide mark westwardly to that point due south of the middle of the most southern or eastern junction of Pearl river with Lake Borgne, and thence from said point due north to the said Pearl river; that the said line be located and permanently buoyed at the joint expense of the two states; that the full

title and sovereignty over all the islands and the land under the waters north and east of the said line so established be de-
[20]creed and adjudged to be in the *state of Mississippi, and that the state of Louisiana and her citizens be perpetually enjoined from disputing such title and sovereignty of the state of Mississippi therein," and for costs and general relief.

The following "Exhibit Map" was attached. [See *post.*]

The state of Louisiana filed replication, and also an answer to the cross bill, the allegations of which were in substance denied.

[21] *As to the act of May 14, 1812, the state said that it could not and did not change the boundaries of Louisiana, and that, in fact, the southern portion of the Mississippi territory as claimed was not then in possession of the United States, and did not extend south of the 31st degree of north latitude; that February 12, 1813, an act was passed "authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi territory and west of the river Perdido," but that this was not published until 1818; nor were the resolution of January 15 and the act of March 3, 1811, on the relations of the United States to Spain, published until after April 20, 1818. 3 Stat. at L. 471, 472.

The cause being at issue, much evidence, documentary and otherwise, was taken, and the case was argued October 10, 11, and 12.

Messrs. **John Dymond, Jr., F. C. Zacharie,** and **Walter Guion** argued the cause and filed a brief for complainant:

The mere question of a dispute over the boundaries of states was sufficient to give the court jurisdiction irrespective of the fact as to whether there was any imminent danger of violent or forcible conflict between the states, or the citizens thereof.

Rhode Island v. *Massachusetts*, 12 Pet. 719, 9 L. ed. 1258; *Alabama* v. *Georgia*, 23 How. 505, 16 L. ed. 556; *Missouri* v. *Iowa*, 7 How. 660, 12 L. ed. 861; *Florida* v. *Georgia*, 17 How. 478, 15 L. ed. 181; *Virginia* v. *West Virginia*, 11 Wall. 39, 20 L. ed. 67; *New Jersey* v. *New York*, 5 Pet. 284, 8 L. ed. 127.

In cases other than those of boundaries this court has taken jurisdiction where the pecuniary interests of states have been involved.

Pennsylvania v. *Wheeling & B. Bridge Co.* 13 How. 589, 14 L. ed. 279; *South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. ed. 782.

In other decisions this court has declared that, in order to vest original jurisdiction, a state must have a proprietary interest.

Wisconsin v. *Pelican Ins. Co.* 127 U. S. 287, 32 L. ed. 242, 8 Sup. Ct. Rep. 1370; *Louisiana* v. *Texas*, 176 U. S. 1, 22, 44 L. ed. 347, 355, 20 Sup. Ct. Rep. 251.

This bill shows a proprietary interest in the state.

Missouri v. *Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

Where there are two conflicting titles, the elder shall be preferred. So where there are conflicting rights as to real property, courts of equity will inquire not which party was first in possession, but under what instrument he was in possession, and when his right is dated in point of time; or, if there be no instrument, they will ask "When did the right arise? Who had the prior right?"

Broom, Legal Maxims, 7th ed. p. 355.

This principle has been applied by this court in cases of boundaries between states where the grants to the colonies prior to the establishment of our government have seemed to conflict. So in *Rhode Island* v. *Massachusetts*, 12 Pet. 658, 9 L. ed. 1234, it is said in the syllabus, "No court acts differently in deciding on boundary between states, than on lines between separate tracts of land," and that the rules and principles of equity would equally apply between individuals.

In *Indiana* v. *Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051, some stress was laid upon the geological character of the territory in dispute as compared with that of the two states, and this geological affinity and similarity was held to be confirmatory of other evidence in the case.

The deep-water sailing channel is the proper boundary line between the two states, recognized by all rules of international law.

1 Halleck, International Law, chap. 6, p. 145; Baker, Navigable Rivers as Boundaries, p. 68, No. 23; Bowen, International Law, 1896, 29, p. 10; Creasy, International Law, 1876, p. 221; Twiss, Law of Nations, 1869, § 174, p. 251; Hall, International Law, 5th ed. p. 122; Rivier, Droit des Gens, 1889, § 14; 1 De Martens, Droit des Gens, 2d ed. p. 134, No. 39, p. 141, No. 40; Bluntschli, Le Droit International Codifié, 5th ed. §§ 298, 299, pp. 184, 185, § 301, p. 185; 2 Fodéré, Droit International, 2d ed. § 657, p. 202, §§ 690, 699, *et seq.*

This court selected the channel or midway of the bay between New York and New Jersey as the proper boundary.

Re Devoe Mfg. Co. 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894.

Louisiana's title to the disputed territory

is confirmed by prescription, usucaption, acquiescence, and specific acknowledgment by the state of Mississippi.

2 Fodéré, Droit International, § 781, pp. 337 *et seq.*; 5 Moore, International Arbitration, pp. 5017 *et seq.*; *Keyser* v. *Coe*. 9 Blatchf. 32, Fed. Cas. No. 7,750; *Rhode Island* v. *Massachusetts*, 4 How. 638, 11 L. ed. 1138; *Missouri* v. *Kentucky*, 11 Wall. 403, 20 L. ed. 119; *Indiana* v. *Kentucky*, 136 U. S. 511, 34 L. ed. 333, 10 Sup. Ct. Rep. 1051; *Virginia* v. *Tennessee*, 148 U. S. 522, 37 L. ed. 541, 13 Sup. Ct. Rep. 728; *Iowa* v. *Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239, 151 U. S. 239, 38 L. ed. 148, 14 Sup. Ct. Rep. 333.

The fact that the forces of nature have helped partially to destroy the peninsular formation of the St. Bernard peninsula does not affect Louisiana's ownership of that body of land.

2 Fodéré, Droit International, § 808, pp. 365 *et seq.*

The acts admitting Mississippi and Louisiana into the Union are not on the same subject-matter, and are therefore not statutes *in pari materia*, because they relate to two entirely different states and two entirely different objects.

26 Am. & Eng. Enc. Law, pp. 621–623; *O'Neal* v. *Robinson*, 45 Ala. 535; *Wilkes* v. *Dinsman*, 7 How. 122, 12 L. ed. 633; *Highgate* v. *State*, 59 Vt. 46, 7 Atl. 898.

The reason for the application of the thalweg, or deep-water theory, to interior rivers, was that it was deemed equitable and just that each of the riparian proprietors should have equal facility and advantage in reaching its shore for purposes of commerce.

1 Halleck, International Law, chap. 6, p. 146; Baker, International Law, p. 68, No. 23; Creasy, International Law, p. 221, No. 230.

We can therefore see no reason in logic or common sense why the same rule should not apply to the arms of the sea, whether they be straits, sounds, gulfs, bays, or other portions of the sea.

See Baker, International Law, p. 68, No. 25; Twiss, Law of Nations, ¶ 2, § 174, p. 251; Halleck, International Law, p. 145, No. 25; Rivier, Programme de Droit des Gens, § 14, p. 46; De Martens, Droit des Gens, p. 134, No. 39; 2 Fodéré, Droit International, p. 202.

In *Devoe Mfg. Co. supra*, this court applied the rule to the bay of New York, which, in some places, is 10 miles wide.

The action of the Federal Land Department concerning the character of the lands which it undertakes to dispose of is conclusive.

Heath v. *Wallace*, 138 U. S. 573, 585, 34 L. ed. 1063, 1068, 11 Sup. Ct. Rep. 380; *United States* v. *Budd*, 144 U. S. 167, 36 L. ed. 388, 12 Sup. Ct. Rep. 575; *French* v. *Fyan*, 93 U. S. 169, 23 L. ed. 812; *Scott* v. *Lockey Invest. Co.* 60 Fed. 36.

Messrs. Walter Guion, John Dymond, Jr., Albert Estopinal, Jr., and *Alexander Porter Morse* filed a brief for complainant on demurrer:

In a boundary suit between states, a state properly makes its appearance in the Supreme Court of the United States through its governor or chief executive.

Kentucky v. *Dennison*, 24 How. 66, 16 L. ed. 717.

The governor, as the special guardian of the state's interest, is a proper party to initiate necessary litigation. His right to do so is indeed a part of his general powers of supervision over the property and welfare of the state (*State ex rel. Mahan* v. *Dubuclet*, 22 La. Ann. 602; *State ex rel. Strauss* v. *Dubuclet*, 25 La. Ann. 161), and it therefore is not necessary that he should first be authorized by legislative act.

14 Am. & Eng. Enc. Law, 2d ed. p. 1100; *Alexander* v. *State*, 56 Ga. 478.

The Supreme Court of the United States, exercising original jurisdiction, will take judicial cognizance without proof or plea of the laws of a state, whether depending upon statute or judicial opinion.

Lamar v. *Micou*, 114 U. S. 223, 29 L. ed. 95, 5 Sup. Ct. Rep. 857; *Gormley* v. *Bunyan*, 138 U. S. 635, 34 L. ed. 1090, 11 Sup. Ct. Rep. 453; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Huntington* v. *Attrill*, 146 U. S. 678, 36 L. ed. 1131, 13 Sup. Ct. Rep. 224; *Lloyd* v. *Matthews*, 155 U. S. 227, 39 L. ed. 130, 15 Sup. Ct. Rep. 70; *Mills* v. *Green*, 159 U. S. 657, 40 L. ed. 295, 16 Sup. Ct. Rep. 132; *Eastern Bldg. & L. Asso.* v. *Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566; *Knower* v. *Haines*, 31 Fed. 514; *Newberry* v. *Robinson*, 36 Fed. 843; *Borland* v. *Haven*, 37 Fed. 406; *South Carolina ex rel. Tillman* v. *Coosaw Min. Co.* 45 Fed. 808; *Western & A. R. Co.* v. *Roberson*, 9 C. C. A. 646, 22 U. S. App. 187, 61 Fed. 594; *Davenport* v. *Moore*, 74 Fed. 946; *Davidow* v. *Pennsylvania R. Co.* 85 Fed. 944; *Andruss* v. *People's Bldg. Loan & Sav. Asso.* 36 C. C. A. 336, 94 Fed. 580.

The court will therefore take judicial notice of act 65 of the Louisiana legislature for the year 1884, vesting authority in the attorney general to initiate litigation necessary to protect the state's interests.

In addition to this specific authority, the attorney general of Louisiana has, by virtue of the jurisprudence of our country,

general authority justifying him in joining in the institution of this suit.

3 Am. & Eng. Enc. Law, 2d ed. p. 479.

The allegations of the demurrer to the effect that this is not a controversy between two states are negatived by the averments of the bill of complaint; but if there be any doubt in the mind of this court as to the sufficiency of the allegations of the bill, the case of *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552, will be sufficient warrant for this court to refuse to dismiss the bill on demurrer.

Messrs. **Hannis Taylor** and **Monroe McClurg** argued the cause and filed a brief for defendant:

In cases of doubt or uncertainty, or apparent conflict or repugnancy, this court will construe all of the acts relating to the same subject-matter together, and in such a manner, if their language will reasonably admit of it, as to permit them all to stand together and remain in full force; if a subsequent act on the same subject affords complete demonstration of the legislative sense of its language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to the courts in expounding the provisions of the law; if a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute; acts of Congress dealing with the same subject-matter should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones; it is not to be presumed that Congress would grant or even simply release the right of the United States to land confessedly before granted. This would be only holding out inducements to litigation.

26 Am. & Eng. Enc. Law, 2d ed. p. 620; *Alexander* v. *Alexandria*, 5 Cranch, 8, 3 L. ed. 21; *Doe ex dem. Patterson* v. *Winn*, 11 Wheat. 386, 6 L. ed. 501; *Pollard* v. *Kibbe*, 14 Pet. 366, 10 L. ed. 496; *United States* v. *Freeman*, 3 How. 556, 563, 564, 11 L. ed. 724, 727; *Ailesbury* v. *Pattison*, 1 Dougl. K. B. 30; *Weatherhead* v. *Bledsoe*, 2 Overt. 352; *Morris* v. *Mellin*, 6 Barn. & C. 454; *Sandiman* v. *Breach*, 7 Barn. & C. 99; *Wimbish* v. *Tailbois*, 1 Plowd. 57; *Mossman* v. *Higginson*, 4 Dall. 14, 1 L. ed. 720; *Cope* v. *Cope*, 137 U. S. 687, 34 L. ed. 833, 11 Sup. Ct. Rep. 222; *Stockdale* v. *Atlantic Ins. Co.* 20 Wall. 323, 22 L. ed. 348; *Converse* v. *United States*, 21 How. 463, 16 L. ed. 192; *United States* v. *Walker*, 22 How. 299, 16 L. ed. 382; *Ryan* v. *Carter*, 93 U. S. 78, 23 L. ed. 807; *Vane* v. *Newcombe*, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60.

Where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; *Wilson* v. *Rousseau*, 4 How. 646, 11 L. ed. 1141; *Bloomer* v. *McQuewan*, 14 How. 539, 553, 14 L. ed. 532, 539; *Blake* v. *National City Banks*, 23 Wall. 307, 320, 23 L. ed. 119, 121; *United States* v. *Kirby*, 7 Wall. 482, 486, 19 L. ed. 278, 280; *Knowlton* v. *Moore*, 178 U. S. 77, 44 L. ed. 984, 20 Sup. Ct. Rep. 747.

Courts will take judicial notice of the prominent geographical facts and features of the country.

The Apollon, 9 Wheat. 362, 6 L. ed. 111; *The Montello* (*United States* v. *The Montello*) 11 Wall. 411, 20 L. ed. 191; *State* v. *Wagner*, 61 Me. 178.

The rule of the thalweg applies only to rivers.

2 Grotius, De Jure Belli ac Pacis, chap. 3, § 17; 1 Vattel, Droit des Gens, chap. 22, § 26; Twiss, Law of Nations, p. 127; 1 Halleck, International Law, Baker's ed. p. 171.

Congress saw fit, in the act admitting Louisiana as a state, to establish for her a land boundary. From the junction of the Rigolets with Lake Borgne to the mouth of the Sabine river the boundary of Louisiana is the "coast." The vital words of the act are: "Including all islands within 3 leagues of the coast." Congress thus established a definite land boundary for that state, and not a shadowy and uncertain water boundary, as claimed in the bill. A special rule having been thus established by competent authority, a general rule, even if such a one existed, could not be invoked. General rules of international law are never applied under such circumstances.

2 Grotius, De Jure Belli ac Pacis, chap. 3; Martens, Precis, § 119, p. 320; 1 Calvo, Droit Int. § 19, p. 109; 1 Phillimore, International Law, 2d ed. pp. 44, 45; 1 Twiss, Law of Nations, pp. 130, 131; Lawrence's Wheaton, International Law, p. 28; 1 Halleck, International Law, Baker's ed. p. 50; I Lorimer, Inst. of International Law, p. 43.

A distinction exists between the coast line of physical geography for the purposes

of boundary, and the political coast line for the purpose of jurisdiction.

1 Rivier, Droit des Gens, pp. 145, 146, 170.

Both in their popular and technical senses, "coast" and "shore" are identical and convertible terms.

Century Dict. *Coast;* 4 Am. & Eng. Enc. Law, 2d ed. p. 818; *United States* v. *Pacheco,* 2 Wall. 587, 17 L. ed. 865; 2 Farnham, Waters, p. 1463; *Hamilton* v. *Menifec,* 11 Tex. 718; 1 Farnham, Waters, p. 227.

The fact that Congress attempted to grant to Mississippi all islands within 18 miles of her coast is conclusive evidence that that body considered the islands in question as such, and that they had not been previously granted to Louisiana. Here the court should apply the rule laid down in *Pollard* v. *Kibbe,* 14 Pet. 366, 10 L. ed. 496. It is not to be presumed that Congress would grant or even simply release the right of the United States to land confessedly before granted.

In the construction of statutes, as in the construction of deeds, the cardinal rule is to effectuate, if possible, the entire intention of the grantor; and, in ascertaining that intention, regard must be had to the situation and the relative position of the parties, and the objects which they had in view.

Saunders v. *Saunders,* 20 Ala. 710; *Strong* v. *Gregory,* 19 Ala. 146.

In the construction of statutes one part must be construed by another; to collect the legislative intention the whole must be inspected (*Strode* v. *Stafford Justices,* 1 Brock. 162, Fed. Cas. No. 13,537); and recourse may be had for this purpose to a proviso which had been repealed by a subsequent act (*Bank for Savings* v. *The Collector* [*Bank for Savings* v. *Field*] 3 Wall. 495, 18 L. ed. 207). Statutes are to be interpreted so as to give effect to all the words therein, if such interpretation be reasonable, and be neither repugnant to the provisions, nor inconsistent with the objects of the statute (*United States* v. *Bassett,* 2 Story, 389, Fed. Cas. No. 14,539). It is not to be presumed, that the legislature intended that any part of the statute should be without its proper meaning, force, or effect (Potter's Dwarr. Stat. p. 188, note 8).

Grants made by a legislature are not warranties; and, if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee.

Rice v. *Minnesota & N. W. R. Co.* 1 Black, 358, 17 L. ed. 147; *Polk* v. *Wendal,* 9 Cranch, 87, 3 L. ed. 665; *United States* v. *Stone,* 2 Wall. 525, 17 L. ed. 765.

Within what are recognized by the laws of nations as the territorial limits of states, a state can define its boundaries on the sea and the boundaries of its counties.

Manchester v. *Massachusetts,* 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

The enactment of legislation by a state for the assertion of its sovereignty and jurisdiction, and the taking of judicial action for the same purpose, is such affirmative action as should be taken to that end.

Indiana v. *Kentucky,* 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051.

Mr. **James N. Flowers** also argued the cause, and, with *Messrs. Hannis Taylor, Monroe McClurg,* and *William Williams,* filed a supplemental brief for defendant:

The doctrine of *in pari materia* is just as applicable in a case of conflict and repugnancy as it is in a case of doubt and uncertainty.

26 Am. & Eng. Enc. Law, 2d ed. p. 623; *McFarland* v. *Bank of State,* 4 Ark. 416; *Robinson* v. *Tuttle,* 37 N. H. 248.

Statutes are *in pari materia* which relate to the same person or thing or to the same class of persons or things, and the phrase is applicable to public statutes or general laws made at different times and in reference to the same subject.

26 Am. & Eng. Enc. Law, 2d ed. p. 621.

In great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.

Handly v. *Anthony,* 5 Wheat. 374, 5 L. ed. 113.

In a statute which requires measurement from the coast, the coast is the point of contact of the mainland with the sea; and, when a bay intervenes, the point of contact of the bay with the mainland is to be considered coast.

2 Farnham, Waters, p. 1463; *Hamilton* v. *Menifee,* 11 Tex. 718.

Messrs. William Williams and *Monroe McClurg* filed a separate brief for defendant:

The state is not sovereign as to its citizens or as to another state, and is under no obligation to collect the debts of its citizens or to otherwise redress their private wrongs. The state cannot loan its name to its citizens or sue in their behalf.

New Hampshire v. *Louisiana,* 108 U. S. 91, 27 L. ed. 662, 2 Sup. St. Rep. 176; *Louisiana* v. *Texas,* 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

Notwithstanding the comprehensive words of the Constitution, the mere fact that a

state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens.

Wisconsin v. *Pelican Ins. Co.* 127 U. S. 287, 32 L. ed. 242, 8 Sup. Ct. Rep. 1370.

No state can be sued either in its own courts or those of any other state or nation without its consent, and states can only be sued in proper cases in this court by reason of their agreement in the Constitution that the judicial power of the United States shall extend to all cases arising under the Constitution and laws.

United States v. *Texas*, 143 U. S. 646, 36 L. ed. 293, 12 Sup. Ct. Rep. 488.

The controversies existing at the time of the adoption of the Constitution were the cause and origin of extending the judicial power of the United States to controversies between the states, and the only purpose of such constitutional provision was to provide a tribunal for settlement of such controversies as to boundaries and other like controversies.

United States v. *Texas*, 143 U. S. 639, 36 L. ed. 291, 12 Sup. Ct. Rep. 488.

It was not the intention of the states, in adopting the Constitution, to give their consent to be sued whenever a dispute arises between citizens of different states in regard to commerce or any property right affecting such citizens.

Hans v. *Louisiana*, 134 U. S. 15, 33 L. ed. 847, 10 Sup. Ct. Rep. 504.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The demurrer was overruled because the court was of opinion that the bill presented a prima facie case of justiciable controversy between the state of Louisiana and the state of Mississippi as to the boundary line between them, and we are clear that the proofs establish the existence of such a controversy as to fully sustain our jurisdiction.

It is apparent that the enforcement of the oyster legislation of the two states led to a conflict between the authorities of both, which involved a dispute as to the true boundary line.

In 1886 the state of Louisiana passed an act vesting the power to control the oyster industry in the hands of the officials of the parishes of the state in their several localities, along general lines laid down in the law. La. Laws 1886, act No. 106. This was followed by the acts of 1892 (No. 110), 1896 (No. 121), and 1900 (No. 159). By the act of 1896 nonresident oyster fishermen were prohibited from fishing oysters in Louisiana waters, and the dredging of oysters was also prohibited, in this particular differing from the laws of Mississippi, which permitted it. By a concurrent resolution of 1900 a legislative commission was created, to investigate and report on the oyster industry of the state.

In January, 1898, the parochial authorities of the parish of St. Bernard equipped and sent out an official expedition to exclude from the oyster water of the parish any nonresident *oyster fishermen who might be [34] found fishing therein. Nonresident Mississippi oystermen were found fishing oysters there, and they were notified that they must stop fishing and move out of those waters. These Mississippians then complained to the Mississippi authorities and a conference ensued between representatives of the parish of St. Bernard and the county of Hancock. In January, 1901, at the instance of the Louisiana legislative commission appointed under the act of 1900, and of committees appointed from the police juries of the Louisiana parishes of St. Bernard and Plaquemines, a meeting of the state officials of Louisiana was held in New Orleans to consider the subject of the dispute with the state of Mississippi, and the invasion by nonresidents of the Louisiana oyster waters. This meeting resulted in the appointment by the governor of Louisiana of a commission of five members, and an official communication from the governor of Louisiana addressed to the governor of Mississippi, requesting the latter to appoint a similar commission to see if it were possible to effect an amicable settlement of the dispute between the two states. This Mississippi commission was accordingly appointed, and the two commissions held a joint conference in New Orleans in March, 1901. Louisiana presented at the conference a map showing the Louisiana contention as to the boundary, which is the map attached to the bill, and marked Exhibit E. The Mississippi commission reported that it was impossible to effect an amicable extrajudicial settlement of the dispute, and that the only hope of settlement was a friendly suit in the Supreme Court of the United States. This report was submitted by the Mississippi commission to the governor of Mississippi, and was transmitted to the legislature of that state. At this session the state of Mississippi passed a new law controlling her oyster waters and oyster industry. Laws 1902, chap. 58. This act created a state oyster commission, vested with entire control of the Mississippi oyster industry. It took the control of the industry out of the hands of the coast county authorities and centralized it in this state department, which was authorized to establish a *system of patrol of the Mississippi [35] oyster waters, and to maintain patrol boats to sustain the oyster laws in her territory.

In July, 1902, the state of Louisiana followed the example of the state of Mississippi and adopted an act (Acts 1902, No. 153) creating a state oyster commission of Louisiana as a state department, vested with full control of the oyster industry of Louisiana, and authorized to establish patrol boats and maintain an armed patrol on the Louisiana oyster waters to protect her rights in the oyster industry therein. In view of the danger of an armed conflict, the oyster commissions of both states, in September, 1902, adopted a joint resolution establishing a neutral territory between the two states "pending the final decision by the Supreme Court of the United States in the boundary suit to be instituted," to remain a common fishing ground. This *modus vivendi* did not include all of the disputed territory, but the waters of Mississippi sound between the deep-water channel and the north shore line of the Louisiana marshes were embraced by it.

In the following October this bill was filed. Louisiana appeared through her governor and her attorney general, and the action of the governor in instituting the suit was subsequently approved, ratified, and confirmed by the legislature.

The facts that the act of Congress admitting the state of Louisiana gave that state all islands within 3 leagues or 9 miles of her coast, and that the subsequent act of Congress admitting the state of Mississippi purported to give that state all islands within 6 leagues or 18 miles of her shore, and that some islands within 9 miles of the Louisiana coast were also within 18 miles of the Mississippi shore, furnished the basis for a boundary controversy, although, in our judgment, the apparent inconsistency is reconcilable, as hereinafter explained. And that controversy involved to each state pecuniary values of magnitude, as is shown by the evidence on both sides. We think that there existed between the two states, in their sovereign capacity as states, a controversy affecting the boundary line separating them
[36] in the locality in *question of a character to justify the exercise of our original jurisdiction within the rules laid down in *Missouri* v. *Illinois*, 200 U. S. 496, *ante*, 572, 26 Sup. Ct. Rep. 268; *Missouri* v. *Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 13 How. 589, 14 L. ed. 279; *Louisiana* v. *Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

2. The state of Louisiana was admitted into the Union by the act of Congress approved April 8, 1812 (2 Stat. at L. 701, chap. 50), which commenced as follows:

"*Whereas*, the representatives of the people of all that part of the territory or country ceded under the name of 'Louisiana' by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: Beginning at the mouth of the River Sabine; thence by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the River Mississippi; thence down the said river to the River Iberville; and from thence along the middle of the said river and Lakes Maurepas and Ponchartrain to the Gulf of Mexico; thence bounded by the said gulf to the place of beginning including all islands within three leagues of the coast; . . ."

Map or diagram No. 1, given in the opening statement, shows the limits as thus defined.

By an act of Congress approved April 14, 1812 (2 Stat. at L. 708, chap. 57), additional territory was added to the state of Louisiana, described thus:

"All that tract of country comprehended within the following bounds, to wit: Beginning at the junction of the Iberville with the River Mississippi; thence along the middle of the Iberville, the River Amite and of the Lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl river; thence up the eastern branch of Pearl river to the thirty-first degree of north latitude; thence along the said degree of latitude to the River Mississippi: thence down the said river to the place of beginning, *shall [37] become and form a part of the said state of Louisiana, and be subject to the Constitution and laws thereof in the same manner, and for all intents and purposes, as if it had been included within the original boundaries of the said state."

This added territory is shown on map or diagram No. 2. The eastern boundary of Louisiana was thereby moved eastward from the Mississippi to Pearl river, and Louisiana was given the country south of the 31st degree of north latitude, and north of the boundary formed by the River Iberville, the middle of Lakes Maurepas and Pontchartrain, and the Rigolets.

The River Iberville is called on this map Bayou Manchac, and is still known by that name. The Rigolets is a gut connecting the waters of Lakes Pontchartrain and Borgne, both of which are bodies of salt water and were originally arms of the sea. In order to reach the open waters of the Gulf of

Mexico from the middle of Lakes Maurepas and Pontchartrain the line ran through the Rigolets into Lake Borgne, and after the addition to the state by the act of April 14, 1812, the eastern boundary line of Louisiana entered Lake Borgne to the south by Pearl river as well as the Rigolets. To get from Lake Borgne into the open water of the Gulf of Mexico beyond Chandeleur islands and around to the western boundary of Louisiana, it was necessary, as Louisiana contends, to follow the deep-water channel north of Half Moon or Grand island, through Mississippi sound, and thence by the pass between Cat island and Isle à Pitre, north of the Chandeleur islands, into the open Gulf. Many maps are given in the record, some made at dates long prior to the admission of Louisiana as a state, some at that time, and some within a few years thereafter, and all show the St. Bernard peninsula to be geographically a true part of the state of Louisiana, or of an area of country that was to form the state, and that the said peninsula projected itself as a well-defined arm of land out into the waters of the Gulf, branching off as a projection from
[38] the main body of land composing *the state, and forming a part of it. We observe that on many of these early maps the term "peninsula" is applied to this projection, and that designation is sufficiently accurate for the purpose of description.

November 14, 1803, President Jefferson sent a communication to Congress, in which, among other things, he said:

"The object of the following pages is to consolidate the information respecting the present state of Louisiana, furnished to the Executive by several individuals among the best informed on the subject.

"Of the province of Louisiana no general map, sufficiently correct to be depended upon, has been published, nor has any been yet procured from a private source. It is indeed probable that surveys have never been made upon so extensive a scale as to afford the means of laying down the various regions of a country which, in some of its parts, appears to have been but imperfectly explored. . . .

"St. Bernardo.

"On the east side of the Mississippi, about 5 leagues below New Orleans, and at the head of the English bend, is a settlement known by the name of the Poblacion de St. Bernardo, or the Terre aux Bœufs, extending on both sides of a creek or drain, whose head is contiguous to the Mississippi, and which, flowing eastward, after a course of 18 leagues, and dividing itself into two branches, falls into the sea and Lake Borgne. This settlement consists of two parishes, almost all the inhabitants of which are Spaniards from the Canaries, who content themselves with raising fowls, corn, and garden stuff for the market at New Orleans. The lands cannot be cultivated to any great distance from the banks of the creek, on account of the vicinity of the marsh behind them, but the place is susceptible of great improvement, and of affording another communication to small craft of from 8 to 10 feet draught, between the sea and the Mississippi."

"Country from Plaquemines to the Sea, and Effect of the Hurricanes.

[39] *"From Plaquemines to the sea is 12 or 13 leagues. The country is low, swampy, chiefly covered with reeds, and having little or no timber, and no settlement whatever. It may be necessary to mention here, that the whole lower part of the country, from the English turn downwards, is subject to overflowing in hurricanes, either by the recoiling of the river, or reflux from the sea on each side; and, on more than one occasion, it has been covered from the depth of 2 to 10 feet, according to the descent of the river, whereby many lives were lost, horses and cattle swept away, and a scene of destruction laid. The last calamity of this kind happened in 1794, but fortunately they are not frequent. In the preceding year the engineer who superintended the erection of the fort at Plaquemines was drowned in his house near the fort, and the workmen and garrison escaped only by taking refuge on an elevated spot in the fort, on which there were, notwithstanding, 2 or 3 feet of water. These hurricanes have generally been felt in the month of August. Their greatest fury lasts about twelve hours. They commence in the southeast, veer about to all the points of the compass, are felt most severely below, and seldom extend more than a few leagues above, New Orleans. In their whole course they are marked with ruin and desolation. Until that of 1793, there had been none felt from the year 1780."

This communication was, of course, before Congress when the act of 1812, admitting Louisiana, was approved, and the peninsula was clearly recognized as forming part of the parish of St. Bernard, as was its marshy character and that of the adjoining parish.

By the act of Congress, approved March 1, 1817 (3 Stat. at L. 348, chap. 23, § 2), the inhabitants of the western part of the then Mississippi territory were authorized to form for themselves a state constitution and to be admitted into the Union, with the following boundaries: "Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence

[40]up the same to the mouth of Bear *creek; thence by a direct line to the northwest corner of the county of Washington; thence due south to the Gulf of Mexico: thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning."

The people in convention, August 15, 1817, formed a constitution and state government (approved subsequently by popular vote), and the state was admitted by resolution December 10, 1817. 3 Stat. at L. 472.

The state of Alabama was admitted by the act of March 2, 1819 (3 Stat. at L. 489, chap. 47, § 2), which provided: "That the said state shall consist of all the territory included within the following boundaries, to wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido river; thence, east, to the western boundary line of the state of Georgia; thence along said line to the southern boundary line of the state of Tennessee; thence, west, along said boundary line, to the Tennessee river; thence, up the same, to the mouth of Bear creek; thence, by a direct line, to the northwest corner of Washington county; thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore, to the Perdido river; and thence, up the same to the beginning."

The islands, marsh or otherwise claimed by Louisiana in this case were all within 3 leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act, yet Mississippi claims thereunder the disputed territory, as being islands within 18 miles of her shore. If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that state and give it to the state of Mississippi. The rule, *Qui prior est tempore, portior est jure*, applied, and § 3 of art. 4 of the Constitution does not permit the claims of any [41]particular state to be *prejudiced by the exercise of the power of Congress therein conferred.

But it is said that the act admitting Louisiana, the act admitting Mississippi, and the act admitting Alabama, must be construed as *in pari materia;* and, being so construed, that Congress must be held to have had in view in the three acts a division of the coast along the Gulf of Mexico so as to equalize the water frontage of Mississippi, Louisiana, and Alabama.

We do not regard these acts as *in pari materia* in any proper sense. They provided for the admission of three separate states, and the subject of each was not only not identical with, but not even similar to, that of the others. They did not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to successfully contend that it changed the earlier act by construction or effected such change because declaratory of the meaning of the prior act.

And assuming, for the sake of argument, that the Louisiana and Mississippi acts were irreconcilably inconsistent, but remembering that when Louisiana was admitted into the Union, the territory now composing the coast counties of Mississippi, that is, below the 31st degree of north latitude, was not actually a part of the Mississippi territory, but was in dispute between the United States and Spain, the theory of any preconceived design in regard to the water front of the two states is too unreasonable to be entertained.

In the treaty of peace between England, France, and Spain of February 10, 1716, article 7, on the subject of the boundary line separating the dominions of England and France in the New World, provided: "That for the future the confines between the dominions of His Britannic Majesty and those of His Most Christian Majesty in that part of the world shall be fixed irrevocably by a line drawn along the River Mississippi from its source to the River Iberville, and from thence by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain to the sea." According to this treaty England retained the port of Mobile and its river and everything east *of [42]the Rigolets. The island of Orleans, formed by the River Iberville, Lakes Maurepas, and Pontchartrain, the Rigolets, the Gulf of Mexico, and the Mississippi river, remained the property of France. In the treaty of February 10, 1763, practically the same language is used in describing the boundary line separating the British from the French territory, and by the twentieth article the cession to England of Florida by Spain and all that Spain possessed on the continent of North America was provided for. By the treaty of September 3, 1783, between England and Spain, England retroceded East and West Florida to Spain. By the treaty of St. Ildefonso of October 1, 1800, Spain ceded to France "the colony or province of Louisiana with the extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other states." April 30, 1803, France ceded to the United States "the colony or province

of Louisiana" using the same description as used by Spain in ceding the territory to her, and stating in article 2: "In the cession made by the preceding article are included the adjacent islands belonging to Louisiana . . . " [8 Stat. at L. 202.]

There is nothing in any of these transfers to raise a doubt that the peninsula of St. Bernard was part of the Island of Orleans, and that this Island of Orleans was in fact formed by the extension to the sea of the boundary line coming down through the middle of Lakes Maurepas and Pontchartrain, and so finding its way to the sea by the deep-water channel.

March 26, 1804, an act of Congress was approved, dividing the country acquired as Louisiana from France into two parts, providing:

"That all that portion of country ceded by France to the United States under the name of Louisiana, which lies south of the Mississippi territory and of an east and west line to commence on the Mississippi river at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a ter-[43] ritory of the United *States under the name of the territory of Orleans, the government whereof shall be organized and administered as follows:

. . . . . .

"Section 12. The residue of the province of Louisiana ceded to the United States, shall be called the district of Louisiana, the government whereof shall be organized and administered as follows: . . ." [2 Stat. at L. 283, 287, chap. 38.]

Congress manifestly regarded the lands to the east, that were south of the Mississippi territory, and which form the disputed area of to-day, as part of the original island of Orleans, included in the treaty of April 30, 1803; and these were given to the territory of Orleans, whose southeastern boundary was the original southeastern boundary of the island of Orleans. At that date the Mississippi territory did not extend south of the 31st degree of north latitude, and its domain did not reach the shore of Mississippi sound, so-called.

February 20, 1811 (2 Stat. at L. 641, chap. 21), an act of Congress was approved "to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states and for other purposes." The description of the limits was as follows: "Beginning at the mouth of the River Sabine, thence, by a line to be drawn along the middle of the said river, including all islands, to the thirty-second degree of latitude, thence due north to the northernmost part of the thirty-third degree of north latitude, thence along the said parallel of latitude to the River Mississippi, thence down the said river to the River Iberville, and from thence along the middle of the said river and Lakes Maurepas and Ponchartrain to the Gulf of Mexico, thence, bounded by the said gulf to the place of beginning including all islands within three leagues of the coast, etc., etc."

The eastern boundary thus described is a water boundary, and, in exending this water boundary to the open sea or Gulf of Mexico, we think it included the Rigolets and the deep-water sailing channel line to get around to the westward. A little *over one year[44] later Louisiana was created a state by the act of Congress of April 8, 1812, with this identical eastern boundary line; and the addition of territory by the act of April 14, 1812, did not affect the deep-water sailing channel line as a boundary.

April 7, 1798 (1 Stat. at L. 549, chap. 28, § 3), an act was approved "for an Amicable Settlement of Limits with the State of Georgia, and Authorizing the Establishment of a Government in the Mississippi Territory," which read in part: "That all that tract of country bounded on the west by the Mississippi; on the north by a line to be drawn due east from the mouth of the Yasous to the Chatahouchee river; on the east by the River Chatahouchee; and on the south by the 31st degree of north latitude shall be, and hereby is, constituted one district, to be called the Mississippi territory." This was in conformity with the treaty between Spain and the United States of October 27, 1795. [8 Stat. at L. 138.] Maps of that date, and subsequently, show that the admitted rights of the United States did not at the time extend south of the 31st degree of north latitude at that point.

By an act of January 15, 1811, the President of the United States was authorized, among other things, in the event that any foreign government attempted to occupy the same, to take possession of the country lying east of the River Perdido, and south of the state of Georgia and the Mississippi territory. The River Perdido is in the state of Alabama east of the state of Mississippi, and flows into the Gulf of Mexico between Mobile bay, in Alabama, and Pensacola bay, in Florida. A few days later, and on March 3, 1811, an act of Congress was approved, providing that the act of January 15, 1811, and this act, should not be published until the end of the next session of Congress, unless with the consent of the President.

By resolution approved January 15, 1811, it was specifically declared that the United States could not, without serious inquietude,

see any part of the territory adjoining the southern border of the United States pass into the hands of any foreign power, "and that a due regard to their own safety com-
[45] pels *them to provide, under certain contingencies, for the temporary occupation of the said territory." 3 Stat. at L. 471.

May 14, 1812, an act of Congress was passed (2 Stat. at L. 734, chap. 84) to enlarge the boundaries of the Mississippi territory, which used the following language: "That all that portion of territory lying east of Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby, annexed to the Mississippi territory," etc. The country described was not at the time in the possession of the United States, and on February 12, 1813, Congress passed an act "authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi territory and west of the River Perdido," which act referred to the tract as "not now in possession of the United States." 3 Stat. at L. 472. But it was not until the enabling act in respect of Mississippi, approved March 1, 1817, that the language was used: "Thence due south to the Gulf of Mexico; thence, westwardly including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne," etc. [3 Stat. at L. 348, chap. 23, § 2.]

The claim of Mississippi is that the disputed area is composed of islands, and as those islands are within 18 miles of her shore, that they were given to her by the act of March 1, and the resolution of December 10, 1817. It is true there are some islands in that area, such as Grassy, Half Moon, Petit Pass, and Isle à Pitre, all of which are between the deep-water channel on the north and the main coast line of St. Bernard peninsula on the south.

The contention of Louisiana is that these islands were previously given to her by the act of April 8, 1812, more than five years prior to the admission of Mississippi, and that her title thereto, even if the acts were in conflict, is superior to that of the state of Mississippi; and she also contends that the islands belong to her because they are south of the deep-water sailing channel line, which she submits is the true boundary line between the two states. Mississippi denies
[46] that the peninsula *of St. Bernard and the Louisiana marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly there are in the body of the Louisiana marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands. They are rather, as the Commissioner of the General Land Office wrote the Mississippi land commissioner in 1904, "in fact, hummocks of land surrounded by the marsh and swamp in said townships. . . ."

And when the Louisiana act used the words: "Thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast" [2 Stat. at L. 701, chap. 50], the coast referred to is the whole coast of the state, and the peninsula of St. Bernard formed an integral part of it. Lake Borgne and Mississippi sound are bodies of salt water, and, as such, parts of the sea or gulf, and as the coast of Louisiana began along the north shore of the peninsula, it is not to be supposed that the islands referred to by Congress in the Louisiana act were solely those islands to the south of that state.

The contention of Mississippi is based upon an assumed inconsistency between the Louisiana and the Mississippi acts, but we think, upon a true interpretation, in the light of the facts, that no such inconsistency can be imputed. The maps show that there is a chain, not of alluvial, but of sea-sand islands, running from the west shore of Mobile bay, in the state of Alabama, westward to and inclusive of Cat island, in the state of Mississippi. This chain forms the southern boundary of Mississippi sound, and the islands are all relatively the same distance from the shore of the states of Mississippi and of Alabama. They, beginning at the eastern end, are Dauphin, Petit Bois, Horn, Ship, and Cat islands, and there are some other islands lying within this chain. If Congress referred to these islands as being thus within 6 leagues of the shore, when the act creating the state of Mississippi was passed, it follows that there would be no conflict with prior existing boundaries of
*the state of Louisiana, particularly if the [47]
deep-water sailing channel line be taken as the correct boundary between the states. And when Congress created a separate territorial government for the eastern part of Mississippi territory and called it Alabama, by the act of March 3, 1817 [3 Stat. at L. 372, chap. 59], it used the same language concerning the western and southern boundary of the territory: "Thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore to the Perdido river and thence up same to the beginning." It seems obvious to us that it was to this chain of islands that Congress referred when it admitted Mississippi into the Union, and that it had no intention whatsoever of giving Mississippi any claim of ownership in the

sea-marsh islands, which had been previously granted to the state of Louisiana.

We are of opinion that the peninsula of St. Bernard in its entirety belongs to Louisiana; that the Louisiana marshes at the eastern extremity thereof form part of the coast line of the state; and that the islands within 9 miles of that coast are hers, except as restricted by the deep-water sailing channel regarded as a boundary. Cat island, for instance, is within the 9 miles, but it is north of the deep-water channel, is not alluvial, and is conceded by both states to belong to Mississippi.

3. That there is a deep-water sailing channel line emerging from the mouth of Pearl river, and extending east between Lower Point Clear and Grand island, is shown by the numerous maps, surveys, and sketches in the record. It separates into two branches, one of them passing between Cat island and Isle à Pitre.

Among the maps put in evidence by Louisiana is one prepared by George Gauld, M. A., for the British Admiralty, in the year 1778, and, from the relative depths of water given, the existence of this same channel, extending out into the Gulf, southwest of Cat island, is shown, and is the same as noted on maps of subsequent years.

February 14, 1839, an act of the legisla-
[48] ture of Mississippi was *approved, providing for a survey of the Mississippi coast. The survey and report are given in full in the record, and the deep-water channel above referred to is traceable in detail on the sketch. The channels indicated on this survey and on the United States Coast and Geodetic Survey map are the same channels. It may be noted, in passing, that the body of water now known as "Mississippi sound," is not so designated on this sketch, and the first map which uses this name, to which our attention has been called, was issued in 1866.

Louisiana lies between the states of Mississippi to the east and Texas to the west. The southern portion of Louisiana is geologically of an alluvial formation, containing the delta of the Mississippi river. The peninsula of the parish of St. Bernard is practically a part of this delta formation.

Mississippi's mainland borders on Mississippi sound. This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat island. The openings from this body of water into the Gulf are neither of them 6 miles wide. Such openings occur between Cat island and Isle à Pitre; between Cat and Ship islands; between Ship and Horn islands; between Horn and Petit Bois islands; between Petit Bois and Dauphin islands; between Dauphin island and the mainland on the west coast of Mobile bay. The maps show all this, and, among others, reference may be made to Jeffrey's map of 1775, given in the record, and which, in reduced form, is reproduced from Jeffrey's Atlas of 1800 as the frontispiece of vol. 2, Adams's History of the United States.

Now to repeat, the boundary of Louisiana separating her from the state of Mississippi to the east is the thread of the channel of the Mississippi river, and this extends south until it reaches the 31st degree of north latitude and then runs directly east along that degree until Pearl river is reached; thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi sound, and Mississippi sound into the open Gulf of Mexico *through, among other outlets, South [49]
pass, separating Cat island from Isle à Pitre.

If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep-water channel.

The term "thalweg" is commonly used by writers on international law in definition of water boundaries between states, meaning, the middle, or deepest, or most navigable channel. And while often styled "fairway" or "midway" or "main channel," the word itself has been taken over into various languages. Thus, in the treaty of Luneville, February 9, 1801, we find "le thalweg de l'Adige," "le thalweg du Rhin," and it is similarly used in English treatics and decisions, and the books of publicists in every tongue.

In *Iowa* v. *Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239, the rule of the thalweg was stated and applied. The controversy between the states of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two states for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between states is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well

established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recog-
[50] nized treatises in international *law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will, on its side, exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the River Mississippi from its source to the River Iberville,' as there used, is meant along the middle of the channel of the River Mississippi."

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries, and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states; but whenever there is a deep-water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de) 2d ed. p. 134; Hall, § 38; Bluntschli, 5th ed. §§ 298, 299; 1 Oppenheim, pp. 254, 255.

Thus Martens writes: "What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré says (vol. 2, p. 202), that as to lakes, "in communication with or connected with the sea, they ought to be considered under the same rule as international rivers."

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In *Re Devoe Mfg. Co.* 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894, the question at issue was in regard to the boundary line between New York and New Jersey, un-
[51] der an agreement between the two *states. The jurisdiction of the state of New Jersey was claimed "to extend down to the bay of New York, and to the channel midway of said bay," and this court sustained the claim. See *Hamburg American S. S. Co.* v. *Grube*, 196 U. S. 407, 49 L. ed. 529, 25 Sup. Ct. Rep. 352.

In the San Juan water boundary controversy between the United States and Great Britain, Emperor William I. gave the award in favor of the United States, October 21, 1871, by deciding "that the boundary line between the territory of Her Britannic Majesty and the United States should be drawn through the Haro channel;" and it is apparent that the decision was based on the deep-channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed, in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until "it reaches the center of the fairway of the straits of San Juan de Fuca." The fairway was the equivalent of the thalweg.

Again, in fixing the boundary line of the Detroit river, under the 6th and 7th articles of the treaty of Ghent, the deep-water channel was adopted, giving Belle isle to the United States, as lying north of that channel. [8 Stat. at L. 221.]

So in the Alaskan boundary case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland channel was the proper boundary line, and included Wales island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it.

But counsel contend that the rule "as to the flow of the midchannel or thalweg of the River Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain, expires by its own limitation when such midchannel reaches Lake Borgne, which, in contemplation of the rule, is the *open sea, and part of the waters of [52] the Gulf of Mexico." This contention is inconsistent, as matter of fact, with the allegation of the cross bill that "the Mississippi sound was recognized as a body of water 6 leagues wide, wholly within the state of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico," and with Mississippi's Exhibit Map A, presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi sound, is not an open sea, but a very shallow arm of the sea, having outside of the deep-water channel an inconsiderable depth.

The maritime belt is that part of the sea which, in contradistinction to the open

sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester* v. *Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248.

In *Manchester* v. *Massachusetts*, the court said: "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory, not exceeding 2 marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or frec-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

Questions as to the breadth of the maritime belt or the extent of the sway of the riparian states require no special consideration here. The facts render such discussion unnecessary.

Islands formed by alluvion were held by Lord Stowell, in respect of certain mud is-
[53] lands at the mouth of the Mississippi, *to be "natural appendages of the coast on which they border, and from which, indeed, they are formed." *The Anna* (1805) 5 C. Rob. 373.

As to these particular waters, the observations of Mr. Hall, 4th ed. p. 129, are in point: "Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases inclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water."

He then states the specific case of the Archipiélago de los Canarios on the coast of Cuba, and says: "In cases of this sort the question whether the interior waters are, or are not, lakes inclosed within the territory, must always depend upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the bank."

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary.

4. Moreover, it appears from the record that the various departments of the United States government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international *rule might be in respect [54] of the acquisition by prescription of large tracts of country claimed by both. *Virginia* v. *Tennessee*, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728; *Indiana* v. *Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Missouri* v. *Kentucky*, 11 Wall. 395, 20 L. ed 116; *Rhode Island* v. *Massachusetts*, 4 How. 591, 11 L. ed. 1116.

The Louisiana enabling act of February 20, 1811, provided that all the waste and unappropriated lands in said state should be and remain the property of the United States government. In the disputed area of to-day are included lands and waters located in various townships, all of which are enumerated in the southeastern land district of Louisiana, east of the Mississippi river. The lands in these townships were surveyed by the government about the year 1842, all of them as being in and forming a part of the state of Louisiana. By the swamp land grants of 1849 and 1850, the United States granted to certain states the swamp and overflowed lands within their respective limits, in order that these lands might be reclaimed, protected from overflow, and brought into use. Louisiana made application to the United States for the approval to her of these lands as being part of her territory and situated within her limits. They all lay south of the deep-water channel and were all approved to the state of Louisiana May 6, 1852. They were then offered by the state through the register of the state land office for sale, and many sales of them were made from time to time to individuals, and patents issued therefor in various years from 1853 to 1894. In 1892, in furtherance of the better protection of the lands of the parishes of St. Bernard and Plaquemines from overflow,

the legislature of Louisiana adopted an act which created a Lake Borgne basin levee commission, and provided a board of commissioners therefor as a department of the state government, and the register of the state land office was authorized to transfer all of the unsold lands to the board, which was done in April, 1895. The board was authorized by law to sell these lands, and also to levy taxes to be used in establishing a protective levee system in the district. The board made sales of a considerable number [55] of acres *to different individuals from September 16, 1898, to March 7, 1902. Isle à Pitre was composed of certain enumerated sections of township 10, south of range 20 east, and these lands were approved to Louisiana by the Commissioner of the General Land Office of the United States May 6, 1852, as forming part of that state, and they were subsequently patented, sold, and conveyed to various individuals, the chain of title extending from 1852,—a period of over fifty years. The lands forming Isle à Pitre have been paying taxes to the state of Louisiana for years. Political and police control and jurisdiction by the parish of St. Bernard officials were exercised over the disputed area, and many instances are given of police control and jurisdiction by Louisiana officials over this general territory. This territory consisted, as heretofore stated, of what was known as the Louisiana marshes, and it is admitted that they have immemorially been known by that name, though some of the witnesses for Mississippi said that they were also known as Grand marshes; admitting, however, that they were quite as frequently called the Louisiana marshes.

Some other matters may properly be referred to as showing the general understanding of and acquiescence in the boundary asserted by Louisiana.

In January, 1901, the Superintendent of the Coast and Geodetic Survey was applied to by a member of the house of representatives from Mississippi for information in regard to the boundary line between Louisiana and Mississippi in the present disputed area, and Hodgkins, an assistant in the department, a well-known expert in such matters, made a report January 30, 1901, which, after considering the subject in all its phases, showed that the correct boundary between the two states in the locality is the deep-water sailing channel line contended for by Louisiana.

The United States Geological Survey published in the year 1900 a bulletin devoted to a discussion of the boundaries of the states and territories, and giving a history of changes as they may have occurred. The [56] third edition was published in *1904. Gannett's Boundaries, 58th Congress, 2d Session, H. R. Doc. 678.

In the opinion of that Bureau, Louisiana was originally bounded by the deep-water channel, and is the owner of the area in dispute to-day, according to the report and the accompanying sketches.

In 1897, Louisiana requested the United States Commission of Fish and Fisheries to make an investigation and report upon certain technical matters in connection with the oyster industry of that state, which investigation was made in February, 1898, by the United States Fish Commission steamer Fish Hawk. A map was made of the area investigated in St. Bernard parish, and that map is given in the opening statement as Diagram No. 4. Louisiana's ownership was clearly recognized.

The General Land Office of the United States began, as early as 1842, a detailed survey of the land forming the disputed area, of which township plats appear in the record. The survey gave the location of Marsh island, Half Moon or Grand Island, an unnamed island. Petit Pass island, and Isle à Pitre, and the sections and townships comprised in these islands. They were all designated as being in the southeastern land district of Louisiana, east of the Mississippi river.

When, as we have said, Louisiana, in the year 1852, selected these and other lands within her state limits as inuring to her under the swamp land grants, the General Land Office, on May, 6, 1852, recognized the correctness of the claim to the lands and approved and patented them to her as a state. Mississippi also applied for the land inuring to her under the provisions of those grants, and received her swamp lands, but the state never selected and never had approved to her, as is shown by the books of the state land office of Mississippi, any of the lands in the disputed area of to-day; but it appeared that the state did have in her land office books a record of the lands forming St. Joseph's island, which lay immediately north of the deep-water channel, and did not extend south of that channel.

*The General Land Office of the United [57] States, in all of the maps it has caused to be made of Louisiana and Mississippi, has been consistent in its recognition of the ownership by Louisiana of the disputed area. See maps of Louisiana, 1879, 1886. 1887, 1896; and of Mississippi in 1890.

As before stated, in 1839 an engineer and surveyor made a report and sketch of the coast of Mississippi, under the authority of that state. This showed the territory lying south of the deep-water channel in outline to be a peninsular formation. The

report referred to Horn, Petit Bois, Cat, and Ship islands as belonging to Mississippi, all of which are east of the disputed territory; and the territory southwest of the deep-water channel, or South pass, was described as the Louisiana marshes. The official maps of Mississippi recognized Louisiana's ownership of the disputed territory. The state map of October 26, 1866, which was approved by Governor Humphrey and also by Governor Alcorn, did this; and other maps, as the official map of Mississippi, published under an act of the legislature of that state on March 8, 1882; Rand McNally's sectional map of Mississippi, compiled from the records of the office of the surveyor general of the board of immigration and agriculture, Jackson, Mississippi; and the railroad commissioners' map of Mississippi gave like recognition. The only exception seems to be a map of the railroad commission, issued in 1904, two years after this suit was instituted, wherein, on the 18-mile theory, Mississippi for the first time cartographically extended her claims into the St. Bernard, Louisiana, peninsula.

The record contains much evidence of the exercise by Louisiana of jurisdiction over the territory in dispute, and of the general recognition of it by Mississippi as belonging to Louisiana. Apparently Louisiana had exercised complete dominion over it from 1812 with the acquiescence of Mississippi, unless the fact that the latter made a general reference to islands within 6 leagues of her shore in her Code of 1880 indicated otherwise. But the evidence fails to satisfy us that she attempted any physical possession or control until after 1900. The few [58] instances *referred to as showing that Mississippi asserted rights in the disputed area are of little weight and require no discussion.

Our conclusion is that *complainant is entitled to the relief sought.*

Decree accordingly.

Final decree entered April 23, 1906.

This cause came on to be heard on the pleadings and proofs and was argued by counsel. On consideration thereof it is found by the court that the state of Louisiana, complainant, is entitled to a decree recognizing and declaring the real, certain, and true boundary south of the state of Mississippi and north of the southeast portion of the state of Louisiana, and separating the two states in the waters of Lake Borgne and Mississippi sound, to be, and that it is, the deep-water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne, and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand island, thence east and south through Mississippi sound, through South pass, between Cat island and Isle à Pitre, to the Gulf of Mexico, as delineated on the following map, made up of the parts of charts Nos. 190 and 191 of the United States Coast and Geodetic Survey, embracing the particular locality.

And it is ordered, adjudged, and decreed accordingly.

It is further ordered, adjudged, and decreed that the state of Mississippi, its officers, agents, and citizens, be and they are *hereby enjoined and restrained from disput- [59] ing the sovereignty and ownership of the state of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map.

And that the costs of this suit be borne by the state of Mississippi.

STATE OF IOWA, *Complainant,*
v.
STATE OF ILLINOIS.

(See S. C. Reporter's ed. 59–60.)

Boundaries between states.—The boundary line between the state of Iowa and the state of Illinois decreed to be the middle of the main navigable channel of the Mississippi river.

[No. 2, Original.]

Stipulation submitted April 16, 1906. Decree entered April 23, 1906.

ORIGINAL SUIT in equity to settle the boundary line between the states of Iowa and Illinois. Final decree entered, establishing such boundary as the middle of the main navigable channel of the Mississippi river.

See same case, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239.

Mr. Chief Justice **Fuller** announced the following order:

This cause came on for final decree and was submitted on the following stipulation:

And now comes the state of Iowa, complainant in this cause, and also comes the state of Illinois, defendant in this cause, and severally and jointly move the court to vacate and set aside so much of the interlocutory order entered in this cause on

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NOTE.—*On rivers and lakes as state boundaries*—see note to Buck v. Ellenbolt, 15 L.R.A. 187.

As to jurisdiction over boundary rivers—see note to Roberts v. Fullerton, 65 L.R.A. 953.

the 3d day of January, A. D. 1893, as orders "that a commission be appointed to ascertain and designate at said places the boundary line between the two states, said commission consisting of three competent persons to be named by the court, upon suggestion of counsel, and be required to make a proper examination, and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action;" and also the interlocutory order entered in this cause on the 7th day of March, A. D. 1893; and also that part of the interlocutory order entered in this cause on the 10th day of April, A. D. 1893, which was not set aside
[60] and vacated by the interlocutory order *entered in this cause on the 15th day of January, A. D. 1894; and that that part of the interlocutory order entered in this cause on the 3d day of January, A. D. 1893, whereby it was "ordered, adjudged, and decreed by this court that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river," be declared the final order, judgment, and decree of this court in this cause.

Chas. W. Mullan,
Attorney General of Iowa.
W. H. Stead,
Attorney General of Illinois.

In consideration whereof and of the decision of this court reported 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239, it is ordered, adjudged, and decreed that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi river, at the places where the nine bridges mentioned in the pleadings cross said river.

STATE OF OREGON, *Complainant*,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office.

(See S. C. Reporter's ed. 60–70.)

1. United States—immunity from suit.— The immunity of the United States from suit prevents a state from maintaining, in the Supreme Court of the United States, a suit against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from allotting and patenting in severalty swamp lands within the limits of an Indian reservation.

2. Courts—interference with Land Department.— The courts cannot interfere with the allotment and patenting by the Land Department of swamp lands within the limits of an Indian reservation, while the legal title is still in the Federal government.

[No. 16, Original.]

Argued April 5, 6, 1906. Decided April 23, 1906.

ORIGINAL BILL in equity, filed by the state of Oregon to restrain the Secretary of the Interior and the Commissioner of the General Land Office from allotting and patenting in severalty swamp lands within an Indian reservation. On demurrer, *dismissed.*

Statement by Mr. Justice **Brewer:**

By leave of court the state of Oregon filed an original bill against Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain the defendants from allotting or patenting to any Indians or other persons certain lands within the limits of the Klamath reservation, which it is alleged were, on March 12, 1860, swamp and overflowed lands, and praying a decree establishing the title of the state of Oregon to such lands, and declaring that the title is subject only to such right of temporary and terminable occupation as may exist in the Indians at present occupying the said reservation, and is not to be defeated by any allotment, patent, agreement, or other arrangement. To this bill the defendants filed a demurrer, partly on jurisdictional grounds and partly on the merits.

For a clear understanding of the questions presented the allegations in the bill must be stated. It is alleged that the defendant Hitchcock is a citizen of the state of Missouri, the defendant Richards of the state of Wyoming; that by an act of Congress approved February 14, 1859 (11 Stat. at L. 383, chap. 33), Oregon was admitted into the Union; that by an act approved September 28, 1850 (9 Stat. at L. 519, chap. 84), Congress granted to the state of Arkansas and other states all lands within their respective limits, which, at the date of the act, were "swamp and overflowed lands," and by reason thereof unfit for cultivation; that by an act of March 12, 1860 (12 Stat. at L. 3, chap. 5), the provisions of the last-named act were extended to the state of Oregon; that on February 14, 1859, as well as on March 12,

NOTE.—*On the immunity of the United States from suit*—see note to Beers v. Arkansas, 15 L. ed. U. S. 991.

1860, the United States owned in fee simple a large region and body of land lying within the boundaries of the state of Oregon, which said body of land was neither [62] reserved nor dedicated to any public *use, and was free from any claim of title or possession, saving and excepting a right to temporary use and occupation belonging to certain Indian tribes; that within this large body of lands were three tribes or bands of Indians,—the Klamaths, the Moadocs, and the Yahooskins,—few in number, that number being estimated by the officials of the United States in charge at from 1,200 to 1,500; that they were all in a savage state, uncivilized, without a fixed place of abode, and roaming from place to place within the region; that they had no other kind of tenure or title than that which they and their ancestors held from time immemorial and before the settlement of white men in the territory; that on October 14, 1864 (16 Stat. at L. 707), a treaty was negotiated between the United States and these tribes of Indians, by which they ceded to the United States their right, title, and claim to all these lands except a certain specified and smaller tract within the original outboundaries, which was created a reservation for their use; that said reservation was continued in the occupation of the Indians according to the aboriginal usages and customs of said Indians and of Indians generally, without any claim or pretense of permanent title or individual right to the lands, or any of them, and without any steps taken towards conferring the ultimate title upon them until after the year 1899, when the defendant Hitchcock, Secretary of the Interior, directed and caused a large portion of the lands to be surveyed and divided into numerous definite lots or tracts, for the purpose and with the intention of allotting such tracts to the individual members of the tribes, to be by them held in severalty, and the further purpose of issuing and delivering to each of them a patent declaring that the United States holds the tract allotted in trust for the Indian and his heirs for a period of twenty-five years, and that at the expiration of such period it will convey the tract to him or his heirs, discharged of the trust, and free from all encumbrances; that in this the defendant Hitchcock was assuming and professing to act under the authority of the act of Congress of February 8, 1887 (24 Stat. at L. 388, chap. 119); that within the reserva- [63] tion made by the *treaty of 1864 were large tracts, which had been and were on March 12, 1860, swamp and overflowed lands and unfit for cultivation, and hence, under the act of March 12, 1860, had become the property of the state, subject only to the right of occupancy on the part of the Indians; that in the year 1902, before any patents were issued, and while the surveying and allotting were in progress, the state caused an examination to be made for the purpose of ascertaining the tracts which, on March 12, 1860, were swamp and overflowed lands, and a list prepared of them, which list is attached to the bill as an exhibit; that it presented and filed that list with the surveyor general of the United States for the state of Oregon, together with evidence tending to prove that all of the tracts within the list had been and were, on March 12, 1860, swamp and overflowed lands, and rendered thereby unfit for cultivation, which evidence was found and certified by the surveyor general to be sufficient. That thereupon the state selected and claimed said tracts as granted to it by the act of Congress of March 12, 1860, and applied to the proper officers of the United States to inquire into and consider the claims of the state; that this application and the evidence were submitted to the defendant Richards, as Commissioner of the General Land Office, and on November 18, 1903, the Acting Commissioner denied and rejected the claim upon the sole ground that the lands, whether swamp and overflowed or not, were not granted to the state of Oregon by the act of Congress. From this decision an appeal was taken to the Secretary of the Interior, and the decision of the Land Office affirmed.

Mr. **Charles A. Keigwin** argued the cause, and, with *Andrew M. Crawford* and *William B. Matthews*, filed a brief for complainant:

While no suit will lie to compel either a state or its officers to affirmative action in public affairs, the officers may be restrained from the execution of any laws or policy of the state which unlawfully affect the rights of individuals.

Osborn v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *United States* v. *Peters*, 5 Cranch, 115, 3 L. ed. 53; *Davis* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 924; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. ed. 623; *Hagood* v. *Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Rolston* v. *Crittenden* (*Rolston* v. *Missouri Fund Comrs.*) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *Reagan* v. *Farmers'*

Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

Suits against the United States, that is to say, suits which affect the interest and concern the property of the United States, are within the same principle. Where a Federal officer is made defendant, it is no objection to the jurisdiction that the controversy involves the property or otherwise concerns the interest of the United States; nor is it necessary, the case being of the character in which a state officer might be sued, that the government should consent to the suit being brought.

United States v. *Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Meigs* v. *M'Clung*, 9 Cranch, 11, 3 L. ed. 639; *Grisar* v. *McDowell*, 6 Wall. 363, 18 L. ed. 863; *Brown* v. *Huger*, 21 How. 305, 16 L. ed. 125; *United States* v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

In cases where jurisdiction is asserted on the ground of diverse citizenship, the Federal courts look only to the citizenship of the parties named on the record, without regard to their relationship to the cause or to the citizenship of those who, though not parties, are the real parties in interest. Thus, in suits against executors, administrators, trustees, or other persons sued in representative capacities, the jurisdiction is determined by the citizenship of the actual defendant, regardless of the citizenship of the beneficiaries.

Childress v. *Emory*, 8 Wheat. 642, 5 L. ed. 705; *Rice* v. *Houston*, 13 Wall. 66, 20 L. ed. 484; *Bonnafee* v. *Williams*, 3 How. 574, 11 L. ed. 732; *Dodge* v. *Tulleys*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; 1 Foster, Fed. Pr. 3d ed. § 19.

The same rule applies where the defendant is sued in a purely official capacity and the real interest is in the state of which he is an officer.

Davis v. *Gray*, *supra*.

With respect to the suggestion that the jurisdiction might be ousted if one of the defendants should, in the progress of the suit, be succeeded by a citizen of the complainant state, the rule seems to be settled that, if the jurisdiction is properly acquired by reason of the diverse citizenship of the original parties, it is not defeated by such a change of parties as brings citizens of the same state upon opposite sides of the record.

1 Foster, Fed. Pr. § 19; *Stewart* v. *Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163; *Phelps* v. *Oakes*, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; *Anderson* v. *Watt*, 138 U. S. 707, 34 L. ed. 1082, 11 Sup. Ct. Rep. 449; *Tug River Coal & Salt Co.* v. *Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 818.

Messrs. **A. C. Campbell** and **F. W. Clements** argued the cause, and, with *Mr. F. L. Campbell*, filed a brief for defendants:

The mere fact that the state of Oregon is the complainant is not conclusive that the court has original jurisdiction.

Taylor, Jurisdiction, § 30, p. 53.

Minnesota v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650, is not authority for the original jurisdiction of the court in this case.

The court would not there have decided that the United States was the real party in interest, and have taken jurisdiction, in the absence of the act of March 2, 1901, which applies only to what are commonly known as school lands.

Taylor, Jurisdiction, § 37, p. 64.

The court is without jurisdiction because the government cannot be made a party defendant in any court without its consent and consent has not been given in an action such as is here under consideration.

United States v. *Lee*, 106 U. S. 196, 207, 27 L. ed. 171, 177, 1 Sup. Ct. Rep. 240.

In any event this court, although it might have appellate, would not have original, jurisdiction. The proper forum for the institution of the suit would be the supreme court of the District of Columbia.

United States v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 171, 37 L. ed. 123, 125, 13 Sup. Ct. Rep. 271; *Brown* v. *Hitchcock*, 173 U. S. 473, 477, 478, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485.

An injunction against individuals as officers of the government is limited to a suit such as is authorized by law and where the act enjoined is purely ministerial in character.

Taylor, Jurisdiction, § 48, p. 78; *Re Ayres*, 123 U. S. 443, 506, 31 L. ed. 216, 230, 8 Sup. Ct. Rep. 164.

The acts here sought to be restrained are not ministerial in character.

Mississippi v. *Johnson*, 4 Wall. 475, 498, 18 L. ed. 437, 440; *United States* v. *Schurz*, 102 U. S. 378, 397, 403, 408, 26 L. ed. 167, 172, 174, 219.

Until the Indian right of occupancy to lands has been extinguished the Indian Bureau, of which the Secretary of the Interior is the head, has jurisdiction and control over the lands so occupied.

United States v. *Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426.

Until the legal title to the land passes from the government, inquiry as to all equi-

table rights comes within the cognizance of the Land Department.

Brown v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Humbird* v. *Avery*, 195 U. S. 480, 502, 503, 49 L. ed. 286, 296, 25 Sup. Ct. Rep. 123.

There has been no finding by the Land Department, of which the Secretary of the Interior is the head, that the lands were swamp or overflowed in character on March 12, 1860. Until such finding is made and patent issued the grant is in process of administration.

Michigan Land & Lumber Co. v. *Rust*, 168 U. S. 589, 591, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; *New Orleans* v. *Paine*, 147 U. S. 261, 266, 37 L. ed. 162, 163, 13 Sup. Ct. Rep. 303.

The acts which the bill alleges the defendants threaten to perform are the making of certain allotments and the issuing of trust patents for such allotments. These acts are such as, by law, are imposed upon the defendants, and require, on their part, the examination and investigation of facts and the construction and application of laws; hence are judicial, and not ministerial, in character. Therefore they are not subject to control, review, or correction in injunction proceedings.

Gaines v. *Thompson*, 7 Wall. 347, 353, 19 L. ed. 62, 65; *New Orleans* v. *Paine*, 147 U. S. 261, 267, 37 L. ed. 162, 164, 13 Sup. Ct. Rep. 303; *Brown* v. *Hitchcock*, 173 U. S. 473, 477, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485.

Mr. Justice **Brewer** delivered the opinion of the court:

The question of jurisdiction of course precedes any inquiry into the merits. By § 2 of art. 3 of the Constitution and Rev. Stat. § 687, U. S. Comp. Stat. 1901, p. 565, this court has original jurisdiction of a suit brought by a state against citizens of other states. *Pennsylvania* v. *Quicksilver Min. Co.* 10 Wall. 553, 19 L. ed. 998; *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 265, 287, 32 L. ed. 239, 242, 8 Sup. Ct. Rep. 1370, and cases cited in the opinion; *California* v. *Southern P. Co.* 157 U. S. 229, 258, 39 L. ed. 683, 693, 15 Sup. Ct. Rep. 591; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650. But the contention is that the United States is the real party in interest as defendant, that it cannot be sued without its consent, and that it has given no consent. [69] While the nominal defendants are *citizens of a state other than Oregon, yet they have no interest whatever in the controversy, and, if a decree be rendered against them in favor of the state, it will not affect their interests, but bind and determine the rights of the United States, the real, substantial defendant. It is further said that if there is any other interest adverse to the plaintiff it belongs to the Klamath Indians, who are not made parties, and that the rule in equity is not to determine a suit without the presence of the parties really to be affected by the decree. *California* v. *Southern P. Co. supra.*

The question of jurisdiction in a case very similar to this was fully considered in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650. There, as here, a state was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian reservation." This suit is brought by a state against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian reservation. In that case we said (p. 387, L. ed. p. 962, Sup. Ct. Rep. p. 655):

"Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale,—to devest the government of its title, and vest it in the state. The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."

[70] *It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901 (31 Stat. at L. 950, chap. 808, U. S. Comp. Stat. 1901, p. 1384), which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation, and an acceptance by the government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential

to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States, or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

Again, it must be noticed that the legal title to all these tracts of land is still in the government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action, or take upon themselves the administration of the land grants of the United States. *New Orleans* v. *Paine*, 147 U. S. 261, 266, 37 L. ed. 162, 163, 13 Sup. Ct. Rep. 303; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 591, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; *United States* v. *Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; *Brown* v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Humbird* v. *Avery*, 195 U. S. 480, 502, 503, 49 L. ed. 286, 296, 297, 25 Sup. Ct. Rep. 123.

For these reasons *the demurrer is sustained and the bill is dismissed.*

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[71] *GEORGE C. HAZELTON, *Appt.*,

v.

MARGARET R. SHECKELS *et al.*, Heirs and Devisees of Francis Miller, Deceased.

(See S. C. Reporter's ed. 71–79.)

Contracts—validity—public policy.—An agreement to sell a tract of land at a specified price if the offer should be accepted within the time mentioned is unenforceable, as contrary to public policy, where made in part consideration of services rendered before and after the making of the agreement, in bringing the property to the attention of committees of Congress as a suitable and appropriate site for a hall of records, although the actual services rendered may have been legitimate.

[No. 225.]

Argued April 12, 1906. Decided April 23, 1906.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, sustaining a demurrer to, and dismissing, a bill for specific performance. *Affirmed.*

See same case below, 25 App. D. C. 337.

The facts are stated in the opinion.

Mr. **Heber J. May** argued the cause and filed a brief for appellant:

This contract differs from an agreement for a contingent fee, by the terms of which a party or attorney does not buy the claim or property, and pays nothing for it, but is to have a per cent of whatever sum may be recovered. This class of contingent agreements is held valid in claims against the government.

Taylor v. *Bemiss*, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; *Stanton* v. *Embrey*, 93 U. S. 548, 23 L. ed. 983; *Nutt* v. *Knut*, 200 U. S. 12, *ante*, 348, 26 Sup. Ct. Rep. 216.

When the court applies the proper rule of construction to the agreement (*Drexel* v. *Berney*, 122 U. S. 254, 30 L. ed. 1222, 7 Sup. Ct. Rep. 1200) either upon its face, or by "looking through the form to the substance," it will result in finding the transaction and the agreement one for the purchase by the appellant of real estate for a valuable and adequate price, and which, as shown by the allegations of the bill, he, in turn, relying on the said agreement as to his rights, sold to the government for a fixed price.

From all that appears in the record there was no design to prejudice the public interest, and such design must clearly appear to warrant a court in denouncing a contract void.

Richardson v. *Mellish*, 2 Bing. 229; *Nichols* v. *Cabe*, 3 Head, 92; *Hertz* v. *Wilder*, 10 La. Ann. 199; Greenhood, Pub. Pol., Rule 129, p. 166; *Richmond* v. *Dubuque & S. C. R. Co.* 26 Iowa, 191; *Kellogg* v. *Larkin*, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; *Hazleton* v. *Putnam*, 3 Chand. (Wis.) 123, 54 Am. Dec. 158; *Swann* v. *Swann*, 21 Fed. 299; See 9 Am. & Eng. Enc. Law, p. 898.

NOTE.—*On the validity of contracts for services to procure legislation*—see notes to Houlton v. Dunn, 30 L.R.A. 737; and Hayward v. Nordberg Mfg. Co. 29 C. C. A. 446.

The objection that a contract is void by reason of public policy is not entertained out of regard for the party making it, but to promote the public interest.

Greenhood, Pub. Pol. 126; *Kelton* v. *Millikin*, 2 Coldw. 410; *Stillman* v. *Looney*, 3 Coldw. 20; *Kimbrough* v. *Lane*, 11 Bush, 556; *Summerlin* v. *Livingston*, 15 La. Ann. 519.

It must be found that the agreement here, or the allegations of the bill, make out such a case as will avoid the transaction for the sake of public policy; or to avoid injury to the public, without reference to the conduct of individuals.

Shrewsbury & B. R. Co. v. *London & N. W. R. Co.* 4 DeG. M. & G. 115; *Simpson* v. *Howden*, 1 Railway Cas. 326.

There is nothing in the transaction with appellant or in his conduct that will bring him within the rule of "evil tendency."

Workman v. *Campbell*, 46 Mo. 305; *Sedgwick* v. *Stanton*, 14 N. Y. 289.

Even if this contract can be construed to be one for the performance of service before a legislative body or its committees for a contingent compensation, it is not against public policy, and is valid and binding.

Lyon v. *Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Trist* v. *Child* (*Burke* v. *Child*) 21 Wall. 441, 450, 22 L. ed. 623, 624; *Howland* v. *Coffin*, 47 Barb. 653, 2 Parsons, Contr. 6th ed. 919; *Marshall* v. *Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Harris* v. *Roof*, 10 Barb. 489; *Coppock* v. *Bower*, 4 Mees. & W. 361; *Fuller* v. *Dame*, 18 Pick. 472; *Hatzfield* v. *Gulden*, 7 Watts, 152, 32 Am. Dec. 750; *Gulick* v. *Ward*, 10 N. J. L. 87, 18 Am. Dec. 389; *Wylie* v. *Coxe*, 15 How. 416, 14 L. ed. 753; *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 17 L. ed. 868; *Wright* v. *Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Stanton* v. *Embrey*, 93 U. S. 548, 23 L. ed. 983; *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Taylor* v. *Bemiss*, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; *Ball* v. *Halsell*, 161 U. S. 80, 40 L. ed. 624, 16 Sup. Ct. Rep. 554; *Spalding* v. *Mason*, 161 U. S. 375, 40 L. ed. 738, 16 Sup. Ct. Rep. 592; *Nutt* v. *Knut*, 200 U. S. 12, *ante*, 348, 26 Sup. Ct. Rep. 216.

Mr. **J. J. Darlington** argued the cause and filed a brief for appellee:

A contract not to prosecute before Congress, acting in a quasi judicial capacity, a claim of right, but to seek to obtain from it, in its purely legislative capacity, and for a contingent compensation, a contract of purchase or other advantage or benefit to which the other party to the contract has no legal claim, is against public policy and void.

29 Am. & Eng. Enc. Law, 2d ed. p. 177; *Clippinger* v. *Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519; *Wood* v. *McCann*, 6 Dana, 366; *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 17 L. ed. 868; *McMullen* v. *Hoffman*, 174 U. S. 648, 43 L. ed. 1121, 19 Sup. Ct. Rep. 839; *Marshall* v. *Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953.

Of the many instances in which this court and other courts have sustained agreements for contingent fees for services before Congress and before the departments, the cases, without exception, involved contracts for the prosecution of claims for the collection of debts. They are, without exception, cases for the prosecution of legal causes of action, tried before courts wherever there were courts possessing the jurisdiction to try them, and before Congress and the departments where, because of the absence of such jurisdiction in the courts, those bodies were appealed to in a quasi judicial capacity, not to make laws, but to pass upon the merits of money demands, and to award execution or provide for their payment to the extent that they were found just and legal.

Ball v. *Halsell*, 161 U. S. 80, 40 L. ed. 624, 16 Sup. Ct. Rep. 554; *Priggs* v. *Pennsylvania*, 16 Pet. 615, 10 L. ed. 1089; *Spalding* v. *Mason*, 161 U. S. 375, 40 L. ed. 738, 16 Sup. Ct. Rep. 592.

A court of equity "looks through the form to the substance" of contracts or other instruments.

Drexel v. *Berney*, 122 U. S. 254, 30 L. ed. 1222, 7 Sup. Ct. Rep. 1200.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill for the specific performance of a contract dated *December 11, 1902, to [77] sell for $9,000, at any time during the then present session of Congress, "and such additional time as may be necessary for settlement under appropriation by that Congress," part of a lot in a square which Congress now has voted to acquire for the erection of a hall of records.

The bill was brought against one Miller. Recently Miller's death was suggested and his heirs and devisees were substituted, but, for convenience, Miller will be referred to as the defendant.

The contract provided that if Hazelton should "fail to take advantage of and accept this offer as above within the time mentioned, then this agreement shall be null and void." The bill alleges that a part of the consideration for the contract "was services rendered both before and after the making of said contract, by the plaintiff, in bringing the property to the attention of the committees of Congress as a suitable and appropriate

site for a hall of records." It sets forth that the plaintiff, before and after the same date, expended much time, labor, and money in rendering those services, and what they were, *viz.*, collecting and printing facts for the information of the committees and members of Congress, making briefs and arguments, and drawing a bill for the purchase or condemnation of the square. The bill passed at the session named in the contract. After its passage the plaintiff negotiated, and finally, in August, 1903, concluded, a sale of the property in question for $14,395.50, subject to examination of the title and arrangements for payment. It is alleged that the time for settlement under the appropriation has not expired. The bill further alleges that the defendant has notified the plaintiff that he does not intend to keep his contract, but means to convey directly to the United States, and to demand the full price agreed upon by the government. The defendant has tendered a deed to the United States, which has not been accepted. The plaintiff has offered to the defendant a deed, to be executed by the latter and his wife, and tendered $9,000, but the defendant has refused to execute the
[78] same. There was a general *demurrer to the bill, and this was sustained by the supreme court of the District and the court of appeals, and the bill was dismissed. The plaintiff appealed to this court.

We assume that the bill sufficiently shows an acceptance of the defendant's offer within the time, although it does not allege it in terms. We assume also that the consideration is alleged sufficiently, subject to the question whether it is one upon which a contract lawfully may be based. But the court is of opinion that that question must be answered in the negative. Every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, the whole promise falls. *Pickering* v. *Ilfracombe R. Co.* L. R. 3 C. P. 235, 250; *Harrington* v. *Victoria Graving Dock Co.* L. R. 3 Q. B. Div. 549; *Woodruff* v. *Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Clark* v. *Ricker*, 14 N. H. 44; *McMullen* v. *Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Bishop* v. *Palmer*, 146 Mass. 469, 474, 4 Am. St. Rep. 339, 16 N. E. 299. According to the bill, and, no doubt, according to the fact, a part of the consideration was services, as we have quoted, and therefore it is not true, as argued, that the plaintiff could have demanded a conveyance on tendering the $9,000 alone. But the services contemplated as a partial consideration of the promise to convey were services in procuring legislation upon a matter of public interest, in respect of which neither of the parties had any claim against the United States. An agreement upon such a consideration was held bad in *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 17 L. ed. 868. Of course, we are not speaking of the prosecution of a lawful claim.

It will be noticed further that the conveyance was in substance a contingent fee. The plaintiff was not bound to accept it, and naturally would not do so unless he could agree, as he did with the government, for a larger price. The real inducement offered to him was that he would receive all that he could persuade the government to pay above the sum named. It is true that if we take the inartificial statements of the bill literally, the part of the consideration which we are discussing was the services, not a promise to render them. The promise to *convey did not become binding [79] until the services were rendered, and, when rendered, according to the allegations of the bill, they were legitimate. We assume that they were legitimate, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. *Marshall* v. *Baltimore & O. R. Co.* 16 How. 314, 335, 336, 14 L. ed. 953, 962, 963.

The general principle was laid down broadly in *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 54, 17 L. ed. 868, 870, that an agreement for compensation to procure a contract from the government to furnish its supplies could not be enforced, irrespective of the question whether improper means were contemplated or used for procuring it. *McMullen* v. *Hoffman*, 174 U. S. 639, 648, 43 L. ed. 1117, 1121, 19 Sup. Ct. Rep. 839. And it was said that there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. 2 Wall. 55, 17 L. ed. 870. In *Marshall* v. *Baltimore & O. R. Co.* 16 How. 314, 336, 14 L. ed. 953, 962, it was said that all contracts for a contingent compensation for obtaining legislation were void, citing, among other cases, *Clippinger* v. *Hepbaugh*,

5 Watts & S. 315, 40 Am. Dec. 519, and *Wood* v. *McCann*, 6 Dana, 366. See also *Mills* v. *Mills*, 40 N. Y. 543, 100 Am. Dec. 535. There are other objections which would have to be answered before the bill could be sustained, but that which we have stated goes to the root of the contract and is enough to dispose of the case under the decisions heretofore made.

Decree affirmed.

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[80]*JOSÉ ANTONIO FERNANDEZ Y PEREZ
Plff. in Err.
v.
JOSÉ PEREZ Y FERNANDEZ.

(See S. C. Reporter's ed. 80–101.)

1. **Wrongful attachment—remedy for, in Porto Rico.**—The general provisions of Porto Rico Civil Code, art. 1902, giving a right of action for acts of fault or negligence, cannot be deemed to authorize an action to recover damages for a wrongful attachment, in view of the comprehensive method specially provided by the Code of Civil Procedure, arts. 1409–1415, for the recovery and assessment of damages in cases where attachments are wrongfully issued and vacated for any cause.
2. **Courts—district court of Porto Rico—conformity to local procedure.**—The district court of Porto Rico, when exercising the jurisdiction of a circuit court, conferred by the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 34, must conform to the local practice for the issuing of attachments, and the recovery of damages when wrongfully issued.
3. **Wrongful attachment—remedy for, in Porto Rico.**—The procedure for the recovery and assessment of damages where attachments have wrongfully been issued, prescribed by Porto Rico Code Civ. Proc. arts. 1409–1415, is applicable where the attachment was caused to be issued by a person claiming to act under a power of attorney from the plaintiff in the attachment suit, although the statute provides that the cost of the attachment and damages shall be assessed against the plaintiff in such suit, since there is nothing to prevent making such person a party to the attachment proceeding if damages are to be assessed against him alone, and if his action was authorized by the real plaintiff, the latter would be liable for the acts of his agent on his behalf.
4. **Courts—district court of Porto Rico—conformity to local procedure.**—Damages for a wrongful attachment may, in view of the provision of the act of April 12, 1900, § 8, continuing local laws in force in Porto Rico, be assessed in the special proceeding provided by Porto Rico Code Civ. Proc. arts. 1409–1415, where attachments have wrongfully been issued and vacated for any cause.
5. **Jury trial—right to, in Porto Rico.**—The ascertainment of the damages in the special proceeding provided by Porto Rico Code Civ. Proc. arts. 1409–1415, where an attachment has wrongfully been issued, does not encroach upon the right to a jury trial, secured by the Federal Constitution,—conceding that such guaranty is applicable and in force in Porto Rico.
6. **Jury trial—right to, in Porto Rico.**—The general provisions for a jury trial as to issues of fact in the Federal circuit courts, contained in U. S. Rev. Stat. § 648, U. S. Comp. Stat. 1901, p. 525, do not, in view of the act of April 12, 1900, § 8, continuing local laws in force in Porto Rico, prevent the district court for the district of Porto Rico, when exercising, under § 34 of that act, the jurisdiction of a circuit court, from enforcing the express provisions of Porto Rico Code Civ. Proc. arts. 1409–1415, for the recovery and assessment of damages for wrongful attachment.
7. **Appeal—questions reviewable—jurisdiction—necessity of exception.**—The Federal Supreme Court will, of its own motion, on a writ of error, inquire into the jurisdiction of the court below, although no special exception was taken.

[No. 1.]

Argued April 29, 1904. Decided April 23, 1906.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment entered on a verdict for plaintiff in an action to recover damages for a wrongful attachment. *Reversed.*

Statement by Mr. Justice **Day:**

An action at law was begun November 18, 1901, in the United States district court for the district of Porto Rico by the defendant in error, José Perez y Fernandez, against José Antonio Fernandez y Perez, to recover in an action for "trespass upon the case for wrongful attachment." The declaration contained the usual averments of a declaration in a common-law action and averred that the attachment had been issued maliciously *and without probable cause, and [81] levied upon a certain two-story house then belonging to the defendant in error, in Mayaguez, Porto Rico. One Rafael Diaz Aguerria was made codefendant, and it was averred that the attachment was issued in a suit brought by Fernandez as attorney in fact and agent of Aguerria, who authorized and ratified the acts complained of. It appeared that the defendant in error, Perez, had owed about 6,000 pesos to one Claudio Barro, who died, leaving a will in which Rafael Diaz Aguerria was named as executor. The will was probated in Spain, and Aguerria qualified there as executor of the estate. Perez, on November 10, 1899, recorded a mortgage in favor of one Don Vic-

tor Ochoa y Perez for 20,000 pesos. The suit in which the attachment was issued was begun January 2, 1900, by the filing of a declaration to recover on certain notes, and was brought in the name of Aguerria as executor of the last will and testament of Claudio Barro. The action was begun in the military court established by the authority of the United States after the cession of Porto Rico, called the United States provisional court for the department of Porto Rico, which court was succeeded by the United States district court. On the date of the beginning of the suit an affidavit for attachment was filed, which was sworn to by Fernandez, plaintiff in error, purporting to have the power of attorney of Rafael Diaz Aguerria, executor of the last will and t ament of Claudio Barro, the ground alleged being that the affiant had reason to believe that the defendant intended to and would fraudulently part with or conceal his property before judgment could be recovered against him, so that the judgment could not be satisfied out of the property. The summons was issued, and a writ of attachment was levied upon the premises of the defendant in error, and notice posted thereon. Further proceedings were arrested by an injunction proceeding in the United States court, brought by Jacinto Perez Barro, heir of Claudio Barro, deceased, upon the ground that Aguerria, plaintiff in the attachment proceeding, suing as executor of the will probated in Spain, had not taken out ancil-
[82] lary letters in *Porto Rico. The action for malicious attachment was joint in form and the summons was returned as to Aguerria that the marshal was unable to find him within his district. The declaration averred that he was a resident of Porto Rico, but he was never served with summons in this case. Fernandez demurred to the declaration, averring that it appeared on its face that he was acting as the duly authorized agent of Aguerria, and was neither principal nor party plaintiff to the action against Perez, the defendant in error. This demurrer was overruled, and no exception taken to such action by Fernandez. Afterwards the general issue was filed, the case was tried to a jury without objection, and upon charge of the court substantially leaving to the jury the question whether Fernandez had caused the attachment to issue and be levied maliciously and without probable cause, to the injury of the standing and credit of the defendant in error as a merchant. A verdict was returned in favor of the defendant in error for the sum of $7,000, upon which a motion for a new trial was overruled and judgment entered.

Mr **James S. Harlan** argued the cause, and, with, *Mr. John Maynard Harlan*, filed a brief for plaintiff in error:

The local jurisprudence was disregarded by the court below.

Baltimore & O R. Co. v. *Hamilton*, 10 Fed. 181.

If the lack of jurisdiction was complete, this court may now consider the question of jurisdiction, and should reverse the judgment of the court below upon the ground that that court assumed jurisdiction where none existed and granted a remedy without legal warrant.

Campbell v. *Porter*, 162 U. S. 478, 40 L. ed. 1044, 16 Sup. Ct. Rep. 871; *Nigh* v. *Dovel*, 84 Ill. App 228; *Thompson* v. *Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765; *Allen* v. *Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; *Parker* v. *Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *United States* v. *Huckabee*, 16 Wall. 414, 21 L. ed. 457; *Fiester* v. *Shepard*, 92 N. Y. 251; *Fowler* v. *Eddy*, 110 Pa. 117, 1 Atl. 789; *Fairfax Forest Min. & Mfg Co.* v. *Chambers*, 75 Md. 604, 23 Atl 1024; *Forsythe* v. *Hammond*, 142 Ind. 505, 30 L.R.A. 576, 40 N. E. 267, 41 N. E. 950.

The Spanish law has no department corresponding exactly to what in the English law is designated by the term "torts."

Lobingier. Blending Legal Systems in the Philippines. Review of Reviews, September 1905.

The alleged malicious act of Fernandez in levying an attachment against Perez was not a negligent act. What is done wantonly and in malice cannot be said to have been done negligently. Negligence implies mere inadvertence, while malice implies deliberate evil intention. "Fault" as used in Porto Rico Civil Code, art. 1902, is the English for the Spanish "culpa." It is clearly not malice, for which the Spanish have the word "malicia." "Culpa" may imply intent with respect to the act, but not an evil purpose with respect to the result of the act. Malice implies both.

4 Roman. Civil Law, p. 1017; 4 Falcon. Civil Code, p. 431.

The damages awarded in this action of trespass on the case could have been assessed in the original attachment proceeding.

92 Jurisp. Civil, 550–553; 88 Jurisp. Civil, 130; 72 Jurisp. Civil, 494; 64 Jurisp. Civil, 538; 8 Jurisp. Civil, 267.

The mode provided in title 14 for ascertaining losses and damages in the attachment proceeding itself was exclusive, under the law then in force, of every other mode.

Manresa y Navarro, Comentario á la Ley de Enjuiciamiento Civil, 1891, pp. 411. 412.

A Federal court sitting in a state, and consequently the Federal court sitting in Porto Rico, cannot entertain jurisdiction or proceed in an attachment suit except in exact accordance with the provisions of the local law. And, if for any reason, constitutional or otherwise, the Federal court is not able to follow out and give effect to all the provisions of the local law, it cannot entertain jurisdiction in attachment at all.

Bates v. *Days*, 5 McCrary, 342, 17 Fed. 167; Waples, Attachment, p. 325.

When a case comes before this court upon a writ of error, the whole record is subject to the revisory power of the court, and any error apparent upon the face of the record may, and, indeed, must, be considered.

Suydam v. *Williamson*, 20 How. 427, 15 L. ed. 978; *Pomeroy* v. *State Bank*, 1 Wall. 592, 17 L. ed. 638; *New Orleans Ins. Asso.* v. *Piaggio*, 16 Wall. 378, 21 L. ed. 358.

If the abolition in Indiana of the common-law forms of action, and the substitution for them of one general form of action, be binding upon a Federal court sitting in that state (*Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 23 L. ed. 898; *Nudd* v. *Burrows*, 91 U. S. 426, 441, 23 L. ed. 286, 290), why should not a similar condition in Porto Rico be obligatory upon the Federal court sitting in that island? By the statute creating that court all the laws that apply to Federal courts in Indiana also apply to the Federal court of Porto Rico. Has the Federal court of Porto Rico the right to substitute common-law forms of action in causes before it for the forms of action provided in the local law?

See *Lewis* v. *Gould*, 13 Blatchf. 216, Fed. Cas. No. 8,324; *Sears* v. *Eastburn*, 10 How. 187, 13 L. ed. 381; *Baltimore & O. R. Co.* v. *Hamilton*, *supra*.

The case presents on the face of the record an error that strikes at the very foundation, not only of the judgment, but of the whole proceeding. The proposition is that the court had no such jurisdiction as it exercised; that it could grant no such remedy; and that the whole proceeding was erroneous from its inception to its conclusion.

Harvey v. *Virginia*, 20 Fed. 411.

***Mr.* Frederic D. McKenney** argued the cause, and, with *Messrs. Francis H. Dexter* and *John Spalding Flannery* filed a brief for defendant in error:

Unless want of jurisdiction in the trial court by reason of the subject-matter of the controversy appears from the face of the record, it would seem that the judgment under review must be sustained.

Hunt v. *Hunt*, 72 N. Y. 225, 28 Am. Rep. 129.

Civil actions for the recovery of damages for injuries to persons and property caused by the fault or negligence of another have been recognized both by the Roman and by the civil law.

4 Bonel y Sanchez, Codigo Civil Español, p. 894; 6 Toullier, Le Droit Civil Français, p. 94.

In the administration of civil law generally there is a well-recognized distinction between the word "délit" (a wrong) when used in connection with civil and as used in criminal complaints.

4 Aubry & Rau, Cours de Droit Civil Français, § 443.

Actions to recover damages in cases arising from acts either of commission or omission are maintainable under the civil law, irrespective of whether the injury complained of was to the reputation, social or commercial, of the complainant, or to his property or "bienes" alone.

4 Aubry & Rau, Cours de Droit Civil Français, § 445; 3 Laurent, Cours Elémentaire de Droit Civil, p. 207; Official Gazette of Madrid, Nov. 8, 1894, p. 220, and Oct. 2, 1893, p. 147; 2 Jurisprudencia Codigo Civil, pp. 542, 547; 3 Jurisprudencia Codigo Civil, pp. 62, 239, 243; 8 Huc, Commentaire Théorique et Pratique du Code Civil, p. 548.

Everyone has a right of action to claim what he may think to be his property or his credit, and also a right to defend himself in any suit whatsoever brought against him; but the improper or abusive exercise of both rights constitutes an act of malice and mala fide, or even a gross fault equivalent to fraud.

2 Baudry-Lacantinerie, Précis de Droit Civil, p. 959; 8 Huc, Commentaire Théorique et Pratique du Code Civil, p. 547.

To sustain a recovery in such cases it is necessary that the damage be done through the fault, fraud, or malice of the doer.

37 Jurisprudencia Civil, p. 360; 55 Jurisprudencia Civil, p. 403.

Where our rights or persons are injured, in any case whatever, we may seek redress through a civil remedy, regardless of a criminal prosecution.

48 Jurisprudencia Civil, p. 394; 60 Jurisprudencia Civil, p. 120; 1 Alcubella, Diccionario, *Civil Actions*, p. 122.

The local law and practice cannot be recognized as a rule of procedure in the courts of the United States where its adoption would be repugnant to the Federal Constitution, or would impair the effect of any Federal legislation.

Poindexter v. *Greenhow*, 114 U. S. 303, 29 L. ed. 197, 5 Sup. Ct. Rep. 903, 962;

Luxton v. *North River Bridge Co.* 147 U. S. 338, 37 L. ed. 194, 13 Sup. Ct. Rep. 356.

Whenever Congress has legislated upon any matter of practice, and prescribed a rule for the government of its own courts, it is, to that extent, exclusive of the state legislation on the same subject.

Southern P. Co. v. *Denton*, 146 U. S. 209, 36 L. ed. 945, 13 Sup. Ct. Rep. 44.

It was the intention of Congress to further uniformity largely through the discretion of the Federal courts, exercised in the form of general rules adopted from time to time.

Shepard v. *Adams*, 168 U. S. 625, 42 L. ed. 604, 18 Sup. Ct. Rep. 214.

A defendant in attachment proceedings is not confined to those proceedings for a recovery of his damages in cases where the attachment was not well brought.

96 Biblioteca Juridica de la Revista General de Jurisprudencia, pp. 909–919; 4 Manresa y Navarro, Commentaries, Spanish Law of Civ. Proc. 1885, p. 253; 2 Derecho Procesal de España, Pozo, p. 188; 58 Jurisprudencia Civil, p. 265; 73 Jurisprudencia Civil, p. 954.

Messrs. Wayne MacVeagh, Francis H. Dexter, and *Frederic D. McKenney* also filed a brief for defendant in error.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

This case was argued orally and upon briefs at the October term, 1904, of this
[91] court. After the case had been argued *and submitted, on December 5, 1904, an order was entered as follows:

"No. 6. *José Antonio Fernandez y Perez, Plaintiff in Error* v. *José Perez y Fernandez.* Counsel are requested to submit additional briefs on these points:

"1. Can this court, on the record of this case, properly consider and determine the contention of the plaintiff in error, that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

"2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

"3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?"

Our views in this case will be practically in answer to these questions.

The case affords a striking illustration of the difficulty of undertaking to establish a common-law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence. The action in this case was begun and tried upon pleadings and under principles which are controlling in a state following the common law, having its origin in England, and the case was submitted to the jury upon general principles governing such actions for the recovery of damages for the seizure of property upon writs of attachment issued maliciously and without probable cause. The action proceeded in all respects in form and substance as it would had it been begun and prosecuted in a common-law state.

Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the *enact-[92] ments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. *Kepner* v. *United States*, 195 U. S. 100, 122, 49 L. ed. 114, 121, 24 Sup. Ct. Rep. 797. This policy has been followed in dealing with the Porto Ricans. President's Message, Dec. 5, 1899; Walton, Civil Law in Spain & Spanish America, 594. The new civil government was established by the act of April 12, 1900, commonly known as the Foraker act. 31 Stat. at L. 77, chap. 191. Section 8 of that act provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The first inquiry, then, to which we shall direct attention, concerns the law in force at the time of the passage of this act in Porto Rico, governing the issuing of attachments and the recovery of damages for wrongfully causing the same to issue and be levied. The additional briefs filed by counsel upon both sides in this case since the or-

der of the court of December 5, 1904, above quoted, exhibit commendable zeal and industry in investigating this question and bringing to the attention of the court the Spanish treatises and cases throwing light upon the subject. Upon behalf of the defendant in error it is insisted that the action is governed by article 1902 of the Civil Code of Porto Rico, which provides: "Art. 1902. A person who, by an act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so [93] done." *War Department Translation of the Civil Code in force in Cuba, Porto Rico, and the Philippines, p. 244. Much discussion is had in the briefs as to the meaning of this section, and whether the term "fault"—*culpa* in the Spanish jurisprudence—is broad enough to include actions brought to recover for conduct which is alleged as malicious, as distinguished from those where the basis of the recovery is a careless act or omission which does not have for its motive the intention to cause damage.

In the view we take of this case we do not find it necessary to consider the authorities cited, or the views pressed pro and con as to whether a malicious act, such as is complained of in this case, is within the terms of this article of the Code. The references to sections of the Code of Procedure show a comprehensive system specially provided for the issuing of attachments and the recovery of damages where the same were wrongfully procured to be allowed. The subject of attachment of property is treated in title 14, Law of Civil Procedure, War Department translation, art. 1395 *et seq.* Unlike ordinary American procedure, an attachment is issued by order of the judge, and certain grounds are recognized. They are summarized as follows: "If the debtor be a foreigner; or if, being a citizen, he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded. It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business, leaving no one in charge or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors." Art. 1398. If it shall turn out that the attachment was wrongfully procured, ample provisions are made for the adjudication and recovery of damages in the action. See articles 1409–1415, which are set forth in the margin.†

*The theory of these sections of the Code [94] is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out in the statute to ascertain the loss and damages *which the [95] defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indemnify the defendant for such losses and damages. And these losses and this recovery are adjudicated in the manner pointed out in articles 927 *et seq.* of the Code of Civil Procedure. These articles are found in title 8 of that Code, entitled "Execution of Judgments." The defendant in the attachment having been declared entitled to recover damages, proceedings follow for the purpose of ascertaining the amount thereof. Section 927 *et seq.* provide for the manner of making up an issue, taking testimony, and hearing witnesses, and, upon final order or decree made by the court, an appeal can be prosecuted. This full and comprehensive statutory method of ascertaining and adjudging the damages to be recovered in cases where attachments are wrongfully issued and vacated for any cause would seem to preclude the application of general provisions of the Code giving a right of recovery for acts of fault or negligence.

We are not cited to any decision of the supreme court of Spain expressly adjudicating this matter, but are referred by counsel on both sides to a treatise on the law of civil procedure ("Commentario á la Ley de Enjuiciamiento Civil," ed. 1891, p. 412), by Señor José Maria Manresa y Navarro, said to be a text writer of the highest authority in Spain. The English translation of his text is given as follows: "We do not think that this rule [relating to independent actions for damages under the mortgage law] is applicable to attachments, because, on the motion to vacate an attachment, no discussion or proof of the *existence of losses [96] and damages is allowed, and because the law itself provides, in addition to this, that when, by final order of the court, an attachment is vacated, the plaintiff be adjudged to pay the defendant his losses and damages, they being ascertained in the manner provided in article 1417, ‡ that is, according to the procedure in article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount, but of the existence, of losses and damages. It follows that the court can decide on both questions without the necessity of a

‡ Porto Rican Code, art. 1415.

†Art. 1409. A person who has requested and obtained a provisional seizure for an amount of more than 1,000 pesetas must request the ratification thereof in an executory action or in the declaratory action which may be proper, filing the corresponding complaint within twenty days after the levying of the attachment. Upon the expiration of this period

new suit, which is precisely what the law has sought to avoid." This seems to be a direct authority for the proposition that this plan of recovery of damages for wrongful attachments is exclusive. In the absence of authority to the contrary, and in view of the plain provisions of the Code, we accept it as properly declaring the existing law upon the subject. We reach the conclusion that the Porto Rican system in force at the time of the passage of the Foraker act, and binding until changed or amended, provided, in the state of affairs shown by this record, a recovery for damages in the method pointed out in the attachment suit, by the special statutory method provided for, and not otherwise.

The difference between the liability of one wrongfully levying an attachment at common law and the assessments of costs and damages under these provisions of the Porto Rican Code is not one of form merely. The former action is substantially one for malicious prosecution, and can be maintained only upon proof of malice and want of probable cause. Under the Code remedies given in Porto Rico the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases where the attachment is vacated, irrespective of the motive in suing it out.

This brings us to briefly inquire as to the nature and extent of the jurisdiction and practice of the United States courts in Porto Rico. Section 34 of the Foraker act established a *United States district court [97] for Porto Rico, and gave to it, in addition to the ordinary jurisdiction of a district court of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and provides that it shall proceed therein in the same manner as a circuit court, the intention of Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both district and circuit courts of the United States in the states. Section 914 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 684) provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district

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without the action having been instituted or a ratification of the seizure having been requested, the latter shall be null *de jure,* and shall be without effect at the instance of the defendant, without the plaintiff being heard. A petition for a rehearing may be made against this ruling, and if it should not be granted, an appeal for a stay and review of the proceedings may be interposed.

Art. 1410. Notwithstanding the provisions of the foregoing article, if the debtor should be included in any of the cases of article 1398, the provisional seizure may also be ordered after the institution of the action, a separate record being made thereof. The provisions contained in articles 1399 to 1410, inclusive, shall be applicable to this case, and after the attachment has been levied the proceedings thereupon shall be continued as prescribed for incidental issues. When an attachment is vacated by a final ruling, because it is not included in any of the cases of said article 1398, the plaintiff shall be taxed all the costs and be adjudged to indemnify the defendant for any losses or damages he may have suffered, which shall be recovered in the manner prescribed in article 1415.

Art. 1411. When the provisional seizure becomes of no effect by reason of its having become null *de jure,* in accordance with article 1409, the surety shall be ordered canceled in the same ruling, if any should have been furnished, or what may be proper shall be ordered for vacating the attachment and canceling the cautionary notice, in a proper case, and all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendants for any losses and damages he may have incurred. If the attachment should be vacated for any other reason, the ruling thereupon shall also determine what may be proper according to the cases with regard to costs and the indemnification of losses and damages which may have been suffered.

Art. 1412. If the acknowledgment of a signature or of the written evidence of a debt should not be made, or be delayed through the fault of the debtor, and if the filing of the complaint and the ratification of the attachment should depend thereupon, the time lost in obtaining said acknowledgment shall not be included in the period of time prescribed in article 1409.

Art. 1413. If the owner of the property seized should request it, the attachment creditor must file his complaint within the period of ten days, unless any of the circumstances mentioned in the foregoing article is attendant. Should he not do so, the attachment shall be vacated, and the costs, losses, and damages shall be taxed against him.

Art. 1414. After the provisional seizure has been levied the debtor may object thereto and request that it be vacated, with indemnification of losses and damages, if not included in any of the cases of article 1398. He may make this petition within the five days following that of the notice of the ruling ratifying the seizure, or before that time, if he should deem it proper, and it shall be heard and determined in a separate record, in accordance with the procedure prescribed for incidental issues.

Art. 1415. In cases in which there is an adjudication of losses and damages, as soon as the ruling thereupon becomes final, they shall be recovered according to the procedure established in articles 927 *et seq.*

courts are held, any rule of court to the contrary notwithstanding." The act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), provides that the circuit courts of the United States shall have original jurisdiction concurrent with the courts of the several states in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the district court exercising the jurisdiction of a circuit court, in analogy to the powers of the circuit courts in the states, to adapt itself, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation, concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law.

In the Revised Statutes of the United States, § 915 (U. S. Comp. Stat. 1901, p. 684), it is provided as to attachments: "In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held,
[98] for the courts thereof; *and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: *Provided*, That similar preliminary affidavits or proofs and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy." By analogy it would seem that the district court of Porto Rico, exercising the jurisdiction of a circuit court in its practice as to the issuing of attachments, is to adapt itself to the local practice recognized and established in Porto Rico. Circuit courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held. *Bates* v. *Days*, 17 Fed. 167.

It is further objected on the part of the defendant in error that Porto Rican procedure can have no application to this action against Fernandez, because he was not a party plaintiff to the attachment suit, and the statute provides that the costs of the attachment and damages shall be assessed against the plaintiff in the action. We do not perceive that this fact affects the determination of the question as to the proper remedy in such cases. There is nothing in this action to show that Fernandez was not authorized to bring the suit and take out the attachment in behalf of the plaintiff in that suit, in which event Aguerria would be liable for the acts of his agent in that behalf. Nor is there any reason why Fernandez might not be made a party to the attachment proceeding if damages were to be assessed against him alone.

It is further objected that the United States court has no method by which it can assess these damages in the manner required in the Porto Rican Code. In giving the remedies provided therein and assessing the damages we see no reason why that court cannot adapt itself to the requirements of the local Code and administer the remedies therein provided. In *Madisonville Traction Co.* v. *Saint Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251, it was held *that the [99] Federal court might follow the methods required by the Kentucky statute in administering the local law for the condemnation of property, so far as required to meet the needs of justice. In that case the local law required the appointment of appraisers by the court to assess compensation for the property taken. Speaking of the judicial power of a circuit court of the United States administered in such courts, it was held: "In the exercise of that power a circuit court of the United States, sitting within the limits of a state, and having jurisdiction of the parties, is . . for every practical purpose, a court of that state. Its function, under such circumstances, is to enforce the rights of parties according to the law of the state, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the laws of the United States." In view of the provisions of the Foraker act, continuing local laws in force, this reasoning has application to the powers of the United States court in that territory. There can be no difficulty in exercising the attachment remedies provided in the Porto Rican Code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that Code. The procedure is simple and easily administered. Nor is there anything in that special procedure encroaching upon the right to a jury trial, secured by the Federal Constitution in suits at common law where the value in controversy exceeds $20. If it be assumed—a point which is not necessary to decide—that that part of the Constitution is applicable and in force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages

in a special proceeding in which property has been wrongfully seized.

Nor would the general provisions of the Revised Statutes (§ 648, U. S. Comp. Stat. 1901, p. 525) providing for a jury trial as to issues of fact in circuit courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican Code as to assessment for damages for wrongful attachment.

[100] *Section 8 of the Foraker act, as we have seen, continues in force the laws and ordinances of Porto Rico, except as modified by military orders and decrees in force, so far as the same are not inconsistent or in conflict with the statutory laws of the United States, which, by § 14 of the act, when not locally inapplicable, with certain exceptions, are declared to be in force and effect in Porto Rico as in the United States. The general provisions as to jury trials in civil causes in circuit courts of the United States are not inconsistent with the enforcement of a special statutory proceeding as to the assessment of damages in attachment proceedings, as to which the United States has no special statutory procedure, and enforces in that respect the requirements of the local law.

If we are right in holding that the Porto Rican law and practice as to attachments and the recovery of damages in respect thereto are controlling in a Federal court in that territory, and a common-law action for a wrongful and malicious attachment was unknown to the Porto Rican procedure, the court had no jurisdiction of the action. The record shows that practically no exception was taken in the record and proceedings in the trial court, but it is familiar law that this court will, of its own motion, inquire into the jurisdiction which it has, and as well that of the court below, without any special exception being taken. If, as illustrated in the brief for counsel for the plaintiff in error, a circuit court of the United States should undertake to entertain a bankruptcy proceeding or an admiralty cause, its proceedings would be void for want of jurisdiction. So, in the present case, there being no such common-law action enforceable under the Porto Rican procedure, a court of that district would have no jurisdiction to entertain the suit. Where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself. *Parker* v. *Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Thompson* v. *Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765.

We, therefore, reach the conclusion that the United States *district court had no [101] jurisdiction of this action, and consequently the proceedings had therein were null and void.

Judgment reversed.

Mr. Justice **White**, dissenting:

As it is conceded that the question upon which the judgment is now reversed was not saved in the court below, I am constrained to dissent. In my opinion the error, if any, was a mere question of mode of procedure, involving no want of jurisdiction *ratione materiæ*, even conceding that the presence of a question of such a character would authorize this court to reverse, in the absence of any exception in the court below, or any reference to the question in that court.

Mr. Justice **McKenna** concurs in this dissent.

UNITED STATES, *Appt.*,
v.
CHEROKEE NATION. (No. 346.)

EASTERN CHEROKEES, *Appts.*,
v.
CHEROKEE NATION and United States. (No. 347.)

CHEROKEE NATION, *Appt.*,
v.
UNITED STATES. (No. 348.)

(See S. C. Reporter's ed. 101-132.)

1. **Indians—Cherokee claims.**—The United States is liable for the amount stated to be due the Indians under the treaty of May 23, 1836 (7 Stat. at L. 488), in the account transmitted by the Secretary of the Interior to the Cherokee Nation, and accepted by the latter pursuant to the agreement for the cession of the Cherokee Outlet to the United States, made between the United States and the Cherokee Nation on December 19, 1891, and ratified by Congress in the act of March 3, 1893 (27 Stat. at L. 641, chap. 209), by which an account of moneys due the Cherokee Nation under treaty stipulations was to be rendered by the United States to such nation without delay, the amount of which, if accepted by such nation, was to be appropriated at once by Congress, the agreement further providing that if the Cherokee Nation did not accept the account, and carried it into the courts, and recovered a judgment, Congress was to make an appropriation for the payment of such judgment at its next session after the cause should be finally decided.

2. **Indians—Cherokee claims.**—The expense of removing the Eastern Cherokees to the Indian territory was, by the treaties of

May 23, 1836 (7 Stat. at L. 478), and August 6, 1846 (9 Stat. at L. 871), imposed upon the United States.

3. **Interest—on Cherokee claims.**—Interest included in the account of the sums due the Indians under treaty stipulation, transmitted by the Secretary of the Interior to the Cherokee Nation pursuant to the agreement for the cession to the United States of the Cherokee Outlet, made between the United States and the Cherokee Nation on December 19, 1891, and ratified by Congress in the act of March 3, 1893, is properly allowed by the court of claims, notwithstanding the provision of U. S. Rev. Stat. § 1091, U. S. Comp. Stat. 1901, p. 747, forbidding the allowance of interest on "any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest," where the question of interest was a subject of difference while the negotiations were being carried on, the determination of which was provided for in the agreement itself.

4. **Indians — award to Cherokees — distribution.**—The Eastern Cherokees as individuals, whether east or west of the Mississippi, who were parties either to the treaty of May 23, 1836, or that of August 6, 1846, exclusive of the "Old Settlers," who had been fully paid, are entitled to share in the distribution, through the Secretary of the Interior, of the amount awarded the Indians as due under those treaties for the removal of the Eastern Cherokees to the Indian territory, by the court of claims, pursuant to the act of July 1, 1902 (32 Stat. at L. 726, chap. 1375), § 68, which, as construed by the act of March 3, 1903 (32 Stat. at L. 996, chap. 994), confers jurisdiction on that court to adjudicate any claim "the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," in a suit to which both the Cherokee Nation and the Eastern Cherokees shall be made parties, and authorizes that court to render judgment in favor of the rightful claimants, and to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part.

5. **Costs and fees—allowance out of fund—Cherokee claims.**—Counsel fees payable out of the amount awarded to the Eastern Cherokees as individuals by the court of claims, pursuant to the act of July 1, 1902, § 68, which, as construed by the act of March 3, 1903, confers jurisdiction on that court to adjudicate any claim arising under treaty stipulations that the Cherokee tribe or any band thereof may have against the United States, in a suit to which both the Cherokee Nation and the Eastern Cherokees shall be made parties, and authorizes that court to render judgment in favor of the rightful claimants, and to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, may be allowed to the Cherokee Nation, whose tribal existence and government is continued by the joint resolution of March 2, 1906, until all the tribal property shall be distributed among the individual members, although, by the acts of June 7, 1897, June 28, 1898 (30 Stat. at L. 62, 495, chaps. 3, 517), and July 1, 1902, the Cherokee Nation was practically incapacitated from acting as trustee, and by § 63 of the latter act it was provided that the tribal government of the Cherokee Nation should not continue longer than March 4, 1906.

6. **Indians—award to Cherokee—distribution.**—The Eastern and Emigrant Cherokees are only entitled to share as individuals with the other Eastern Cherokees in the distribution, through the Secretary of the Interior, of the amount awarded the Indians as due under the treaties of May 23, 1836, and August 6, 1846, for the removal of the Eastern Cherokees to the Indian territory, by the court of claims, pursuant to the act of July 1, 1902, § 68, which, as construed by the act of March 3, 1903, confers jurisdiction on that court to adjudicate any claim "the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," in a suit to which both the Cherokee Nation and the Eastern Cherokees shall be made parties, and authorizes that court to render judgment in favor of the rightful claimants, and to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part.

[Nos. 346, 347, 348.]

Argued January 16, 17, 18, 1906. Decided April 30, 1906.

APPEALS from the Court of Claims to review an award to the Eastern Cherokee Indians of the amounts due from the United States under treaty stipulations. Modified by excluding the "Old Settlers" from the distribution of the amount awarded for the removal of the Eastern Cherokees to the Indian territory, and, as so modified, *affirmed.*

See same case below, 40 Ct. Cl. 252.

Statement by Mr. Chief Justice **Fuller:**

Section 68 of the act of Congress of July 1, 1902, entitled "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Town Sites Therein [Described], and for Other Purposes" (32 Stat. at L. 726, chap. 1375), reads as follows:

"Jurisdiction is hereby conferred upon the court of claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the court of claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to

examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The court of claims shall have
[103] full authority, by proper orders and *process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

February 20, 1903, the Cherokee Nation filed a petition in the court of claims asking judgment on an account rendered by Slade & Bender. pursuant to the treaty of March 3, 1893 (27 Stat. at L. 640, chap. 209), with interest.

March 3, 1903, an act was approved entitled "An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Four, and for Other Purposes" (32 Stat. at L. 996, chap. 994), containing the following provisions:

"Section sixty-eight of the act of Congress entitled 'An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Town Sites Therein, and for Other Purposes,' approved July 1st, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi river, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the court of claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives' Executive Document Numbered Three Hundred and Nine of the second session of the *Fifty-seventh Con-[104] gress; and if said claim shall be sustained in whole or in part, the court of claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi river constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to as "the award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893."

March 14, 1903, a petition was filed on behalf of all the Eastern Cherokees, both west and east of the Mississippi river, alleging in substance that there was due to the Eastern Cherokees, upon the account of Slade & Bender, the sum of $1,111,284.70, with interest from June 12, 1838, as an award against the United States or, if the court should not hold said account as an award, the sum of $1,761,447.27, with interest at 5 per cent from the same date, together with interest on the income annually accruing, at the rate of 5 per cent per annum until paid, by virtue of the treaties of 1828 (7 Stat. at L. 313) and the treaty of 1835–1836, commonly known as the "treaty of New Echota." [7 Stat. at L. 478.] But at the trial of the case no contention was made for this larger amount.

March 20, 1903, a petition was filed on behalf of certain Eastern Cherokees, living east of the Mississippi, amended September 3, 1903, when petitioners took the title of the Eastern and Emigrant Cherokees, asserting their claim to a *pro rata* share of—

"That portion of the removal and subsistence fund improperly taken by the United States from the five-million fund on account of removal of Eastern Cherokees, as found *by the expert accountants, Messrs. Slade &[105] Bender, April 28, 1894, the said five-million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi

river, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty proclaimed May 23, 1836 [7 Stat. at L. 488], this sum so misapplied amounting, in accordance with said accounting, to $1,111,284.70, with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date."

The three petitions were consolidated and heard as one case, and although in effect the proceedings were in equity, findings of fact and conclusions of law were filed.

Among the facts found were these:

XVIII.

By § 14 of the act of Congress entitled "An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Year Ending June 30, 1890, and for Other Purposes," approved March 2, 1889 (25 Stat. at L. 1005, chap. 412), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands lying west of the 96th degree of longitude in the Indian territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson, and Warren G. Sayre such commissioners.

By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"To meet and enter into negotiations with [106] the above-named *commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled."

By said act of Congress it was made the duty of said commissioners appointed by the President to report all agreements resulting from such negotiations to the President, to be by him reported to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners, on the part of the Cherokee Nation, to report all their proceedings in full to the national council for its approval and ratification. Ex. Doc. 56, 52d Cong., 1st sess., 17.

At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the "Cherokee Outlet," the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian territory, and demanded as "a condition precedent to any agreement for the sale of the land" that some adjustment of such contentions should be made.

On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by article 1 of which it was agreed that—

"The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the state of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the territory of Oklahoma, and the Cheyenne and Arapahoe reservation created or defined by Executive order, dated August 10, 1860, the tract of land *embraced within [107] the above boundaries containing eight million, one hundred and forty-four thousand, six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less."

By article 2 that—

"For and in consideration of the above cession and relinquishment the United States agrees:"

First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

Second. That a certain article of the antecedent treaty of July, 1866 [14 Stat. at L. 799], should be abrogated and held for naught.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, †

†No such treaty appears to have been made in this year. The treaty intended was doubtless the one made October 24, 1804 (7 Stat. at L. 228), and not proclaimed until May 17, 1824.—Ed.

1828, 1835–1836, 1846, 1866, and 1868 [7 Stat. at L. 156, 195, 228, 311, 478; 9 Stat. at L. 871; 14 Stat. at L. 799; and 16 Stat. at L. 727], and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the court of claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall, at its next session after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered *in [108] her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas river.

Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. at L. 640, chap. 209).

Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

"As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because *the Chero- [109] kees are compelled to accept the construction of the treaties made by the executive and administrative branches of the government.

"Whatever that construction is, the Indian must abide by. There is no appeal except to Congress. Without going specifically into details, the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated, the provision was agreed to, as set out. The government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected." Sen. Ex. Doc. 56, 52d Cong., 1st sess., pp. 11, 12.

Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the 4th section of article 2, to wit:

"The 4th section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly prepare the same. On this provision of the agreement the commissioners say:

" 'The government has made the accounting, has kept the books, has construed the treaties. If this has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected. It creates no new obligations against the government, but only provides for legal discharge of the old ones.'

"This seems to me to be a reasonable view to take of this provision, and I do not see

that any valid objection could be advanced against it.

[110] *"In your reference of the matter to this office you said:

"'Particular attention is called to § 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.'

"In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose." Senate Ex. Doc. No. 56, 52d Cong., 1st sess., p. 8.

This report of the Commissioner was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney General for the Interior Department "for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the questions of law relating to the subject," and on or about February 25, 1892, said [111] officer reported thereon, as appears *in said Senate Executive Document 56, Fifty-second Congress, first session, saying, among other things:

"The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. . . . The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. . . .

"The considerations for said cession, as contained in article 2, are set forth under six subdivisions. . . .

"The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all money agreed to be paid to the Indians, or which they may be entitled to under any treaty or act of Congress since 1817. And, if said accounting is satisfactory, Congress shall make the necessary appropriation to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the court of claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.

"The Commissioner of Indian Affairs asks for a special appropriation of $5,000 to enable him to make the accounting."

All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat. at L. 641, chap. 209), in the following language, to wit:

"Which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred *to being com- [112] monly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and the acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows: . . . [Amendments not important here.] . . .

"And the provisions of said agreements so amended shall be fully performed and carried out on the part of the United States; *Provided* that the money hereby appropriated shall be immediately available, and the remaining sum of eight million, three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal

annual instalments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated; . . .

"The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands; . . .

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand, seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be, and treated as, a part of the public domain."

XIX.

[113] *By said act of March 3, 1893, ratifying said agreement for the purchase of the "Cherokee Outlet," the Congress also provided as follows:

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement."

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was, by the Secretary of the Interior, referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted, was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States, charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender; and did request said Secretary of the Interior to notify the Congress of the United States of *such acceptance, and on the 7th of January, [114] 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

"Sir: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat. at L. 643, chap. 209), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835, 1836, 1846, 1866, and 1868 [7 Stat. at L. 156, 195, 228, 414, 478; 9 Stat. at L. 871; 14 Stat. at L. 799; and 16 Stat. at L. 727], and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee national council, accepting such accounting.

"The Speaker of the House of Representatives." House Ex. Doc. No. 182, 53d Cong., 3d sess.

XX.

The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing finding, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

Under the treaty of 1819:	
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "school" fund	$2,125 00
(With interest from February 27, 1819, to date of payment.)	
[115]*Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian territory, improperly charged to treaty fund.....	1,111,284 70
(With interest from June 12, 1838, to date of payment.)	
Under treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kansas, never credited to Cherokee Nation	432 28
(With interest from January 1, 1874, to date of payment.)	
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund	20,406 25
With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.	

"Washington, D. C., April 28, 1894.
"(Signed)

Jas. A. Slade,
Jos. T. Bender."

XXI.

In arriving at the item of $1,111,284.70, the accountants, among other tabulations, made the following statement of the account:

"Figuring upon the basis stated in the 9th article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

For improvements		$1,540,572 27
For ferries		159,572 12
For spoliations		264,894 09
For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items:	{ $335,105 91 1,047,067 00 }	
For debts and claims upon the Cherokee Nation		101,348 31
For the additional quantity of land ceded to the nation.....		500,000 00
[116]*For amount invested as the general fund of the nation.....		500,880 00
For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund.....		172,316 47
		4,621,756 17
For lands and possessions		5,000,000 00
For spoliations		264,894 09
Balance of $600,000 applicable to removal		$335,105 91
Appropriation of June 12, 1838..		1,047,067 00
		6,647,067 00
From which deduct charges as above		4,621,756 17
Balance to be distributed *per capita*		2,025,310 83
Deduct amount actually distributed as already explained..		914,026 13
Balance due		1,111,284 70

The sum of $914,026.13 actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

Amount found due by Treasury officials, under article 9, 1846, in the report of the Auditor and Comptroller of December 3, 1849		$627,603 95
Erroneous charge corrected by act of February 27, 1851 [9 Stat. at L. 570, chap. 12]		96,999 42
Erroneous charge account subsistence, corrected by Congress, September 30, 1850 [9 Stat. at L. 544, chap. 91].....		189,151 24
		914,026 13

This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East.

Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and distributed *per capita* to said Eastern Cherokees in the same payment. The balance to be distributed *per capita* according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 *per capita*, excluding interest, *they should have received the fur-[117] ther sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total *per capita* of $124.78.

The settlement made with the Old Settlers was as set forth in Finding XVII.

XXII.

Neither the whole nor any portion of the various sums with interest found and stated by the concluding schedule of the so-called

Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation, or to any officer, agent, or other person acting in its behalf.

With the exception of the provision contained in the act of March 2, 1895 [28 Stat. at L. 764, chap. 177, U. S. Comp. Stat. 1901, p. 776], making appropriations for the legislative, executive, and judicial expenses of the government, directing the Attorney General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States court of claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

Acting under said direction of March 2, 1895, above referred to, the Attorney General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender. Said communication of the Attorney General was, on December 2, 1895, by the Congress referred to the Committee on Indian Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session.

May 18, 1905, the court "adjudged, or-
[118] dered, and decreed *that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of..... With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.	$2,125 00
Item 2. The sum of..... With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	1,111,284 70
Item 3. The sum of ..... With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.	432 28
Item 4. The sum of ..... With interest thereon from July 1, 1893, to date of payment.	20,406 25

"The proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.

"The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

"The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the possession of the United States and held by them as trustees.

*"The sum of $1,111,284.70 with interest [119] thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat. at L. 996, chap. 994), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals.

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of §§ 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter, by appropriate order or decree, shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to re-

ceive the same, upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

The facts are stated *in extenso* in the report of the case, 40 Ct. Cl. 252, occupying some forty pages.

Assistant Attorney General **Pradt** argued the cause and filed a brief for the United States.

Messrs. **Frederic D. McKenney** and **Charles Nagel** argued the cause, and, with *Mr. Edgar Smith,* filed a brief for the Cherokee Nation.

Mrs. **Belva A. Lockwood** argued the cause and filed a brief for the Eastern and Emigrant Cherokees.

Messrs. **Robert L. Owen** and **William H. Robeson** argued the cause, and, with *Messrs. Robert V. Belt, James K. Jones, M. C. Butler, John Vaile,* and *Scarritt & Cox,* filed a brief for the Eastern Cherokees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Of the four items of the amounts allowed, only one, that for $1,111,284.70, need be considered here.

(1) The correctness of the account is conceded, and the question is whether the United States were properly held liable therefor. The court of claims ruled that the account rendered by Slade and Bender under the agreement between the United States and the Cherokee Nation, ratified by Congress, was neither an award nor an account stated, but that the United States were nevertheless liable in the circumstances for the balance found.

The case is thus put by Chief Justice Nott:

"But while the account was neither an award nor an account stated, it must be conceded that the scope of the accounting was intended to be as broad, as the causes of action secured by the agreement to the Cherokee Nation 'the right within twelve months to enter suit against the United States in the court of claims for any alleged or declared amount of money promised but with-[121] held by the United States from the *Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting.' That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws.' This meant that there were to be no technical defenses set up, no pleas of *res judicata,* no releases or relinquishments, compromises or settlements; or it meant nothing. . . .

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and re-examined *de novo;* and that upon the faith of that belief they made a cession of the Outlet. In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered, until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it,—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale *and delivery and nonpayment of the pur-[122] chase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account 'without delay;' if the Cherokee Nation accepted it, the amount was to be appropriated by Congress; such 'appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate 'at its next session after such case shall be finally decided.' Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the

obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it.

"The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894), the 'twelve [123] months' of the agreement, within which *the nation must consider it and enter suit against the other party in the court of claims, began to run, and with the nation's acceptance of the account (December 1, 1894) the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

Weldon, J., concurred with the Chief Justice in a separate opinion. Peelle, J., concurred in the judgment, but rested his conclusion on the ground that the United States were liable "to pay the expense of removal" of the Eastern Cherokees from their eastern home to the Indian territory, under the treaties of 1835–1836 and 1846 (7 Stat. at L. 478; 9 Stat. at L. 871) and therefore to pay this conceded balance. The various treaties from 1817, down, the legislation, accountings, and proceedings, were duly considered in arriving at the result reached. Wright, J., dissented.

We agree that the United States were liable, and think the liability might well be rested on both grounds,—that is, that failing one, it could be sustained on the other; but we do not deem it necessary to set forth in our own language what has already been so well stated by Chief Justice Nott and Judges Weldon and Peelle.

2. Recovery of the item of $1,111,284.70 was adjudged *"with interest thereon at the [124] rate of 5 per cent from June 12, 1838, to date of payment," and it is contended that the court of claims erred in this allowance of interest.

Under the 11th article of the treaty of 1846 the Cherokees agreed to submit to the Senate of the United States, as umpire, the question whether interest should be allowed on the sums found due them. The Senate of the United States, as umpire, on September 5, 1850, found that interest should be allowed, in the following resolution: "Resolved, That it is the sense of the Senate that interest at the rate of 5 per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid."

The Cherokees who had emigrated prior to 1835, with accessions to that date, were known as the "Old Settlers," or "Western Cherokees," and in the case of the *United States* v. *Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650, this court said in respect of the claim for interest:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of 5 per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

"Under § 1091 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 747), no interest can 'be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest;' and in *Tillson* v. *United States*, 100 U. S. 43, 25 L. ed. 543, it was held that a recovery of interest was not authorized under a private act referring to the court of claims a claim founded upon a contract with the United States, which did not ex-

pressly authorize such recovery. But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination
[125] of which was provided for *in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. 9 Stat. at L. 556, chap. 91.

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of 4,179.26, which stands upon different ground."

The Congress of the United States on numerous occasions had recognized the force of the decision of the Senate, and made appropriations accordingly, appropriating the funds due as interest.

On September 30, 1850, Congress appropriated to the Eastern Cherokees, in reimbursing an amount improperly charged the treaty fund for subsistence, the sum of $189,422.76, with the provision:

"That interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of fifth September, eighteen hundred and fifty." 9 Stat. at L. 556, chap. 91.

On February 27, 1851, Congress, in appropriating the amount of the *per capita* then conceded to be due the Eastern Cherokees, to wit, $724,603.37, provided as follows:

"And interest on the above sum, at the rate of five per centum per annum, from twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated." 9 Stat. at L. 572, chap. 12.

Congress, on September 30, 1850, in appropriating the amount of the *per capita*, then conceded to be due the Old Settlers, provided:

"That interest be allowed and paid upon
[126] the above sums *due respectively to the Cherokees and 'Old Settlers,' in pursuance of the above-mentioned award of the Senate under the reference contained in the said 11th article of the treaty of sixth August, eighteen hundred and forty-six." 9 Stat. at L. 556, chap. 91.

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself" in 1846, and in the "agreement itself" in 1891, and is the same in principle as in the case of the Old Settlers.

3. Was the recovery given proper destination by the decree?

We refer to the same item, as there is really no controversy over the other three items, and the criticism as to the payment of item three is not material. If no proper agent of the Cherokee Nation to receive the $432.28 can be found, it may be received by the United States as trustee.

The jurisdictional act of March 3, 1903, provided that "both the Cherokee Nation and said Eastern Cherokees, so-called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned;" and authorized the court "to render a judgment in favor of the rightful claimant and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part."

In the petition filed by the Cherokee Nation in this case it is declared that the Cherokee Nation is "a body politic," and "is, as such, the 'Cherokee tribe' mentioned in § 68 of the act of Congress aforesaid [July 1, 1902, 32 Stat. at L. 726, chap. 1375], and authorized thereby to bring this proceeding." But the language of the section is that jurisdiction is conferred to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and even if it were conceded that the Cherokee Nation could be treated as a body politic, not as a body corporate, but in the sense of a governmental community, we should say "the Cherokee tribe or any band *thereof" means the Cherokee people as a
[127] people, or any band thereof, and not the Cherokee Nation as a body politic.

It should be observed that the term "Cherokee Nation" has been used as representing the people themselves; the government of the Cherokees; and the government as trustee for all of its people, or for some of them, as their rights might appear.

In the treaty of July 2, 1791, the "Cherokee Nation" was described as "all the individuals composing the whole Cherokee Nation of Indians." [7 Stat. at L. 39.] In the treaty of 1835 these Indians are referred to as the "Cherokees" and as "the Cherokee Nation." In the treaty of 1846 as "the Cherokee Nation," "the Cherokee people," and "the Cherokees."

Under the first article of the treaty of 1846 the lands of the Cherokee Nation belonged to the whole Cherokee people. The lands sold east of the Mississippi river belonged to the Cherokee people as then exist-

ing as communal property. The Western Cherokees, so-called, that is to say, the Old Settlers, were paid for their interest in those lands as communal owners. 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650. They were paid individually, a community within a community.

Mr. Chief Justice Nott treats of this matter thus:

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as [128] communal ownership is involved. *of the chiefs and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation, and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the nation, and the nation properly made no distinction when parting with the Outlet, but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the nonfulfilment of the treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners."

And after referring to the present status of the Cherokee Nation as about to terminate, the Chief Justice says:

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person who should not be intrusted with the *receipt and distri- [129] bution of the moneys belonging to other persons."

The court of claims decreed that after deducting counsel fees, costs, and expenses, the sum of $1,111,284.70, with interest, should be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes of paying costs and expenses, as stated, and then distributing the remainder "directly to the Eastern and Western Cherokee, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals."

The eighth finding of fact was as follows:

"The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called 'Western Cherokees.' After the removal, under the treaty of 1835–1836, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term 'Western Cherokees' was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as 'Old Settlers.'

"The Cherokees who were domiciled east of the Mississippi river at the time of the making of the treaty of 1835–1836, according to the census just then completed, were thereafter known as 'Eastern Cherokees,' the great body of whom subsequently, in 1838, moved to the lands west of the Mississippi."

So far as the "Old Settlers" are concerned, they have been fully paid and cannot be allowed to participate in this distribution. There had been a settlement with these Cherokees, which was reopened in the *Old Settlers Case* and they were allowed to assert any and all claims on their part against the United States. Judgment was thereafter rendered as to a portion of these claims

in their favor (148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650), which judgment was thereafter paid in full by the United States, so that these Old Settlers have no
[130] standing in this action. And, *indeed, they never had nor asserted any interest whatever in the claim herein involved and are not claimants. In the settlement of 1851, the cost of removal, with which they were charged, did not diminish the five-million-dollar treaty fund, but came entirely from the $600,000 added to that fund by the third supplemental article of the treaty of New Echota, and the payment that was made to them pursuant to the 4th article of the treaty of 1846 was not a third of the residuum of the treaty fund, but a sum equal to one third. It was the Eastern Cherokees only who were interested in that residuum, and so article 9 of that treaty provided for payment to the Eastern Cherokees of that balance, and for a fair and just settlement of all moneys due to the Cherokees, and payment of the same *per capita* to the Eastern Cherokees. The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees.

The act of February 27, 1851, appropriating the amount due on the accounting under article 9 of the treaty of 1846, provided that it should be in full satisfaction of all claims and demands of the Cherokee Nation and that a receipt in full should be given. The receipts as given were signed by the individual Eastern Cherokees.

We concur with the court of claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to "the Eastern and Western Cherokees," are perhaps liable to misconstruction, although limited to those "who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river." This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals,
[131] whether east or west of the Mississippi, *parties to the treaties of 1835–1836 and 1846 and exclusive of the Old Settlers.

In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the court of claims in the allowance of fees and costs.

It is true that, in the replication of the Cherokee Nation to the petition of the Eastern Cherokees this paragraph occurs:

"It denies that the Cherokee Nation, in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit; and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees, exclusively or otherwise."

It is also true that by the acts of June 7, 1897, June 28, 1898 [30 Stat. at L. 62, 495, chaps. 3, 517], and July 1, 1902, the Cherokee Nation was practically incapacitated from acting as trustee, and by § 63 of the Cherokee allotment act (32 Stat. at L. 725, chap. 1375) it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six." But by joint resolution of March 2, 1906, Congress provided as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Nevertheless, taking the entire record together, the various treaties and acts of Congress, and of the Cherokee councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs.

4. The Eastern and Emigrant Cherokees, in respect to whom it is stated in their petition "that they number about 4,500 *per-[132] sons, more or less, all Eastern Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay, and Macon counties, North Carolina, some in north Georgia, northern Alabama, and eastern Tennessee, together with about 1,500 emigrants, portions of their various families, gone West, nearly all of whom have been recognized as citizens, and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names, or those of whose ancestors, may be found on the rolls of 1835 and 1838," asked that one-fourth part of the whole sum recovered be set apart for them as their distributive share. But we think they are only entitled to receive the *per capita* payment with the Eastern Cher-

okees, and should obtain that payment accordingly.

The result is, that with the modification of the second subdivision of the fourth paragraph of the decree, relating to the $1,111,284.70 with interest, above indicated, *the decree of the Court of Claims is affirmed.*

E. L. WHITNEY, Warden of the Idaho State Penitentiary, *Appt.*,
v.
GEORGE DICK, *Appellee.* (No. 494.)

E. L. WHITNEY, Warden of the Idaho State Penitentiary, *Petitioner*,
v.
GEORGE DICK, *Respt.* (No. 557.)

(See S. C. Reporter's ed. 132–141.)

1. Appeal—from circuit court of appeals—criminal case.—The want of any money value in controversy precludes an appeal to the Supreme Court of the United States from an order of a circuit court of appeals, discharging, on a writ of certiorari issued on a petition for habeas corpus and certiorari, a person convicted of introducing intoxicating liquors into an Indian reservation, and sentenced to fine and imprisonment.

2. Habeas corpus—in circuit court of appeals—as original proceeding.—The silence of the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), on the subject of habeas corpus, prevents a circuit court of appeals from issuing a writ of habeas corpus as an original and independent proceeding, although, in view of §12 of that act, giving such courts the powers specified in U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580, it may issue such a writ in cases when necessary for the exercise of a jurisdiction already existing.

3. Certiorari—in circuit court of appeals—as substitute for writ of error.—Authority to issue a writ of certiorari as an original and independent proceeding to review a conviction in an inferior Federal court is not found in the grant to the circuit courts of appeals by the act of March 3, 1891, § 12, of the powers specified in U. S. Rev. Stat. § 716, which authorizes certain Federal courts to "issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," where the only question in the case is whether the punishment of the offense charged is within the jurisdiction of the Federal courts, and the case is put in proper condition for a review on writ of error.

[Nos. 494, 557.]

Submitted April 3, 1906. Decided April 30, 1906.

APPEAL from, and on writ of Certiorari to, the United States Circuit Court of Appeals for the North Circuit, to review an order discharging, on writ of certiorari issued on a petition for habeas corpus and certiorari, a person convicted in the District Court for the District of Idaho, Northern Division, of introducing intoxicating liquors into an Indian reservation, and sentenced to fine and imprisonment. Appeal *dismissed* for want of jurisdiction. Order *reversed* on writ of certiorari, and case remanded with instructions to quash the proceeding and dismiss the petition.

See same case below, 141 Fed. 5.

Statement by Mr. Justice **Brewer:**

On May 16, 1905, the respondent in these two cases was convicted in the district court of the United States for the district of Idaho, northern division, on the charge of unlawfully and feloniously introducing intoxicating liquors into the Nez Percé Indian reservation, and sentenced to pay a fine of $100 and be confined in the penitentiary for the term of one year and ten days. On July 21, 1905, a bill of exceptions was duly prepared and signed. Thereafter, without suing out a writ of error, respondent applied to the circuit court of appeals of the ninth circuit for writs of habeas corpus and of certiorari. It does not affirmatively appear that any writ of habeas corpus was issued, the record in the court of appeals reciting:

"The petition in the above-entitled matter for a writ of habeas corpus and a writ of certiorari having been duly submitted to the court, and the petition for a writ of certiorari therein having been granted, and a writ of certiorari having been issued, directed to the honorable the United States district court for the district of Idaho, and requiring the said district court to certify to this court a transcript of the record and proceedings in the suit therein of the *United States* v. *George Dick*, and the return to the

NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

On the jurisdiction of the circuit court of appeals—see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; Saimon v. Mills, 13 C. C. A. 374; and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.

On certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On exceptions to rule that certiorari will not lie where there is an appeal—see note to State *ex rel.* Hamilton v. Guinotte, 50 L.R.A. 787.

said writ of certiorari having been filed, the matter was duly argued and submitted to the court for consideration and decision upon the said return and upon the briefs of counsel for the respective parties.

"On consideration whereof, and the court being of the opinion that the United States [134] district court for the district of *Idaho did not have jurisdiction of the offense charged in the indictment found against the petitioner in the suit of the *United States* v. *George Dick*, it is ordered and adjudged that the petitioner, George Dick, be discharged from imprisonment."

From this order of discharge, Whitney, as warden of the Idaho state penitentiary (the respondent named in the petition for a habeas corpus), perfected an appeal to this court, and that appeal is case No. 494. Subsequently he applied for a writ of certiorari, to review the decision of the court of appeals, which was allowed, and that is case No. 557. The record in case No. 494 was directed to stand as the return to the writ of certiorari. Both the appeal and the certiorari were taken by the warden, appearing by the United States attorney for the district of Idaho, under the direction of the Attorney General of the United States.

Solicitor General **Hoyt** submitted the cause for appellant and petitioner.

Mr. **Frank E. Fogg** submitted the cause for appellee and respondent.

Mr. Justice **Brewer** delivered the opinion of the court:

The first question is, of course, one of jurisdiction. Final orders of the circuit court of appeals may of right be brought to this court only where the matter in dispute exceeds in value $1,000. As there is no amount in controversy, the appeal was unauthorized and must be dismissed. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. But by certiorari the judgment of the court of appeals is properly before us. *Re Chetwood*, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385.

Had the court of appeals jurisdiction to issue separately either a writ of certiorari or one of habeas corpus, or the two jointly? And, first, as to the writ of habeas corpus. Undoubtedly that writ is one of high privilege. We are not confronted with the case of a failure by Congress to make any provision for it. Under § 751, Rev. Stat. (U. S. Comp. Stat. 1901, p. 592), the Supreme, circuit, and district courts may issue writs of habeas corpus, and by § 752 (U. S. Comp. Stat. 1901, p. 592), like power is given to the several justices and judges of said courts for the purpose of inquiry into the cause of restraint of liberty. Thus adequate provision has been made for securing to everyone entitled thereto the writ of habeas corpus. So, when Congress passes an act establishing a new court, there is no constraining presumption that it must intend to give to that court jurisdiction in habeas corpus. The court of appeals act (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488) does not in terms grant authority to issue the writ. It is silent on the subject, and in order to sustain its jurisdiction we must write something into the statute which Congress itself did not put there. In this we are speaking of the writ of habeas corpus as an original *and [136] independent proceeding, for by § 12 of the act "the circuit court of appeals shall have the powers specified in § 716 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 580)." Section 716 provides that "the Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Cases may arise in which the writ of habeas corpus is necessary to the complete exercise of the appellate jurisdiction vested in the circuit court of appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist, for the writ asked for here was an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court. There was no proceeding of an appellate character pending in the court of appeals, for the complete exercise of jurisdiction in which any auxiliary writ of habeas corpus was requisite. Appellate proceedings are, generally speaking, initiated by appeals and writs of error, and for these the court of appeals act specifically provides. The writ of habeas corpus is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in a trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error. It is doubtless true that if the language of the court of appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of habeas corpus, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *Ex parte Bollman*, 4 Cranch, 75, 2 L. ed. 554. The 14th section of the original judiciary act contained this language: "That all the before-

mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may [137] be necessary *for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." [1 Stat. at L. 81, chap. 20, U. S. Comp. Stat. 1901, p. 580.] And the question presented was whether the grant of power to issue a writ of habeas corpus was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice Marshall, delivering the opinion of the court, partly on the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the court of appeals act there is no mention of habeas corpus, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing.

It will be borne in mind that the circuit court of appeals, which is a court created by statute (*Kentucky* v. *Powers*, 201 U. S. 1, 24, *ante*, 633, 26 Sup. Ct. Rep. 387), is not in terms endowed with any original jurisdiction. It is only a court of appeal. Section 2 of the act says that it "shall be a court of record with appellate jurisdiction, as is hereafter limited and established." Section 6 provides that it "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases," etc. By § 10, "Whenever, on appeal or writ of error, or otherwise, a case coming . . . from a circuit court of appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination." [26 Stat. at L. 826, 828, 829, chap. 517, U. S. Comp. Stat. 1901, pp. 547, 550, 552.] Sections 4, 13, and 15 name the courts whose judgments may be reviewed in the courts of appeals. Obviously, the courts of appeal are simply given appellate jurisdiction over certain specified courts. It follows that they are not authorized to issue original and independent writs of habeas corpus.

Have they jurisdiction to issue writs of certiorari? As we have seen, the procedure [138] prescribed by the statute for bringing *to the courts of appeal those final decisions of courts which they are authorized to review is appeal or writ of error, and that, in this country, is the ordinary method by which review is obtained in an appellate court. Especially is this true of the Federal procedure, the only instance in which certiorari is named as the writ for the removal of cases from a lower to a higher court being in the authority given to this court to bring up cases from the courts of appeal by certiorari. Inasmuch as appeal and writ of error are specifically prescribed in the court of appeals act as the process to bring up final decisions to that court for review, the authority to issue a certiorari must be found in the grant of power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." That certiorari may be used to bring up portions of a record not originally returned to a court of appeals is undoubted, for it may be necessary for the complete exercise of its appellate jurisdiction; but not otherwise, for every case of which that court may take jurisdiction can be carried up by appeal or writ of error. Of course, if, in the case at bar, the writ of habeas corpus was not or could not rightfully be issued, then certiorari cannot be sustained as auxiliary process, but must stand or fall as an independent proceeding.

It may be said that the power of this court to issue original and independent writs of certiorari has been upheld under the authority given by § 716. A reference to some of the decisions may be well. See generally *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 589, and cases cited in the opinion; *Ewing* v. *St. Louis*, 5 Wall. 413, 18 L. ed. 657; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872.

Fowler v. *Lindsey*, 3 Dall. 411, 1 L. ed. 658, was the case of an application before judgment to remove certain actions from the circuit court to this court on the ground that a state was the real party in interest, and it was said by Mr. Justice Washington (p. 413, L. ed. p. 659):

"But as it is proposed to remove the suits under consideration *from the circuit court [139] into this court, by writs of certiorari, I ask whether it has ever happened, in the course of judicial proceedings, that a certiorari has issued from a superior to an inferior court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur."

In *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758, where an appli-

cation was made for mandamus and certiorari, Mr. Justice Gray, speaking for the court, after quoting § 716, said (p. 380, L. ed. p. 489, Sup. Ct. Rep. p. 762):

"Under this provision, the court might doubtless issue writs of certiorari, in proper cases. But the writ of certiorari has not been issued as freely by this court as by the court of Queen's bench, in England. *Ex parte Vallandigham*, 1 Wall. 243, 249, 17 L. ed. 589, 592. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413, 1 L. ed. 658, 659; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226, 4 L. ed. 224–226; *Ex parte Hitz*, 111 U. S. 766, 28 L. ed. 592, 4 Sup. Ct. Rep. 698. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288, 3 L. ed. 347; *Ex parte Gordon*, 1 Black, 503, 17 L. ed. 134; *United States* v. *Adams* (*United States* v. *Child*) 9 Wall. 661, 19 L. ed. 808; *United States* v. *Young*, 94 U. S. 258, 24 L. ed. 153; *Luxton* v. *North River Bridge Co.* 147 U. S. 337, 341, 37 L. ed. 194, 195, 13 Sup. Ct. Rep. 356."

In *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385, Mr. Chief Justice Fuller said (pp. 461, 462, L. ed. p. 788, Sup. Ct. Rep. p. 392):

"By § 14 of the judiciary act of September 24, 1789 (1 Stat. at L. 81, chap. 20), carried forward as § 716 of the Revised Statutes, this court and the circuit and district courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;' and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 380, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758.

[140] And although, as observed *in that case, this writ has not been issued as freely by this court as by the court of Queen's bench, in England, and, prior to the act of March 3, 1891, chap. 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition, the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd, Pr. *398; Bacon, Abr., *Certiorari*."

And in *Re Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177, it was held that "a writ of certiorari, such as is asked for in this case, will be refused when there is a plain and adequate remedy, by appeal or otherwise.'

This court has never decided that certiorari was to be resorted to in place of a writ of error whenever it suited the convenience of parties. There must be "circumstances imperatively demanding" a departure from the ordinary remedy by writ of error or appeal. In the case at bar the indictment charges the introduction of liquor into the Indian country. It is not questioned that this is a criminal offense under the laws of the United States, but it is contended that the place of the alleged offense was not Indian country. The trial court ruled that it was. This ruling was excepted to, a bill of exceptions prepared and signed, and the case put in proper condition for review in the court of appeals on writ of error. There was no necessity for a certiorari.

Apparently the thought of petitioner was to get rid of the case at once and entirely. It was not a new trial or any mere correction of errors, but a termination of the litigation which induced this proceeding rather than a writ of error. It was a short way of disposing of the entire matter,—the same reason that has so often prompted writs of habeas corpus. We have repeatedly held against such procedure. While undoubtedly the power exists, and it may sometimes be proper for a court to put an end to the litigation by some short summary process, yet, as a rule, the orderly way is to proceed by writ of error. The latest expression of the views of this court is to be found *in [141] *Riggins* v. *United States*, 199 U. S. 547, *ante*, 303, 26 Sup. Ct. Rep. 147. To that and the cases cited in the opinion we refer, saying that in the case at bar there is no special reason why the ordinary procedure should not obtain. It will be borne in mind that the act with which the respondent was charged was not done under or by virtue of the authority of the Constitution or laws of the United States, and therefore his prompt release is not necessary in order to uphold the national authority. It was not an act to be commended, and the only question is whether its punishment was within the jurisdiction of the Federal courts, and that question, under the circumstances, should have been settled in the ordinary way.

For these reasons *the decision of the Court of Appeals is reversed*, and the case is remanded with instructions to quash the writ of certiorari and dismiss the petition.

FIRST NATIONAL BANK OF BALTIMORE, *Petitioner*,
v.
WILLIAM H. STAAKE, Trustee.

(See S. C. Reporter's ed. 141–149.)

Bankruptcy—liens of attaching creditors—preservation for benefit of estate.—Liens acquired by attaching creditors on real property which, but for such attachments, would have passed to a subsequent purchaser under an unrecorded deed, may be preserved for the benefit of the estate of the bankrupt debtor by a court of bankruptcy in the exercise of its discretionary power, under the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450), § 67*f*, to preserve for the benefit of the estate rights under liens obtained against an insolvent within four months prior to the filing of a petition in bankruptcy against him, since to construe this provision as referring only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, would restrict its application to a contingency already provided for by a prior clause in that section, annulling all such liens, and providing that property affected thereby shall pass to the trustee as a part of the estate.

[No. 213.]

Argued March 15, 16, 1906. Decided April 30, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review an order affirming a decree of the District Court for the Western District of Virginia, preserving, for the benefit of the bankrupt estate, liens acquired by attaching creditors on real property of the bankrupt, which, but for such attachments, would have passed to a purchaser under an unrecorded deed. *Affirmed.*

See same case below, 66 C. C. A. 547, 133 Fed. 717.

Statement by Mr. Justice **Brown**:

[142] *This writ of certiorari was allowed to review an order of the circuit court of appeals, affirming a decree of the district court in favor of Staake, as trustee in bankruptcy of the estate of Chester R. Baird, bankrupt, subrogating him to the rights of certain creditors, and authorizing him to enforce their attachment liens with like force and effect as the attaching creditors—one of which was the First National Bank of Baltimore—might have done had not the bankruptcy proceedings intervened.

The facts of the case are substantially as follows: Chester R. Baird, doing business under the name of C. R. Baird & Company, and owning certain real estate in Virginia known as the West End Furnace Company, sold the same, December 7, 1899, to the Roanoke Furnace Company, subject to certain encumbrances, executed a contract in writing, and received from the furnace company the entire consideration, namely, $500,000, in the capital stock of the furnace company. Under this contract of sale the furnace company took immediate possession, but no deed to the company was made until November 5, 1900, when a deed was executed and recorded.

Meantime, however, and on October 26, 1900, nine different attachments, among them one by the petitioning bank, were sued out of the hustings court for the city of Roanoke, amounting to over $40,000, against Baird as a nonresident, and were levied upon the furnace property. Under the provisions of the law of Virginia the attachments, having been levied before the deed of the furnace property had been executed and recorded, the attaching creditors acquired, as against Baird and the furnace company, a lien on the properties attached.

Within four months after the levy of the attachments, namely, December 24, 1900, Baird was adjudicated a bankrupt in the district court for the eastern district of Pennsylvania, and on January 2, 1901, the district court for the western district of Virginia, assumed ancillary jurisdiction of such property as was located in Virginia. On December 29, 1900, the Roanoke Furnace Company was also adjudicated a *bankrupt. [143] On March 26, 1901, Staake was appointed trustee of Baird's estate, and on June 29, 1901, John M. N. Shimer was appointed trustee of the Roanoke Furnace Company.

It was further agreed that the deed of November 5, 1900, from Baird to the Roanoke Furnace Company, was a valid conveyance to a purchaser in good faith for a then fair consideration, and was not affected by the bankruptcy proceedings.

The proceedings in question here were instituted by a petition filed by Staake, entitled both in the cases of Chester R. Baird and the Roanoke Furnace Company, averring that under the laws of Virginia the rights of the attaching creditors were superior to those of the furnace company, and that as to them the property attached was the property of Baird; but that, by reason of his insolvency and of the fact that these attachments had been levied within four months preceding the filing of the petition in bankruptcy, such attachments were null and void, unless the court should order them preserved for the benefit of the estate. He therefore prayed that they be decreed null and void as regards plaintiffs, but that they be preserved for the benefit of petitioner.

The bank demurred to this petition, and also answered, denying that its attachment was null and void, and also denying the right of the court to enter an order preserving the attachment for the benefit of the petitioner; and alleging that respondent is entitled to the benefit of the attachment, said property when sold by an interlocutory order having realized enough to pay said attachment, as well as all prior liens.

Shimer, trustee for the Roanoke Furnace Company, also answered, praying that, if the attachment be continued for the trustee of Baird, the petitioner should be required to abate a large claim which he filed against the estate of the Roanoke company, by the amount of said attachments.

Upon a hearing before the district court, that court overruled the demurrer to Staake's petition, and authorized him to enforce the attachment liens for the benefit
[144] of the estate. *126 Fed. 845. The court of appeals affirmed this action (66 C. C. A. 547, 133 Fed. 717), and the bank petitioned this court for a writ of certiorari, which was granted.

Mr. **S. Hamilton Graves** argued the cause and filed a brief for petitioner:

The words "The property of the bankrupt," as used in the act and the decisions, mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has the bare legal title.

Hewit v. *Berlin Mach. Works,* 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Low* v. *Welch,* 139 Mass. 33, 29 N. E. 216.

Bankrupt and insolvent laws are intended to secure the application of the effects of the debtor to the payment of his debts (omitting question of discharge), and do not affect property held in trust.

2 Kent, Com. pp. 389–400; *Kip* v. *Bank of New York,* 10 Johns. 63; *Dexter* v. *Stewart,* 7 Johns. Ch. 52; *Yates* v. *Curtis,* 5 Mason, 80, Fed. Cas. No. 18,127.

The object of bankruptcy acts, the fundamental principle upon which they are founded, so far as creditors are concerned (other than the subject of discharge), is to take possession of, through the medium of a trustee, the property of the insolvent debtor, convert the same into money, and distribute it among the general creditors without preference. For that purpose, and that alone, the bankruptcy act declares void certain liens acquired within a specified time upon the property of the bankrupt.

Mayer v. *Hellman,* 91 U. S. 503, 23 L. ed. 379; *Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Stewart* v. *Platt,* 101 U. S. 731, 25 L. ed. 816; *Conner* v. *Long,* 104 U. S. 244, 26 L. ed. 729.

The bankruptcy act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues.

Hewit v. *Berlin Mach. Works,* 194 U. S. 302, 48 L. ed. 988, 24 Sup. Ct. Rep. 690.

The object of a bankruptcy act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt.

Pirie v. *Chicago Title & T. Co.* 182 U. S. 449, 45 L. ed. 1178, 21 Sup. Ct. Rep. 906.

The trustee occupies no higher position than the bankrupt and his general creditors as of the date the petition was filed except as to an encumbrance which is void by some positive provision of the act.

Thompson v. *Fairbanks,* 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Re Garcewich,* 53 C. C. A. 510, 115 Fed. 87.

The act creates no assets and does not attempt to deal with the rights which may exist between a creditor of a bankrupt and a third party. The relations of the creditor, his right to collect of others, the personal security he may have or acquire, are no concern whatever of the bankrupt's trustee. It is immaterial whether rights which do not affect the bankrupt's estate were created by contract or by the failure of a third party to comply with some statutory requirement.

Swarts v. *Fourth Nat. Bank,* 54 C. C. A. 387, 117 Fed. 7.

In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter.

1 Kent, Com. 461.

It is a general rule that the cardinal purpose or intent of the whole act shall control, and to effectuate that intent a limitation, if necessary, will be placed on the sense of general terms.

Sutherland, Stat. Const. p. 318.

A lien, to be void under § 67*f*, must be upon property which passes to the trustee of the bankrupt (under other provisions of the act) as a part of the bankrupt's estate.

Powers Dry Goods Co. v. *Nelson,* 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; *Frazee* v. *Nelson,* 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40; *McKenney* v. *Cheney,* 118 Ga. 387, 45 S. E. 433; *Doyle* v. *Heath,* 22 R. I. 213, 47 Atl. 213; *Metcalf Bros.* v. *Barker,* 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67.

Messrs. **Holmes Conrad** and **William Gordon Robertson** also argued the cause for petitioner. For their contentions see

their brief as reported in *McHarg* v. *Staake*, *post*, 971.

Messrs **Arthur G. Dickson, John Dickey, Jr.,** and **S. Griffin** argued the cause, and, with *Messrs. H. Gordon McCouch, M. Griffin,* and *Samuel W. Cooper,* filed a brief for respondent.

Mr. Justice **Brown** delivered the opinion of the court:

At the time these attachments were levied, the title to the property in question stood in the name of Baird, and the attaching creditors, by their levies, secured a preferential lien upon the property, not only as against Baird, but also as against the furnace company, which received a deed to the property November 5, 1900, after the attachments had been levied. These attachments, however, were annulled by the filing of a petition in bankruptcy against Baird within four months after the attachments were levied, and if the case stood upon this fact alone there could be no doubt that the property would pass to the trustee of the furnace company, discharged of the lien of the attachments. We are not concerned here with any conflicting rights of the two trustees, Staake and Shimer, since they were both appointed receivers of the Roanoke Furnace Company, and the only claim made by Shimer now is that, if the attachments be continued, the petitioner Staake be required to abate his claim
[145] against the *estate of the furnace company by the amount of these attachments. It is therefore unnecessary to consider whether, if the attachments were annulled, the property would pass unencumbered to the trustee of the furnace company, since, as stated by the district judge, the demurrer to the petition is intended merely to raise the question whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

This depends upon the peculiar terms of § 67 of the bankrupt act, which provides as follows:

"Sec. 67*f*. That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, *unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate;* and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Section 67*c*, which also treats of liens created by attachments on mesne process, and provides for their dissolution, in the last clause declares that—"if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the state, shall be subrogated to the rights of the *holder of such lien, and [146] empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened." [30 Stat. at L. 564, 565, chap. 541, U. S. Comp. Stat. 1901, pp. 3449, 3450.]

This section (67*f*) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors; that is, "for the benefit of the estate,"—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors.

The first provision contemplates the attachment of property to which the bankrupt has the complete, legal, and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since, under the first clause, the entire value of the property attached passes to the trustee, free from the attachment. The second clause contemplates property in which

the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential
[147] lien *in favor of the attaching creditors, by the institution of proceedings in bankruptcy.

In the present case Baird had contracted to convey the property to the Roanoke Furnace Company, possession had been taken, and the consideration paid, but the deed was not actually executed and recorded until after the attachment had been levied. Hence, under the Virginia statute, the validity of which is not questioned, the lien of the attachment took precedence of the deed, and would have remained a prior lien, had it not been for the institution of the bankruptcy proceedings within four months. This dissolved the attachment, and, had the case rested here, the property would have apparently passed to the furnace company, or to its trustee in bankruptcy, Shimer; but at this point the court, under the second proviso of § 67*f*, interposed and recognized the lien of the attachment; not, however solely for the benefit of the attaching creditors, but for the benefit of Baird's estate. Shimer made no objection, and the court declined to express an opinion as to his rights.

This is one of the very contingencies provided for by the second clause of the section, which apparently vests in the court a certain discretion with regard to the preservation of the right acquired under the attachment or other lien. In this case the court recognized the validity of the lien, the trustee of the furnace company making no objection to this; but the attaching creditors insist that, as the lien was acquired for their own benefit, they should not be required to share with the general creditors of Baird's estate.

Their argument is based upon the theory that the second clause was not intended to apply to liens acquired upon the estate of third parties, but to property which would have passed to Baird's trustee had the attachment not been levied. In other words, that the bankruptcy court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied upon it. Indeed, the
[148] opinion especially *finds that "had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company."

To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties (such as purchasers under an unrecorded deed), such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the district judge, "In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors." [126 Fed. 847.]

Section 67*f* is merely carrying out the general purposes of the act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.

The argument that § 67*f* in question here refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annulling all such liens and providing *that
[149] property affected thereby shall pass to the trustee as a part of the estate. Under the argument of the attaching creditors in this case, the subsequent clause would be entirely unnecessary. This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken, doubtless this property would have been sold for the benefit of the attaching creditors.

The general rule relied upon by the bank

in this case, that the words "property of the bankrupt" mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in *Hewit* v. *Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. But the extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as the property of the bankrupt, though in fact such property had been conveyed by an unrecorded contract, is a matter solely within the discretion of Congress. The liens acquired in this case were liens upon property which, as to attaching creditors, was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee. As remarked by the court of appeals: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." [66 C. C. A. 550, 133 Fed. 720.]

If the interest of Baird in this property were sold solely for the benefit of the attaching creditors, it would obviously result in a preference to those creditors over the general creditors of his estate, and in fraud of the bankruptcy act, which is designed to secure equality among all creditors.

The judgment of the Court of Appeals is affirmed.

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[150] *HENRY K. McHARG, Receiver, *et al.*, *Petitioners*,

v.

WILLIAM H. STAAKE, Trustee.

(See S. C. Reporter's ed. 150.)

This case is governed by the decision in *First Nat. Bank* v. *Staake*, *ante*, 967.

[No. 214.]

Argued March 15, 16, 1906. Decided April 30, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review an order affirming a decree of the District Court for the Western District of Virginia, preserving, for the benefit of the bankrupt estate, liens acquired by attaching creditors on real property of the bankrupt, which, but for such attachments, would have passed to a purchaser under an unrecorded deed. *Affirmed.*

See same case below, 66 C. C. A. 547, 133 Fed. 717.

Messrs. **William Gordon Robertson** and **Holmes Conrad** argued the cause, and, with *Mr. Edward W. Robertson*, filed a brief for petitioners:

Both under the present law and under the law of 1867 the trustee in bankruptcy takes no greater interest in the property than the bankrupt himself.

Mattocks v. *Baker*, 2 Fed. 455; *Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Stewart* v. *Platt*, 101 U. S. 731, 25 L. ed. 816; *Re New York Economical Printing Co.* 49 C. C. A. 133, 110 Fed. 514; *Hewit* v. *Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

Independent of the bankrupt law it has been held in Virginia that a debtor can make an assignment preferring certain creditors and it will be good against creditors whose claims are postponed, and this is true in a large number of states; and the main object of the provision of the Constitution of the United States that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States" was to enable Congress to put it out of the power of an insolvent debtor to do injustice to his creditors by making fraudulent preferences.

McKenney v. *Cheney*, 118 Ga. 387, 45 S. E. 433; *Swarts* v. *Fourth Nat. Bank*, 54 C. C. A. 387, 117 Fed. 3.

Section 67*f*, after providing that the attachments and other liens therein mentioned shall be decreed null and void in case the party is adjudged a bankrupt, declares that the property covered by the lien shall be decreed "wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt." This language clearly shows that the property to which the section refers is property which, but for the lien, would pass to the trustee of the bankrupt.

Powers Dry Goods Co. v. *Nelson*, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; *Frazee* v. *Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40; *McKenney* v. *Cheney*, *supra*.

The trustee in bankruptcy of Baird could stand in no higher position than a general assignee to whom a deed had been made by Baird conveying the property for the benefit of all of his creditors. If such a general assignment had been made, it is obvious that the property, the title of which had passed to the furnace company, could not have been conveyed to the general assignee.

Re Grissler, 136 Fed. 754.

The trustee takes not as an innocent purchaser, but subject to all valid claims, liens, and equities.

Collier, Bankr. 5th ed. p. 554; *Chatta-*

nooga Nat. Bank v. *Rome Iron Co.* 4 Am. Bankr. Rep. 441, 102 Fed. 755; *Winsor* v. *McLellan*, 2 Story, 492, Fed. Cas. No. 17,887; *Re New York Economical Printing Co.* 49 C. C. A. 133, 6 Am. Bankr. Rep. 615, 110 Fed. 514.

Mr. **S. Hamilton Graves** also argued the cause for petitioners. For his contentions see his brief as reported in *First Nat. Bank* v. *Staake*, *ante*, 967.

Messrs. **Arthur G. Dickson, John Dickey, Jr.,** and **S. Griffin** argued the cause, and, with *Messrs. H. Gordon Couch, M. Griffin,* and *Samuel W. Cooper,* filed a brief for respondent.

Per Curiam: As the facts in this case are practically the same as those set forth in the preceding, and the legal principles are identical, this is also *affirmed.*

Mr. Justice **Harlan,** Mr. Justice **White,** and Mr. Justice **Peckham** dissented in both cases.

ROBERT SAWYER and Arthur Adams,
Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 150–168.)

1. **Jury—conditional or qualified challenge.**—The conditional or qualified right of challenge on behalf of the Federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning any cause, still exists in those states where such practice obtains, notwithstanding the enactment of the acts of March 3, 1865 (13 Stat. at L. 500, chap. 86), and June 8, 1872 (17 Stat. at L. 282, chap. 333), giving peremptory challenges to the government, if such practice has, conformably to the act of July 20, 1840 (5 Stat. at L. 394, chap. 47, U. S. Rev. Stat. § 800, U. S. Comp. Stat. 1901, p. 623), been adopted by a court rule in the Federal courts.
2. **Jury—conditional or qualified challenges.**—There has been no unreasonable exercise of the conditional or qualified right of challenge on behalf of the Federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning cause, where neither the government nor the defendants had exhausted all their peremptory challenges when the jury was obtained.
3. **Witnesses—cross-examination of accused.**—A prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and may be cross-examined upon his evidence in chief as to the circumstances connecting him with the crime with the same latitude that would be exercised in the case of an ordinary witness.
4. **Appeal—harmless error—cross-examination of accused.**—Error in cross-examining the accused with reference to previous misconduct which has no tendency to connect him with the offense charged is not available on a writ of error, where the witness denied such misconduct, and no attempt was made to contradict his denial.
5. **Appeal—improper argument—correction and withdrawal.**—An improper remark by the district attorney in summing up before the jury is not ground for reversing a conviction, where the court, on objection, held such remark to be improper, and the counsel withdrew it, and apologized for it.
6. **Trial—conduct of judge—ruling on exceptions.**—The trial court does not err in characterizing as frivolous an exception to its action on objection to an improper argument by the district attorney in summing up before the jury, where the court held such argument to be improper, and the district attorney withdrew it, and apologized for it.
7. **Appeal—harmless error—instructions.**—No harm is done by charging the jury that the accused were not charged with the murder of a certain person, when the indictment in fact contained his name as one of those whose murder was alleged, where the court also said that, if so charged in the indictment, there was no evidence to sustain that charge.

[No. 553.]

Argued April 4, 5, 1906. Decided April 30, 1906.

IN ERROR to the Circuit Court of the United States for the Eastern District of North Carolina to review a conviction of murder. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The writ of error in this case brings before this court a judgment of conviction of murder, rendered in the circuit court of the United States for the eastern district of North Carolina.

The plaintiffs in error were indicted at the fall term, 1905, of the United States district court for the eastern district of North Carolina, Wilmington division, for the murder, by shooting, on the 28th day of October, 1905, of E. R. Rumill, captain, John T. Hall, mate, John Falbe, cook, C. L. Smith, engineer, and John S. Coakley, seaman, committed on the high seas and within the jurisdiction of the court wherein the indictment was found, and on board of the Ameri-

NOTE.—*On the cross-examination of the defendant in criminal cases*—see note to People v. Tice, 15 L.R.A. 669.

On reversal of conviction for unfair or irrelevant argument or statements of fact by prosecuting attorney—see notes to People v. Fielding, 46 L.R.A. 641, and Hall v. United States, 37 L. ed. U. S. 1003.

can vessel called the Harry A. Berwin. The indictment alleged that after the shooting the deceased were thrown into the sea. Upon the trial of the plaintiffs in error in November, 1905, in the United States circuit court for the eastern district of North Carolina, to which court the indictment had been duly transferred for trial, they were convicted of the murder of the first four named in the indictment. The court told the jury that the defendants were not charged with killing Coakley, and, if charged in the bill, there was no evidence to support the charge.

[152] *There is no question made as to the sufficiency of the indictment or of the jurisdiction of the court.

It appeared on the trial that the plaintiffs in error were part of the crew, and, together with one Henry Scott, who was also one of the crew, were the only living persons found on the Berwin when they were arrested by the crew of a small boat that was put off from a schooner called the Blanche H. King, which was then proceeding on a voyage up the coast from Brunswick, Georgia, to Philadelphia, Pennsylvania, and had arrived at a point about 32 miles southwest from Cape Fear bar. The attention of Captain John W. Taylor, of the schooner, was directed about 9 o'clock in the evening in the month of October, 1905, to a vessel just ahead of him, on account of the manner in which she was carrying her lights, and because she was right in the track of his own vessel. He sent a small boat, manned by several seamen, to the vessel (which proved to be the Berwin), and the boat brought back the plaintiffs in error and Scott, who, on being brought to the deck of the vessel and telling their story, were put in irons by direction of the captain, who then steered his vessel for the nearest port, which was Southport, North Carolina, where the men were delivered to the Federal authorities. Upon the trial of the indictment which was found against the plaintiffs in error, the man Scott was called as a witness, and swore to the murder by the plaintiffs in error while the vessel was at sea, and on or about October 28, 1905.

Scott was subsequently indicted alone for the murders, and was also convicted, the plaintiffs in error being witnesses against him, and they testified that he committed the murders. He has been reprieved by the President, so that he may be again used as a witness against the plaintiffs in error in case of a new trial being granted to them.

Mr. **Corcoran Thom** argued the cause, and, with *Messrs. George Rountree* and *Harry P. Blair,* filed a brief for plaintiffs in error:

At common law, prior to the reign of Edward I., the government had the right to challenge as many jurors peremptorily as it pleased. This was the cause of great injustice to the defendants, and also caused great delay in the trial of cases. By the statute of 33 Edw. I., this right of peremptory challenge was taken away and the right of the prosecution to challenge jurors was limited to challenges for cause. There then sprang up the privilege of the prosecution to stand *venire* men aside and put them at the foot of the panel.

United States v. *Marchant,* 12 Wheat. 480, 6 L. ed. 700; *United States* v. *Shackleford,* 18 How. 588, 15 L. ed. 495; *United States* v. *Douglass,* 2 Blatchf. 207, Fed. Cas. No. 14,989; *Sealy* v. *State,* 1 Ga. 213, 44 Am. Dec. 641; *Mathis* v. *State,* 31 Fla. 316, 12 So. 681; *Rex* v. *Parry,* 7 Car. & P. 836; *Reg.* v. *Frost,* 9 Car. & P. 129; 1 Chitty, Crim. Law, 534; Bacon, Abr. title *Juries,* E. 10; *Hayes* v. *Missouri,* 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350.

This rule was in force in the Federal courts when the government had no right of peremptory challenge.

United States v. *Marchant, supra; United States* v. *Wilson,* Baldw. 82, Fed. Cas. No. 16,730; *United States* v. *Douglass* and *United States* v. *Shackleford, supra.*

But as the right of challenging jurors peremptorily has now been given the prosecution, it should stand on the same footing with the defense, and either exercise the right of challenge at once or not at all.

United States v. *Butler,* 1 Hughes, 457, Fed. Cas. No. 14,700.

This decision was rendered in the Columbia circuit of South Carolina, where the right of qualified peremptory challenge was recognized in the state practice.

State v. *Stephens,* 13 S. C. 285; *State* v. *Barrontine,* 2 Nott & M'C. 553; *State* v. *Wise,* 7 Rich. L. 412.

It was not contended by the government in this case that there was any rule in the circuit court of the United States for the eastern district of North Carolina adopting the practice of the state in this particular.

See *United States* v. *Shackleford, supra; United States* v. *Devlin,* 6 Blatchf. 73, Fed. Cas. No. 14,953; *Lewis* v. *United States,* 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136.

A party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination.

Greenl. Ev. § 445; *Philadelphia & T. R. Co.* v. *Stimpson,* 14 Pet. 448, 10 L. ed. 535.

The cross-examination of persons who are witnesses in their own behalf, when on trial

for criminal offenses, should, in general, be limited to matters pertinent to the issue, or such as may be proved by other witnesses.

People v. *Brown*, 72 N. Y. 573, 28 Am. Rep. 183.

Of course, the government would have the right to cross-examine the witness for the purpose of impeaching his testimony in any manner which would legitimately affect his credibility.

Wigmore, Ev. §§ 2276, 2277, pp. 3154, 3161; *Allen* v. *United States*, 52 C. C. A. 597, 115 Fed. 3.

The courts have uniformly excluded questions which do not have that effect.

People v. *Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *People* v. *Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *Van Bokkelen* v. *Berdell*, 130 N. Y. 141, 29 N. E. 254; *People* v. *Patrick*, 182 N. Y. 212, 74 N. E. 843.

The moment questions are asked concerning facts touching the witness's character which are irrelevant to the facts in issue for any other purpose than to affect his credibility, or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and, on objection, should be restrained within legitimate limits.

Buel v. *State*, 104 Wis. 132, 80 N. W. 78; *Bailey* v. *State*, 67 Miss. 333, 7 So. 348; *State* v. *Carson*, 66 Me. 116; *People* v. *Pinkerton*, 79 Mich. 110, 44 N. W. 180; *State* v. *Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *State* v. *Hale*, 156 Mo. 102, 56 S. W. 881; *Saylor* v. *Com.* 97 Ky. 184, 30 S. W. 390; *Nix* v. *State* (Tex. Crim. App.) 74 S. W. 764; Thompson, Trials, § 653; *Bullock* v. *State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *State* v. *Barker*, 68 N. J. L. 19, 52 Atl. 284.

The latitude of cross-examination in North Carolina seems to be broader than in most other jurisdictions in America (*State* v. *Kent* [*State* v. *Pancoast*] 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052); and yet in *State* v. *Traylor*, 121 N. C. 674, 28 S. E. 493, it is definitely stated that such questions as those which were put to Adams on cross-examination must be confined solely to contradiction or impeachment, and are not to affect the guilt or innocence of the accused.

It is error to allow the cross-examination of the accused, who has taken the stand in his own behalf, which could serve no other purpose than to prejudice him before the jury.

Allen v. *United States, supra; Hayward* v. *People*, 96 Ill. 492; *Gifford* v. *People*, 87 Ill. 210; *Buel* v. *State, supra; People* v. *Molineux*, 62 L.R.A. 345, note, 168 N. Y. 264, 61 N. E. 286.

Even though the questions which were put to Adams on cross-examination were answered in the negative, it was still error to allow the questions to be propounded.

Bates v. *State*, 60 Ark. 450, 30 S. W. 890; *Gale* v. *People*, 26 Mich. 161; *People* v. *Wells*, 100 Cal. 459, 34 Pac. 1078.

It can hardly be controverted that any other witness would not be allowed to testify as to the matter concerning which Adams was cross-examined.

Smith v. *United States*, 161 U. S. 85, 90, 40 L. ed. 626, 627, 16 Sup. Ct. Rep. 483; *Morrison* v. *Pettibone*, 87 Fed. 330.

In the case at bar the defendant Adams was not even arrested for any misconduct, but the question was intended to prejudice him with the jury by showing, and it was in fact shown, that he had formerly, on a different vessel, quarreled about his food,—the alleged motive for the present crime. It has been distinctly held by this court that testimony of that kind is improper.

Boyd v. *United States*, 142 U. S. 450. 35 L. ed. 1077, 12 Sup. Ct. Rep. 292; *Hall* v. *United States*, 150 U. S. 76, 37 L. ed. 1003, 14 Sup. Ct. Rep. 22.

Admitting that such cross-examination would have been relevant simply for the purpose of impeaching the veracity of Adams, we submit that, at any rate, the court should have instructed the jury that it was receivable only for that purpose; and, not having done so, it is reversible error, although the court was not requested so to do.

State v. *Parker*, 134 N. C. 209, 46 S. E. 511.

The argument of counsel and remarks of the court are in the highest degree improper.

Thompson, Trials, chap. 30.

The language of the district attorney was calculated, under the conditions under which these people were tried to arouse prejudice and inflame the passions of the jury. It exceeds in bitterness the natural exaggeration often used in the heat of argument, and comes within the class of remarks frequently condemned by the courts.

Hall v. *United States, supra; Graves* v. *United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40; *Williams* v. *United States*, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92; *Hawkins* v. *United States*, 53 C. C. A. 663, 116 Fed. 569; *State* v. *Smith*, 75 N. C. 306; *Coble* v. *Coble*, 79 N. C. 589, 26 Am. Rep. 338; *Perry* v. *Western North Carolina R. Co.* 128 N. C. 471, 39 S. E. 27.

It is the duty of the presiding judge, either of his own motion or upon the request of the opposing party or his counsel, to interpose and check the party or his coun-

sel in an improper and prejudicial line of argument. The duty is a very plain one and good care should be taken to discharge it fully and faithfully.

Thompson, Trials, § 958.

The incident was prejudicial to the defendants in that the action of the court tended to justify the comments of the district attorney and unjustifiably to disparage counsel for the defendants, and it is to be also noted that the court did not attempt, in his charge to the jury, to remove the bad impression thus made.

Allen v. *United States*, 52 C. C. A. 597, 115 Fed. 3; *Wilson* v. *United States*, 149 U. S. 60, 67, 37 L. ed. 650, 652, 13 Sup. Ct. Rep. 765.

An objection by an opposing counsel, promptly interposed, followed by a rebuke from the bench, and an admonition from the presiding judge to the jury to disregard the prejudicial statement, is generally, though not always, held sufficient to cure the prejudice.

Thompson, Trials, § 960. *Hall* v. *United States*, 150 U. S. 81, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22.

How different the action of the court in this case from that of the court in the following cases:

Dunlop v. *United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375; *United States* v. *Alexander*, 119 Fed. 1015; *Wright* v. *United States*, 48 C. C. A. 37, 108 Fed. 805.

The judge refused or failed to put his whole charge in writing, although requested so to do at the proper time.

Dupree v. *Virginia Home Ins. Co.* 92 N. C. 418; *Jenkins* v. *Wilmington & W. R. Co.* 110 N. C. 442, 15 S. E. 193; *State* v. *Tyson*, 133 N. C. 692, 45 S. E. 838.

Solicitor General **Hoyt** argued the cause and filed a brief for defendant in error:

The right of the prosecution temporarily to stand jurors aside was not abrogated by the law allowing peremptory challenges on behalf of the goernment.

Haines v. *Com.* 100 Pa. 317; *Smith* v. *Com.* 100 Pa. 324; *Com.* v. *O'Brien*, 140 Pa. 555, 21 Atl. 385; *State* v. *McNinch*, 12 S. C. 89; *State* v. *Stephens*, 13 S. C. 285; *Pointer* v. *United States*, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410.

It does not appear that the prisoners were in any way prejudiced. They had a trial by a competent and impartial jury, and, as they obtained such a jury from those who remained on the panel, this was all they could demand.

Northern P. R. Co. v. *Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *United States* v. *Cornell*, 2 Mason, 104, Fed. Cas. No. 14,868; *Hayes* v. *Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; *Brown* v. *New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77.

The control of argument is necessarily committed largely to the discretion of the trial court, and appellate courts will interfere only in cases where the trial court has refused to exercise its powers, or where it is manifest that its discretion has been abused by permitting prejudicial matters to be rehearsed to the jury in argument.

1 Thompson, Trials, § 964; *Graves* v. *United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40; *Cross* v. *State*, 63 Ala. 476; *Pierson* v. *State*, 18 Tex. App. 524; *House* v. *State*, 19 Tex. App. 227; *Shular* v. *State*, 105 Ind. 289, 55 Am. Rep 211, 4 N. E. 870; *State* v. *Griffin*, 87 Mo. 608; *Polin* v. *State*, 14 Neb. 540, 16 N. W. 898; *Combs* v. *State*, 75 Ind. 215; *State* v. *Stark*, 72 Mo. 37; *State* v. *Hamilton*, 55 Mo. 520; *Com.* v. *Nicely*, 130 Pa. 261, 18 Atl. 737; *Thompson* v. *Barkley*, 27 Pa. 263; *State* v. *Horner*, 139 N. C. 606, 52 S. E. 136.

A defendant, in his witness character, is on the same footing as any other witness.

Fitzpatrick v. *United States*, 178 U. S. 304, 315, 44 L. ed. 1078, 1083, 20 Sup. Ct. Rep. 944.

When a party is a witness he may be cross-examined on matters not within the direct examination, the course and extent of such cross-examination being committed to the control of the court, in the exercise of a sound discretion, which is not reviewable on writ of error.

Storm v. *United States*, 94 U. S. 76, 85, 24 L. ed. 42, 45; *Rea* v. *Missouri*, 17 Wall. 532, 542, 21 L. ed. 707, 709; *Davis* v. *Coblens*, 174 U. S. 719, 727, 43 L. ed. 1147, 1150, 19 Sup. Ct. Rep. 832; *Blitz* v. *United States*, 153 U. S. 308, 38 L. ed. 725, 14 Sup. Ct. Rep. 924: *Allen* v. *United States*, 52 C. C. A. 597, 115 Fed. 3.

The weight of authority commits the control and scope of cross-examination to the discretion of the court, and permits any witness to be impeached on cross-examination, always by questions going to his veracity, generally by questions directed at his reputation in allied respects,—honesty, probity, integrity,—often by general character, and less frequently, but still in numerous cases, by specific instances of other misconduct than the different varieties of the *crimen falsi*.

2 Wigmore, Ev. §§ 889–891, 922–926, 983, 987, pp. 1013–1016; 3 Wigmore, Ev. § 2277, p. 3159.

The law of North Carolina permits great latitude on cross-examination; bad character may be shown, and, it seems, specific instances of misconduct as well.

State v. *Efler*, 85 N. C. 585; *State* v. *Boswell*, 13 N. C. (2 Dev. L. 209); *State* v. *O'Neale*, 26 N. C. (4 Ired. L.) 88; *State* v. *Dove*, 32 N. C. (10 Ired. L.) 469; *State* v. *Parks*, 25 N. C. (3 Ired. L.) 296; *State* v. *Stallings*, 3 N. C. (2 Hayw.) 300; *State* v. *Thomas*, 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518.

Subject to the constitutional privilege of a witness to refuse to answer questions the answers to which may tend to criminate him, it is proper to show collateral facts that might tend to criminate, disgrace, or degrade the witness, if such other facts tend to weaken his credibility.

State v. *Kent* (*State* v. *Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

A defendant witness subjects himself to the same rules of cross-examination as other witnesses, with the exception that his privileges are to some extent curtailed in that he is not only required to answer any relevant and proper question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense when such answer also tends to convict him of the offense for which he is being tried, or bears upon any of the issues involved in such case.

Ibid.

Nothing is better settled than that where a witness is asked as to collateral crimes, for the purpose of affecting credibility, his answers are absolutely conclusive on the party asking.

State v. *Kent* (*State* v. *Pancoast*) 5 N. D. 516, 35 L.R.A. 533, 67 N. W. 1052; 3 Rice, Ev. § 222; *People* v. *Jackson*, 3 Park. Crim. Rep. 391; *Oxier* v. *United States*, 1 Ind. Terr. 85, 38 S. W. 331; *Newcomb* v. *Griswold*, 24 N. Y. 298; 1 Starkie, Ev. 190.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The first question to be noticed in this case arises by reason of these facts: When the case was called for trial the clerk proceeded to call the names of the jurors, and the record shows that:

[158] *"While the jury was being impaneled several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the panel, without any challenge on the part of the government, and without an opportunity given to defendants to accept, challenge for favor or cause, or to peremptorily challenge any and all of said jurors so stood aside.

"To each and to every action in this respect on the part of the government the defendants promptly and in due time objected, but the court overruled the objections, saying the state practice would be followed, and there was no United States statute on the subject; to which ruling of the court the defendants, by their counsel, then and there duly excepted, and the exceptions were allowed. It appeared that neither the government nor the defense had exhausted all their peremptory challenges when the jury was impaneled."

The inquiry is whether the court had the power to permit such conditional challenge by the government.

The origin of this practice is stated by Mr. Justice Field in delivering the opinion of the court in *Hayes* v. *Missouri*, 120 U. S. 68–71, 30 L. ed. 578–580, 7 Sup. Ct. Rep. 350, 351, It is there said:

"Originally, by the common law, the Crown could challenge peremptorily, without limitation as to number. By act of Parliament passed in the time of Edward the First, the right to challenge was restricted to challenges for cause. But, by a rule of court, the Crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the Crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

The question here involved was not directly before the court in that case, but the accuracy of the statement is not questioned. It is not disputed that the practice has prevailed in *the state of North Carolina ever [159] since the foundation of the state, and it has also prevailed in South Carolina and Pennsylvania.

In 1790 Congress provided for granting certain peremptory challenges to the defendant (1 Stat. at L. 119, chap. 9), but no peremptory challenge was allowed to the government.

While the government was thus situated in regard to peremptory challenges, the case of *United States* v. *Marchant*, 12 Wheat. 480, 6 L. ed. 700, came before the court. The question directly involved was whether persons jointly charged in the same indictment for a capital offense had a right by law to be tried separately without the consent of the prosecutor, and it was held that persons so jointly charged had not that right, but that such separate trial was a matter to be allowed in the discretion of the court. In the course of the opinion, however, which was delivered by Mr. Justice Story, it was stated as follows:

"But a still more direct conclusion

against the right may be drawn from the admitted right of the Crown to challenge in criminal cases, and the practice under that right. · We do not say that the same right belongs to any of the states in the Union; for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is not as to what is the state prerogative, but, simply what is the common-law doctrine as to the point under consideration. Until the statute of 33 Edw. I., the Crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the Crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the Crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (2 P. C. chap. 43, §§ 2, 3), 'if the King challenged a juror before the panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury [160] without the person so challenged. And *if the defendant, in order to oblige the King to show cause, presently challenge *touts paravaile;* yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the King need to show any.' And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times.

"This acknowledged right of peremptory challenge existing in the Crown before the statute of 33 Edw. I. and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial he could at any time be defeated by the Crown of such choice, by its own admitted prerogative."

It is true that the matter involved in the *Marchant Case* did not call for this statement, as the direct question was not in issue. It was made argumentatively, as one reason for denying the right claimed by defendant in that case. Subsequently the circuit court of the United States in Pennsylvania, in 1830, followed the views expressed in the *Marchant Case*. *United States* v. *Wilson*, Baldw. 78, Fed. Cas. No. 16,730. In that case the right was claimed by the district attorney and denied by counsel for defendant, but was allowed by the court upon the ground that it considered the opinion of the Supreme Court as a recognition of the qualified right of the United States to challenge, and directed the juror to be put aside until the panel was exhausted, declaring that if that should happen and the juror be again called, the United States could not then challenge him without showing cause.

Again, in the case of *United States* v. *Douglass*, 2 Blatchf. 207, Fed. Cas. No. 14,989, which was decided in 1851, this qualified right of challenge was conceded to exist by Mr. Justice Nelson, who presided on *the trial in that case, but was denied by Dis- [161] trict Judge Betts, who sat with him. The case was tried in the southern district of New York, in which state no such right of conditional challenge existed. A motion for a new trial was made before the same court, and Judge Nelson said in his opinion, in denying the motion, that "this qualified right of challenge without cause is the settled doctrine of the common law, and has been recognized by the Supreme Court of the United States in the case of *United States* v. *Marchant*, *supra*, and has been practised upon in some of the circuits." The judge then said that the doubt as to the right of the government arose by reason of the passage of the act of July 20, 1840 (5 Stat. at L. 394, chap. 47), providing for the designation of jurors to serve in the Federal courts, and empowering those courts to make rules and regulations for conforming the designation and impaneling of jurors to the laws and usages of the states as they may exist at the time. A rule to that effect has been adopted in the southern district of New York. The justice further stated in his opinion that the act of 1840 applied only to the mode and manner of drawing or selecting the jury,—that is, by ballot, lot, or otherwise,—as prescribed by the state laws, and that it did not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause: and that those questions stand upon the common law, except where regulated by the act of Congress. Judge Betts, in his opinion, which is set forth in the report, held that no such right existed, certainly not in the states where such practice was not recognized.

In 1855 the case of *United States* v. *Shackleford*, 18 How. 588, 15 L. ed. 495, came before the court. It arose on a certificate of difference of opinion between the judges holding the circuit court of the United States for the district of Kentucky. The question was whether the defendant, who was indicted for a misdemeanor, was en-

titled to any peremptory challenges, and, as the judges were divided in opinion, they certified the question of difference to this court. Mr. Justice Nelson, in delivering the opinion of the court, stated that the power [162] conferred upon *the Federal courts under the act of 1840, *supra*, enabled those courts to adopt rules and regulations for conforming the designation and impaneling of jurors to the laws and usages in force at the time in that state, and that by virtue of that act the courts were enabled to adopt those laws and usages in respect to challenges of jurors, whether peremptorily or for cause, and in cases both civil and criminal, with the exception therein stated. It was further held that, as the act of 1790 (1 Stat. at L. 119, chap. 9) gave persons indicted for treason a certain number of peremptory challenges, etc., that act expressly recognized the right of peremptory challenge, and the right should be regarded as excepted out of the power of the courts to regulate the subject by rule or order under the aforesaid act of 1840. Mr. Justice Nelson further observed as to the common law that it "gave to the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn." Continuing, he said:

"The court is of opinion that the right of challenge by the prisoner, recognized by the act of 1790, does not necessarily draw along with it this qualified right, existing at common law, by the government, and that, unless the laws or usages of the state, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the state law."

In the case before us the laws or usages of the state permitted this qualified right of challenge by the government. No case in this court has been cited, nor have we found one, that decides the question now before us. Those which we have referred to, whether of this court or the circuit courts of the United States, were, at any rate, decided before the passage of the act of Congress of 1865 (13 Stat. at L. 500, chap. 86), amended in some particulars by the act of 1872 (17 Stat. at L. 282, chap. 333). These statutes gave peremptory challenges to the govern- [163] ment, and the question *now presented is whether, after Congress has dealt with the subject of such challenges, the former qualified right of challenge on the part of the government still exists in those states where such practice obtains, and the practice has been adopted by a rule of court in the courts of the United States. Section 800 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 623) in substance reproduces the act of 1840 above referred to, so that the subject must be considered with reference to that section as well as the statute which gives challenges to the government.

The question arose in *United States* v. *Butler*, 1 Hughes, 457–467, Fed. Cas. No. 14,700. The trial was held before Chief Justice Waite and Judge Bond in the United States circuit court for the district of South Carolina in April, 1877. Upon the impaneling of the jury a juror was called and was examined on his *voir dire*, and was then told by the counsel for the government to stand aside. The defense objected, and insisted that the prosecution must either exercise the right of challenge or waive it entirely and at once. The court held that this rule was in force when the government had no right of peremptory challenge, but as the right of peremptory challenge had been given to the prosecution, it should be given the same right with the defense and should exercise the right at once or not at all.

This decision of the Federal circuit court is the only one brought to our attention that has been decided since the passage of the acts of Congress, giving the right of peremptory challenge to the government. It was by virtue of the act of 1840, already mentioned (Rev. Stat. § 800), that the Federal courts have been enabled to adopt the laws and usages of the state in respect to the challenging of jurors, whether peremptorily or for cause. *United States* v. *Shackleford*, *supra*.

When the Federal statute granted the right to a certain number of peremptory challenges to the defendant in criminal cases, it was said that such right must be regarded as excepted out of the power of the court to regulate the same by rule of *order [164] under the act of 1840. As the statute prescribed the number of challenges to the defendant, the court could not, therefore, proceed under the act of 1840, and by rule or order prescribe any other number, or none at all, in accordance with the practice of the state courts in that respect. The Federal statute was held to be exclusive of any other regulation on the subject, because to give any other number of challenges to the defendant would be inconsistent with the provisions of the Federal statute, even though the matter of peremptory challenge was provided for by the state practice. In such a case the power to provide by rule of court was to be regarded as excepted from the provisions of the act of 1840.

But, in giving by statute the right of peremptory challenge to the government in

certain cases, it does not necessarily affect the exercise of the power of the government to challenge in this qualified manner. A conditional or qualified right of challenge is not inconsistent with the existence of the right of peremptory challenge given by statute. The two may co-exist, and the government may exercise the right of peremptory challenge given by statute and in the same case exercise the qualified or conditional challenge, as in the case at bar.

It was stated in the opinion in the *Shackleford Case* that unless the laws or usages of the state (adopted by rule by the Federal courts under the act of 1840) allowed it, the right should be rejected, and the practice conformed in that respect to the state law. But in North Carolina the state law permits such qualified right of challenge, and the court in this case made the order to follow the state practice, there being no United States statute on the subject.

In Pennsylvania, which is one of the states where the practice has always obtained, the supreme court held that a statute giving peremptory challenges does not take away this right of the government. *Haines* v. *Com.* 100 Pa. 317, 322; *Com.* v. *O'Brien*, 140 Pa. 555, 560, 21 Atl. 385.

To the same effect are the decisions in [165] North Carolina. The *right remains notwithstanding the enactment of a law giving peremptory challenges to the state. *State* v. *Benton*, 19 N. C. (2 Dev. & B. L.) 196–203; *State* v. *Hensley* (1886) 94 N. C. 1021.

The courts of Georgia and Florida are of a different opinion. *Sealy* v. *State*, 1 Ga. 213, 44 Am. Dec. 641; *Mathis* v. *State*, 31 Fla. 291, 315, 12 So. 681.

We are of opinion that the passage of the acts of Congress, granting peremptory challenges to the government, has not taken away the qualified right of challenge under discussion in this case. As we have said, there is certainly nothing in the statute granting peremptory challenges to the government to prevent its exercise of the other kind of challenge when permitted in the state, and where it has been adopted by the Federal court as a rule, or by special order, as in this case. The exercise of this right is under the supervision of the court, and it ought not to be permitted to be exercised unreasonably, or so that the interests of the defendant might be unduly prejudiced. The court should take special care to that end.

In this case it appears that neither the goverment nor the defendants had exhausted all their peremptory challenges when the jury was obtained. We think it plain that the government's right of qualified challenge was not unreasonably exercised, and the rights of the plaintiffs in error suffered no injury by the course permitted by the court.

Another question argued arises upon the cross-examination by the district attorney, of the plaintiff in error Adams, who voluntarily became a witness on the trial on his own behalf and in behalf of his fellow plaintiff in error. The cross-examination referred to the conduct of the witness on a previous voyage and on a different vessel, in regard to which nothing had been said on the examination of the witness in chief.

It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would *be exercised in the case of an ordi- [166] nary witness, as to the circumstances connecting him with the crime. *Fitzpatrick* v. *United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944.

It is contended on the part of the plaintiffs in error that within this rule the cross-examination was improper, as the subject-matter of the cross-examination had no tendency to connect the prisoner with the alleged crime for which he was on trial.

The district attorney, on his cross-examination, began with questions relating to the experience which the witness had had as a seaman, and asked him in regard to the vessels that he had sailed on. It appeared that he had been one of the crew, among others, of the schooner Benefit, for some fifteen months, whose captain was a man named Falkner. He was then asked if during the latter part of the fifteen months he was on the schooner he did not have trouble and try to create insubordination on board that vessel. This question was duly objected to by counsel for defendants, and the objection overruled by the court and an exception allowed. He answered that he was not logged, and then stated that the trouble arose from the cook giving them molasses to make tea, which he said was not right, and he and three other men went to the captain and asked him if he thought it was right, and the captain said they did not have sugar and would have to use molasses. The witness took the tea and threw it overboard; that he never went among the men and tried to create dissatisfaction among them; that the captain never threatened to put him in irons, and when he left the Benefit he shipped on another vessel named the Benj. Russell, where he stayed for over three months.

It is unnecessary in this case to inquire whether the cross-examination was within the prescribed limits, because the witness denied that he had any trouble, or that he

had ever tried to create any trouble, or that there was any insubordination on his part on board the vessel named. What he said in regard to the facts showed that there was [167] neither trouble nor *insubordination. The government made no attempt to contradict the evidence of the witness on this subject, and hence there could have been no harm arising from the cross-examination. There are some state authorities which hold that the error, if any, is not cured by answer of the witness denying the charge. But we think the better rule is where, as in this case, it is plain that there is no injury, the exception is not available.

The plaintiffs in error also ask for a new trial because of the remarks made by the district attorney in summing up to the jury, and the action of the court thereon.

In the course of his remarks, and in speaking of the fact that during the time these murders were being perpetrated, one of the plaintiffs in error had testified that he drank some coffee, the district attorney said, "A man, under such circumstances, who would drink coffee, ought to be hung on general principle." This remark the counsel for the plaintiffs in error objected to, and, after hearing counsel on the objection, the court directed the district attorney to confine himself to a proper argument, and thereupon the district attorney expressed his regret if he had made an improper argument, and withdrew the remark.

When the objection was first made by counsel for the plaintiffs in error the court asked if he wanted to cut the district attorney off from making any argument, but thereupon the court immediately directed the district attorney to confine himself to a proper argument, as above stated.

Counsel for the plaintiffs in error objected to both the remarks of the district attorney and the comments of the court as made, and counsel asked to be allowed to file an exception. Upon this request the court replied, "I will give counsel the benefit of a statement that he has made an exception which the court considers frivolous."

The remark of the district attorney was not appropriate argument and should not have been made, but we see nothing more that could have been done than was done by the court as soon as the objection was [168] made by the counsel for the plaintiffs *in error. Counsel, in summing up to a jury, are under some excitement, and may naturally make a remark or statement which is improper. But there is not, on that account, any ground laid for setting aside a verdict where, as in this case, the court held it was improper, and the counsel withdrew and apologized for it. *Dunlop* v. *United States*, 165 U. S. 486–498, 41 L. ed. 799–803, 17 Sup. Ct. Rep. 375. Under such circumstances it does seem as if the exception were frivolous, and the court, in stating its opinion to that effect, is not open to censure.

The error assigned that the court said the plaintiffs in error were not charged with the murder of Coakley, when in fact the bill contained his name, has not been pressed, and we think there is no merit in it. The court said that if charged in the bill, there was no evidence to support such charge. Certainly no harm was thereby done the plaintiffs in error.

Upon full consideration of all the objections urged by counsel for the plaintiffs in error, we think no ground appears for granting a new trial. *The judgment is affirmed.*

Mr. Justice **White** dissented.

UNITED STATES, *Appt.*,
v.
MILLIKEN IMPRINTING COMPANY.

(See S. C. Reporter's ed. 168–177.)

1. **Court of claims—jurisdiction.**—A petition for the reformation of a contract with the Federal government, and for damages for breach of such contract as reformed, is within the jurisdiction of the court of claims, under the act of March 3, 1887, chap. 359, § 1 (24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 752), which defines such jurisdiction as extending to all claims founded "upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims a party would be entitled to redress against the United States, either in a court of law, equity or admiralty if the United States were suable."

2. **Reformation of instruments—grounds—mistake.**—A contract with the Federal government for imprinting revenue stamps will not be reformed by incorporating clauses in a prior communication from the Commissioner of Internal Revenue to contractors then engaged in that work, to the effect that, in awarding contracts, no application would be considered from those not then engaged, and that application would only be received up to a specified time, in answer to which an application for a renewal "in accordance with your official communicator was made by letter,—especially where the contractor's letter, naturally interpreted would confine the changes in the contract to the Commissioner's require-

NOTE.—*On the reformation of contracts for mistake*—see notes to Rosenbaum Bros. v. Council Bluffs Ins. Co. 3 L.R.A. 189; Page v. Higgins, 5 L.R.A. 152; German Ins. Co. v. Gueck, 6 L.R.A. 835; Riegel v. American L. Ins. Co. 11 L.R.A. 857; Butler v. Barnes, 12 L.R.A. 273, and Wasatch Min. Co. v. Crescent Min. Co. 37 L. ed. U. S. 455.

ments concerning the salaries of the supervising government employees and the rate of compensation for the work, and there is no evidence that the contract was not drawn just as the government intended, although, when executing the contract, the contractor was assured that the only changes from the former contract were those contained in the Commissioner's letter.

[No. 227.]

Argued April 16, 17, 1906. Decided April 30, 1906.

APPEAL from the Court of Claims to review a decree reforming a contract and awarding damages for breach of such contract as reformed. *Reversed.*

See same case below, 40 Ct. Cl. 81.

The facts are stated in the opinion.

Mr. **Louis A. Pradt** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for appellant:

A suit in equity is the only known remedy for the reformation of a written contract.

Stockbridge Iron Co. v. *Hudson Iron Co.* 102 Mass. 48; Pom. Eq. Jur. § 188.

The purpose of an action for reformation of a contract on the ground of mistake is not to interpret the written contract, but to correct it so that it shall truly state the agreement of the parties. And since, in such an action, the court is simply called upon to declare the true and complete contract of the parties, which the written contract, through mistake, does not fully set forth, it is clear that the mistake alleged must be mutual.

Alabama Midland R. Co. v. *Brown*, 98 Ala. 648, 13 So. 70; Pom. Eq. Jur. §§ 870, 1376; *Maher* v. *Hibernia Ins. Co.* 67 N. Y. 290.

The evidence of this mutual mistake must be clear and convincing,—the strongest possible.

Pom. Eq. Jur. § 850; 1 Story, Eq. Jur. § 152; *Phœnix F. Ins. Co.* v. *Gurnee*, 1 Paige, 279, 19 Am. Dec. 431; *Newton* v. *Holley*, 6 Wis. 604.

The mistake, indeed, according to the current of authority, must be established beyond reasonable doubt.

Hearne v. *New England Mut. M. Ins. Co.* 20 Wall. 490, 22 L. ed. 396; *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 49; *Mead* v. *Westchester F. Ins. Co.* 64 N. Y. 455; 1 Story, Eq. Jur. 13th ed. p. 153.

The most that the evidence established in this case is the mistake of the claimant alone,—a one-sided mistake, which is not ground for reforming a contract.

Hearne v. *New England Mut. M. Ins. Co.* 20 Wall. 491, 22 L. ed. 397.

Mr. **David Milliken** argued the cause and filed a brief for appellee:

The court of claims, proceeding as a court of equity, has power to reform a contract.

United States v. *Jones*, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669; *South Boston Iron Works* v. *United States*, 34 Ct. Cl. 200; *District of Columbia* v. *Barnes*, 197 U. S. 146, 49 L. ed. 699, 25 Sup. Ct. Rep. 401.

The written application in connection with the proposal, and the acceptance of that application, constitute the contract between the parties.

Hearne v. *New England Mut. M. Ins. Co.* 20 Wall. 488, 22 L. ed. 395; *Equitable Safety Ins. Co.* v. *Hearne*, 20 Wall. 494, 22 L. ed. 398; *Harvey* v. *United States*, 105 U. S. 671, 26 L. ed. 1206; *Garfielde* v. *United States*, 93 U. S. 242, 23 L. ed. 779.

There was, in the first written draft agreed upon by the claimant and defendant, the contract between them.

Palmer v. *Hartford F. Ins. Co.* 54 Conn. 510, 9 Atl. 248.

Where the agreement, as reduced to writing, omits terms or stipulations, contrary to the common intention of the parties, the instrument will be corrected or reformed so as to make it conform to their real intent.

Hearne v. *New England Mut. M. Ins. Co. supra; Hunt* v. *Rousmanier*, 8 Wheat. 174, 5 L. ed. 589; *Andrews* v. *Essex F. & M. Ins. Co.* 3 Mason, 10, Fed. Cas. No. 374; *Oliver* v. *Mutual Commercial M. Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498; *Van Tuyl* v. *Westchester F. Ins. Co.* 55 N. Y. 657; 2 Pom. Eq. Jur. § 849; 1 Story, Eq. § 152.

The office of a bill for the reformation of an instrument is not to establish and effectuate rights,—not to have the effect of the deed adjudged,—but rather to define the status which the parties intended to create, and upon which such rights as they would have acquired under a correct instrument may be asserted and defended. The real question is not what the real instrument was intended to mean or how it was intended to operate, but what it was intended to be.

Tillis v. *Smith*, 108 Ala. 264, 19 So. 374; *Connor* v. *Armstrong*, 86 Ala. 265, 5 So. 449; *Alabama Midland R. Co.* v. *Brown*, 98 Ala. 647, 13 So. 70; *Parker* v. *Parker*, 88 Ala. 362, 16 Am. St. Rep. 52, 6 So. 740.

Subsequent conduct is important in determining the fact of omission.

Simpson v. *United States*, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212.

The omission of appellee to read the final contract before execution does not affect its rights.

West v. *Suda*, 69 Conn. 60, 36 Atl. 1015.

Mr. **Malcolm Lloyd, Jr.**, also argued the cause for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition praying for the reformation of a contract and for damages for breach of the same as reformed. The court of claims granted the prayer and made a decree for damages (40 Ct. Cl. 81), whereupon the United States appealed to this court.

The contract is an elaborate and formal instrument, dated June 19, 1899, under the seal of the petitioner, and executed on behalf of the United States by the Commissioner of Internal Revenue. It is unnecessary to state its terms. Members of a partnership subsequently incorporated as the petitioner had a contract of like sort expiring July 1, 1899. On or about April 25, 1899, they received from the Commissioner of Internal Revenue the following communication, bearing that date:

To contractors for imprinting stamps:

In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July 1st, 1899, it has been determined to add the following provisions to contracts in addition to those now contained in the existing contracts for imprinting stamps.

Each contractor will be required to pay [172] salaries aggregating *thirty-four hundred dollars ($3,400) per annum for one government stamp agent and two counters, payable monthly.

As compensation in full for imprinting stamps, the contractor shall charge all persons requiring the same the sum of 80 cents per thousand stamps imprinted, when imprinted upon sheets containing five or more stamps, and $1 per thousand stamps when imprinted upon sheets containing less than five stamps to the sheet. In order to secure absolute uniformity in prices these charges shall be rigidly adhered to, and any evasion or attempted evasion of the express terms hereof shall be deemed a violation of the terms of the contract.

No application for contract to imprint stamps for period named will be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the government.

Each application for contract must be accompanied by the guaranty of at least two responsible persons, that in case contract is entered into and accepted, bond will be furnished in the sum of twenty-five thousand dollars ($25,000) for the faithful performance thereof.

The Commissioner reserves the right to reject any or all applications and to cancel any contract wherever and whenever it shall appear to the interests of the public and the government to do so.

Applications will be received at the office of the Commissioner of Internal Revenue, Washington, District of Columbia, until 12 M., May 25, 1899, such applications to be carefully sealed and marked "Applications for contract for imprinting internal revenue stamps," and addressed to the Commissioner of Internal Revenue.

G. W. Wilson,
Commissioner.

On May 25, 1899, the firm wrote to the Commissioner stating that they then had the privilege to imprint stamps, etc., *and [173] "would most respectfully make application to you for a contract to continue the same for the period of one year, commencing July 1, 1899, and in accordance with your official communication, dated April 25, 1899, we to pay salaries aggregating $3,400 for one government stamp agent and two counters, and to receive as compensation for imprinting stamps the sum of 80 cents per thousand when imprinted upon sheets containing five or more stamps, and $1 per thousand when imprinted upon sheets containing less than five stamps per sheet." They added that they attached a guaranty to furnish the required bond, and referred to letters accompanying the original application. This letter now is denominated an acceptance of what is called the offer of April 25, above set forth. The alleged mistake is the omission, from the formal contract, of the paragraph in that communication, to the effect that no application will be considered from any person not now engaged in printing stamps under contract with the government, and the following one, limiting the time for applying to May 25. After May 25 an application was accepted from the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the government on April 25. The damages awarded were the profits which would have been made by the petitioner had it not lost the customers who went to the corporation last named.

The government objects at the outset that the court of claims has no jurisdiction in equity, and that, although the petitioner's demand is for money under a contract as it should have been drawn, yet, in this suit, that demand is incident to the reformation asked, which certainly is true. Reformation is not an incident to an action at law, but can be granted only in equity. When relief is granted also on the contract as reformed, it means only that the court of equity sees fit to go on and finish the whole case. But

we are of opinion that the court was warranted in taking jurisdiction under a fairly liberal interpretation of the act of March 3, 1887, chap. 359, § 1, 24 Stat. at L. 505,
[174] U. S. Comp. Stat. 1901, p. 752. *That section gives the court of claims jurisdiction of "all claims founded . . . upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." A claim for money upon a contract, which would be like a right of action at common law but for the need of help from equity to establish the contract, seems to us to fall within these words, in their obvious, literal sense. *District of Columbia* v. *Barnes*, 197 U. S. 146, 150, 152, 49 L. ed. 699–701, 25 Sup. Ct. Rep. 401; *South Boston Iron Works* v. *United States*, 34 Ct. Cl. 174, 200.

We come, then, to the merits. It is unnecessary to consider whether the court of claims ought to have made the findings of fact required in an ordinary case. We leave that question where we find it. *District of Columbia* v. *Barnes*, 197 U. S. 146, 150, 49 L. ed. 699, 700, 25 Sup. Ct. Rep. 401; *Harvey* v. *United States*, 105 U. S. 671, 691, 26 L. ed. 1206, 1213. For we are of opinion that the United States was entitled to a ruling as matter of law that there was no evidence which would warrant a decree for the petitioner; and therefore it would be a useless form to send the case back for findings to be made.

The petitioner's case depends on the assumption that the communication of April 25 was an offer, and that the letter of May 25 was an acceptance. But obviously this is a mistake. The former is a notice, not an offer. Its very first words, "In awarding contracts," contemplate the necessity of further action on the Commissioner's part. The clause which it is said should have been inserted speaks of an "application for contract," the right to reject applications is reserved in terms, and directions are given for sending them and as to the time within which they will be received. In like manner the letter of May 25 purports to "make application to you for a contract," and refers to recommendations, thus showing that it was understood that the Commissioner might refuse what was asked. No preliminary agreement was made *and there was no [175] new contract until the instrument sought to be reformed was signed. It is true that Milliken, the president of the petitioner, in the court below, says that he was informed by the Commissioner that his application was accepted and his contract would be renewed. But he goes on to say that he then called on the chief of the stamp division, was informed by him that it had been decided that the application of any person who had a contract would be granted, and received blank copies of the contract to be executed, so that the acceptance was contemporaneous with the delivery of the instrument informing the petitioner of the terms. There is no room for the application of *Harvey* v. *United States*, 105 U. S. 671, 26 L. ed. 1206, and similar cases, upon which the petitioner relies. The only effect of the testimony is to confirm, by the conduct and language of the parties, the interpretation of the previous communications, which does not need that confirmation to be plain. It should not pass unmentioned that the communications were between the Commissioner and the firm, and therefore not even with the same person that brings the present suit.

In strictness it is not necessary to go further. For the parol testimony which we shall mention amounts to nothing, except upon the footing that there was a preliminary written agreement. But it is proper to add that it is doubtful, at least, whether the two letters bear the interpretation which the petitioner now puts upon them. It is plain that not all the paragraphs of the notice to contractors after the first were provisions to be added to future contracts. That which follows the one in question was, on the face of it, simply information as to what the applicants must do. The last paragraph, fixing the time within which applications would be received, also obviously was a self-protecting notice only, and although the petitioner does set it up as properly a term of the agreement, the averment is only by way of make-weight to what mainly is relied upon, and we hardly think that it needs discussion. The communication was a general form to instruct *and direct appli- [176] cants for contracts. The most natural meaning of the clause principally in question was simply to give notice that applications from persons not already engaged in imprinting stamps would not be considered, and thereby to limit the applications sent in. It is not natural to read it as intended to contract the government out of its right to employ new persons in case a need to do so should arise.

The petitioner's letter also, in its most natural interpretation, would confine the changes in the contract to the requirements concerning salaries and the rate of compensation. It is true that it contains the general words, "and in accordance with your official communication dated April 25, 1899," but it goes on to show what it regards as

the elements of that communication material to the contract by the following words. It mentions salaries and the rate of compensation, nothing else. The words quoted are not an independent clause, but they qualify the next phrase, "we to pay salaries" etc. On these two letters, even if they had made a contract, which they did not, the government hardly could have been held to the disputed terms. It may be mentioned further that Milliken testified that when he wrote that letter he did not consider the clause in question to relate directly to the subject-matter of the contract, and although at a later date he stated that he desired to modify his testimony, the only intelligible modification, if it be called one, is that his testimony related to the time when he wrote the letter, not to the time when he received the contract to be signed.

After what we have said, but a few words need be added with regard to the parol evidence offered. Milliken says that when he received the blanks he said to the chief of the stamp division that he presumed the only changes from the former contract were those contained in the letter of April 25, was answered, "That is all," and thereupon afterwards executed the contract without reading it. If this were undisputed and had come from anyone authorized to bind the government, still, whatever effect, if any, it might [177] have upon an undisclosed *insertion, it would afford no ground for complaint at an omission, especially an omission of the paragraph we have discussed. The answer was true in letter and spirit, and in no degree warranted the inference that the blanks contained the disputed clause. The petitioner executed those blanks without any ground whatever for assuming that they contained anything which they did not, even if Milliken had been right in what he says he supposed to be the import of the notice of April 25.

Finally, there is not a particle of evidence that the contract was not drawn just as the United States, through its representative, the Commissioner of Internal Revenue, intended that it should be, and for this reason again reformation must be denied. It is true that Milliken testifies that the Secretary of the Treasury admitted to him that the contract with the American Imprinting Company was in violation of the contract with the petitioner. But it is left doubtful, at least, whether the Secretary knew anything about what contract was intended to be made. The act of March 3, 1899, chap. 424, 30 Stat. at L. 1090, 1091, authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to procure certain stamps by contract, to be awarded under such terms, restrictions, and regulations as might be prescribed by the former with the approval of the latter. But that is not sufficient to warrant an assumption that the Secretary gave directions or had knowledge as to the intended form of the contract. Moreover, so far as appears, the Secretary did not suggest or admit that there was any mistake in the form of the instrument. It would seem that Milliken exhibited to him the notice of April 25 as containing the government's agreement, and that the Secretary fell in with Milliken's interpretation of the paper, but refused to do anything until the Commissioner of Internal Revenue returned. For all the reasons which we have stated, we are of opinion that the United States is entitled to a decree as matter of law.

Decree reversed.

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*Re JAMES LINCOLN, Petitioner. [178]

(See S. C. Reporter's ed. 178–183.)

Habeas corpus—in Federal courts—substitute for writ of error.— Habeas corpus will not be granted by the Supreme Court of the United States on behalf of a person convicted in a district court of bringing intoxicating liquors into the Indian country, unless there are special circumstances making immediate action instead of the usual remedy by writ of error from a circuit court of appeals necessary or expedient.—especially where the term of his imprisonment had almost expired before the application for the writ.

[No. 21, Original.]

Submitted April 23, 1906. Decided May 14, 1906.

PETITION for a writ of habeas corpus on behalf of a person convicted in the District Court of the United States for the District of Nebraska of bringing intoxicating liquors into the Winnebago Indian reservation. *Denied.*

Statement by Mr. Justice **Brewer:**

The petitioner was convicted in the district court for the district of Nebraska on an indictment charging that he did "wrongfully and unlawfully introduce into Indian country, to wit, into and upon the Winnebago Indian reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Winnebago Indians,

NOTE.—*On habeas corpus in the Federal courts*—see notes to *Re* Reinitz, 4 L.R.A. 236; State *ex rel.* Cochran v. Winters, 10 L.R.A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

certain spirituous, vinous, malt, and other intoxicating liquors.

Upon this conviction he was sentenced to pay a fine of $100 and the costs of prosecution, and to be imprisoned in the jail of Douglas county, Nebraska, for the term of sixty days, and until said fine and costs were paid. The imprisonment commenced on February 19, 1906. Without pursuing his remedy by writ of error, the petitioner, on April 2, 1906, filed in this court his application for a writ of habeas corpus, alleging that the United States has no police power or jurisdiction over the Winnebago reservation, and that the law under which [179] the *indictment was drawn is unconstitutional and void in so far as it applies to the said Winnebago reservation, and that the United States district court was wholly without jurisdiction in the premises. The indictment was found under the act of Congress of January 30, 1897. 29 Stat. at L. 506, chap. 109. April 30, 1906, the case was submitted on petition, return, and a stipulation of facts.

Messrs. **Thomas L. Sloan** and **Williamson S. Summers** submitted the cause for petitioner.

Solicitor General **Hoyt** submitted the cause for respondent.

Mr. Justice **Brewer** delivered the opinion of the court:

The sixty days named as the term of imprisonment had expired before the case was submitted, and, indeed, had almost expired before the application was made for the writ. There is nothing to show whether the fine and costs have been collected upon execution, as the sentence authorizes. If not so collected, and if they cannot be collected, then, though possibly still in jail, he can shortly be discharged on taking the poor debtor's oath. Rev. Stat. § 1042, U. S. Comp. Stat. 1901, p. 724. This section authorizes a discharge after a confinement of thirty days on account of the nonpayment of fine and costs. So that within ninety days from February 19, the time the sentence took effect, the petitioner can secure his discharge either by paying the fine and costs, or by taking the poor debtor's oath, as above stated.

In *Ex parte Baez*, 177 U. S. 378, 44 L. ed. 813, 20 Sup. Ct. Rep. 673, which was an application for a writ of habeas corpus, it appeared that before a return to the writ could be made, or other action taken, the restraint of which the petitioner complained would terminate, and it was held that the application for the writ should be denied. Indeed, the case at bar in principle is not unlike *Mills* v. *Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *Flour Inspectors* v. *Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; *Kimball* v. *Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; and *Joncs* v. *Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611, *in each of which, intermediate [180] the ruling below and the time for decision here, events had happened which prevented the granting of the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time in deciding a moot case.

While the full jurisdiction of this court in habeas corpus may be conceded, there is in every case a question whether the exercise of such jurisdiction is appropriate. In *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734, Royall, who was held under state process for trial on an indictment charging an offense against the laws of the state, filed his petition in habeas corpus in the circuit court of the United States, praying release from that custody. The circuit court refused to order his discharge, and from its ruling he appealed, and at the same time filed an original petition in this court. P. 254, 29 L. ed. 872, 6 Sup. Ct. Rep. 734. The question was fully considered, and it was held that while the Federal courts, circuit and Supreme, had jurisdiction in the premises, there was a discretion whether in any case, a writ should be issued, Mr. Justice Harlan, speaking for the court, saying (p. 251, 29 L. ed. 871, 6 Sup. Ct. Rep. 740):

"That discretion should be exercised in the light of the relations existing under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations,—in such and like cases of urgency, involving the authority and operations of the general *govern- [181] ment, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently

interposed by writs of habeas corpus, and discharged prisoners who were held in custody under state authority."

And again, after commenting on the relations of state and national courts (p. 252, 29 L. ed. 872, 6 Sup. Ct. Rep. 741):

"That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

The propositions thus laid down have been upheld by repeated decisions of this court. *Ex parte Fonda*, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; *Re Duncan* (*Duncan* v. *McCall*) 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Re Wood* (*Wood* v. *Brush*) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; *Cook* v. *Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Re Frederich*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; *New York* v. *Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Pepke* v. *Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *Andrews* v. *Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Iasigi* v. *Van de Carr*, 166 U. S. 391, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; *Baker* v. *Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley* v. *Anderson*, 171 U. S. 101–104, 43 L. ed. 91–96, 18 Sup. Ct. Rep. 805; *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Markuson* v. *Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *Davis* v. *Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *Gusman* v. *Marrero*, 180 U. S. 81, 45 L. ed. 436, 21 Sup. Ct. Rep. 293; **Minnesota* v. *Brundage*,[182] 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; *Storti* v. *Massachusetts*, 183 U. S. 138, 46 L. ed. 121, 22 Sup. Ct. Rep. 72.

In *Re Loney* (*Thomas* v. *Loney*) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; *Re Neagle* (*Cunningham* v. *Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Ohio* v. *Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453, and *Boske* v. *Comingore*, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701, writs of habeas corpus were sustained, but in each of these cases the act charged against the petitioner was one for which he was amenable alone to the laws of the United States, or he was exercising some authority under those laws, and so they all come within the exceptions noted in *Ex parte Royall*, *supra*.

While the same reasons do not apply when the petitioner is in custody by virtue of the process of a Federal court, yet a writ of habeas corpus is not to be made use of as a writ of error (*Crossley* v. *California*, 168 U. S. 640, 42 L. ed. 610, 18 Sup. Ct. Rep. 242; *Whitney* v. *Dick*, 202 U. S. 132, *ante*, 963, 26 Sup. Ct. Rep. 584); the ordinary procedure for the correction of errors in criminal cases is by writ of error, and that method should be pursued unless there be special circumstances calling for a departure therefrom. *Ex parte Mirzan*, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341; *Re Huntington*, 137 U. S. 63, 34 L. ed. 567, 11 Sup. Ct. Rep. 4; *Re Lancaster*, 137 U. S. 393, 34 L. ed. 713, 11 Sup. Ct. Rep. 117; *Re Chapman*, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; *Riggins* v. *United States*, 199 U. S. 547, *ante*, 303, 26 Sup. Ct. Rep. 147. Several of these cases, it is true, were applications for habeas corpus prior to final decisions in the lower courts, and the refusal of the writs was based partly, at least, upon the proposition that the orderly administration of justice would be better subserved by declining to exercise our jurisdiction until the conclusion of the proceedings below. In *Ex parte Mirzan*, however, this court declined to issue a writ of habeas corpus after a conviction, holding that it might be issued by the proper circuit court, and that application should be made to that court except in cases where there were some special circumstances making immediate action by this court necessary or expedient. In the case at bar, if there was any error in the proceedings of the trial court, it could have been corrected by writ of error from the court of appeals, and no reason is given why that remedy should not have been pursued, except the request of the district judge, who decided the *case. Reference is[183]

made to a decision of the court of appeals of the eighth circuit (*Re Boyd*, 1 C. C. A. 156, 4 U. S. App. 73, 49 Fed. 48), but that only announced the doctrine of some of the cases cited above,—that ordinarily, prior to final judgment a writ of habeas corpus ought not to be issued.

It is true that we issued a writ of habeas corpus in a case in some respects like the present (*Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506), and it is relied upon by petitioner as authority for this application; but it was shown in that case that there was a direct conflict between the state and local Federal courts in the precise point of law involved, each asserting jurisdiction over the same offense; that the court of appeals had already decided the question adversely to the contention of petitioner, so that a writ of error from that court would have accomplished nothing; and further, that the matter involved opened up inquiry into questions of great significance affecting the respective jurisdiction of the nation and the states over large numbers of Indians. There were special reasons, therefore, for our issuing a writ of habeas corpus and investigating the matter in that case. But it does not follow from the action then taken that it is necessary or proper for this court to issue a habeas corpus in every case involving the question of the legality of a sale of liquor to Indians or the bringing of liquor into the Indian country. It is enough that the cases be disposed of in the orderly and customary mode of procedure. It may be assumed that the trial courts will follow the rulings of this court, and if there be, in any case, a departure therefrom, the proper appellate court will correct the error. To permit every petty criminal case to be brought directly to this court upon habeas corpus, on the ground of an alleged misconception or disregard of our decisions, would be a grievous misuse of our time, which should be devoted to a consideration of the more important legal and constitutional questions which are constantly arising and calling for our determination.

For these reasons *the petition for a writ of habeas corpus is denied.*

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[184] *UNITED STATES, *Petitioner*,

v.

CORNELL STEAMBOAT COMPANY.

(See S. C. Reporter's ed. 184–195.)

1. Courts—jurisdiction of district court—salvage claim against the United States.—A Federal district court has jurisdiction under the provisions of the Tucker act (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, pp. 752, 753), defining the concurrent jurisdiction of the district court and the court of claims, of a petition which is, in effect, a libel *in personam* for the salvage on duties collected and paid over to the Federal government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers, since the claim may properly be said to be one for unliquidated damages in a case "not sounding in tort," in respect of which the party would be entitled to redress in a court of admiralty if the United States were suable.

2. Admiralty jurisdiction—libel in personam—salvage.—The remedy *in personam* given by general admiralty rule No. 19 "against the party at whose request, and for whose benefit, the salvage services have been performed," is not confined to the legal owner of the property saved, but extends to one who had a direct pecuniary interest in such property.

3. Salvage—on duties—liability of Federal government.—The liability of the Federal government, as having a direct pecuniary interest in the property saved, for salvage upon the duties collected by it upon a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers, may be founded on the assumption that the Secretary of the Treasury, acting under the authority of U. S. Rev. Stat. §§ 2984, 3689 (U. S. Comp. Stat. 1901, pp. 1958, 2460), would have refunded the duties if the property had been destroyed by the fire.

4. Courts—jurisdiction of district court—claims against the United States—case arising under revenue laws.—A suit to recover from the United States for the salvage on duties collected and paid over to the government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers, does not arise under the revenue laws, so as to be excluded from the jurisdiction of the district court under the Tucker act, because the liability of the United States, as having a direct pecuniary interest in the property saved, is founded on the assumption that the Secretary of the Treasury, acting under the authority of U. S. Rev. Stat. §§ 2984, 3689, would have refunded the duties if the property had been destroyed by the fire.

[No. 239.]

Argued April 20, 1906. Decided May 14, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a decree affirming a decree of the District Court for the Southern District of New York, for the recovery of salvage on the duties collected by the

Federal government upon a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers. *Affirmed.*

See same case below, 137 Fed. 455.

Statement by Mr. Justice **Brown:**

This was a petition under what is known as the Tucker act, defining the jurisdiction of the court of claims, to recover salvage upon the duties on 1,883 bags of sugar, cargo of the lighter Bangor.

The facts agreed upon and found by the court are substantially as follows:

The steamboat company, a New York corporation, and owner of the steam tug R. G. Townsend, at great risk and peril to the tug, saved a certain lot of 1,883 bags of sugar on board of a lighter called the
[185] Bangor, in the waters of the port *of New York, which was in danger of being destroyed by fire. The sugar had been imported from a foreign country, was subject to duty under the laws of the United States, and at the time of the fire had not been delivered to the consignees, and was still in the possession and control of the customs officers. The duties on this sugar, amounting to $6,000, had been paid to the government.

Petitioner filed a libel in the district court against the cargo to recover salvage compensation for services rendered in saving the sugar. The case resulted in a decree awarding the petitioner salvage, amounting to 10 per cent of the value of the property saved, *viz.*, $1,274.03. 108 Fed. 277. In fixing this sum, the district court considered the invoice value of the sugar only, excluding salvage upon the duties saved to the United States by the salving services.

Upon these facts the district court awarded the petitioner 10 per cent upon the amount of the duties saved to the United States, namely, $600, with clerk's fees, $3.60. 130 Fed. 480. The circuit court of appeals affirmed this judgment (137 Fed. 455), whereupon the United States applied for this writ of certiorari.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for petitioner:

The district court had no jurisdiction.

Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed. The principle is fundamental, applies to every sovereign power, and but for such protection the government would be unable to perform the various duties for which it was created. To collect revenue for its support would be impossible without infinite embarrassments and delays if it were subject to civil process the same as a private person.

Nichols v. *United States*, 7 Wall. 122, 19 L. ed. 125.

The doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done.

The Davis (*United States* v. *Douglas*) 10 Wall. 15, 19 L. ed. 875.

Benefit, however great, from salving a cargo, cannot support a claim *in personam* for the services rendered.

The Sabine (*The Mayflower* v. *The Sabine*) 101 U. S. 384, 25 L. ed. 982.

The claim set up in the present proceeding must be regarded as arising under the revenue laws. Such claims are not within the jurisdiction of the courts, since those laws constitute a distinct and exclusive system of collection and redress.

Nichols v. *United States*, *supra*; *D. M. Ferry & Co.* v. *United States*, 29 C. C. A. 345, 54 U. S. App. 705, 85 Fed. 550; *State Railroad Tax Cases*, 92 U. S. 614, 23 L. ed. 673; *Auffmordt* v. *Hedden*, 137 U. S. 324, 34 L. ed. 678, 11 Sup. Ct. Rep. 103; *Treat* v. *Staples*, Holmes, 5, Fed. Cas. No. 14,162.

The maritime law, for the purposes of public policy, and for the advantage of trade and commerce, imposes in cases of salvage a *jus in re*,—a liability upon the thing saved,—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.

Kennedy, Civil Salvage, 6; *Falcke* v. *Scottish Imperial Ins. Co.* L. R. 34 Ch. Div. 234; *Mason* v. *The Blaireau*, 2 Cranch, 240, 2 L. ed. 266; *The Emblem*, 2 Ware, 68, Fed. Cas. No. 4,434.

Salvage is eminently a subject for admiralty jurisdiction, and it has been decided that no action will lie at common law unless the salvor can prove a contract with the owner of the property saved or with his agent.

2 Parsons, Shipping & Admiralty, 260.

It must be obvious and certain that the master's reluctance or resistance to the saving of the property under his charge should not bar claims of salvors, but rather enhance them, if their services were necessary or in all respects meritorious and useful.

2 Parsons, Shipping & Admiralty, 264.

The rule of rewarding salvors is grounded on policy. It is desirable to encourage

those who chance to be in a position to help vessels in distress to use their best exertions, to risk, if necessary, their own lives and property, and to delay their adventures for that purpose. The prospect of reward, which is generally assessed liberally, brings out a readiness and strenuousness which cannot always be expected without that motive, and both lives and property at sea are thus made more safe.

Carver, Carriage by Sea, 3d ed., § 323.

Salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued.

Cope v. *Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336.

The right does not arise on saving property of other kinds which may have been moored afloat, and have got adrift, such as a raft of timber, a buoy, or a floating dry dock.

Carver, Carriage by Sea, 3d ed., § 322.

The foundation of the admiralty jurisdiction in the awarding of salvage is the power of enforcing the maritime lien obtained on property saved by salvors.

The Schiller, L. R. 2 Prob. Div. 145; *The Emblem, supra; The Independence,* 2 Curt. C. C. 350, Fed. Cas. No. 7,014.

Under the nineteenth admiralty rule an action *in personam* for salving services could not be sustained unless they were at the request and for the benefit of the defendant, or at least in those cases where the property had been destroyed or removed after having been restored.

The Sabine (*The Mayflower* v. *The Sabine*) *supra.*

Salving charges cannot be enforced for rescuing bills of exchange and other evidences of debt.

The Emblem, supra.

Salvage cannot be awarded for saving the United States mails, because not subject to detention and sale.

The Merchant, Fed. Cas. No. 9,435.

The respondent freely asserted its rights by a proceeding *in rem* against the cargo, and has had all the relief to which it was entitled.

Cornell S. B. Co. v. *1,883 Bags of Sugar,* 108 Fed. 277.

Mr. **R. D. Benedict** argued the cause, and, with *Messrs. Benedict & Benedict,* filed a brief for respondent:

When the property of the government has been saved from destruction by salvors, justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes upon all other property in like condition.

The Davis (*United States* v. *Douglas*) 10 Wall. 19, 19 L. ed. 876.

The United States government is liable to pay salvage.

The Davis (*United States* v. *Douglas*) 10 Wall. 15, 19 L. ed. 875; *Gould* v. *United States,* 1 Ct. Cl. 184; *Bryan* v. *United States,* 6 Ct. Cl. 128; *McGowan* v. *United States,* 20 Ct. Cl. 147; *United States* v. *Morgan,* 39 C. C. A. 653, 99 Fed. 570; *Hartford & N. Y. Transp. Co.* v. *United States,* 138 Fed. 618; *Rees* v. *United States,* 134 Fed. 146.

The law which sustains such a claim is but a form of the general and ancient rule that the United States, in relation to the proprietorship of real or personal property, has, in its public capacity, like authority and remedies, and is subject to like liabilities in dealing with them through legal agencies or otherwise as natural persons.

Re 858 Bales of Cotton, Blatchf. Prize Cas. 325, Fed. Cas. No. 4,318.

When the United States allows itself to be sued before the court, it must stand before the court like any other party, affected by the same considerations as any other party.

Cooke v. *United States,* 12 Blatchf. 59, Fed. Cas. No. 3,178; *Re 858 Bales of Cotton, supra; United States* v. *Bostwick,* 94 U. S. 53, 24 L. ed. 65.

The "implied contract growing out of the successful event of the service" (*United States* v. *Morgan,* 39 C. C. A. 653, 99 Fed. 572) has always been held sufficient ground for the jurisdiction of the court to award salvage.

The supposition that the government will not do justice is not to be indulged.

Gibbons v. *United States,* 8 Wall. 269, 19 L. ed. 453.

That the Secretary would, on the facts here admitted, be required to refund these duties, is sustained by many authorities and decisions of this court and other courts.

Rock Island County v. *United States,* 4 Wall. 435, 18 L. ed. 419; *Galena* v. *Amy* (*Galena* v. *United States*) 5 Wall. 708, 18 L. ed. 561; *Ralston* v. *Crittenden,* 13 Fed. 512; *New Orleans Nat. Bank* v. *Merchant,* 18 Fed. 841; *National Bank* v. *St. Joseph,* 31 Fed. 216; *Provisional Municipality* v. *Lehman,* 6 C. C. A. 349, 13 U. S. App. 411, 57 Fed. 324; *Little Rock* v. *United States,* 43 C. C. A. 261, 103 Fed. 418; *Kent* v. *United States,* 51 C. C. A. 189, 113 Fed. 237; *People ex rel. Otsego County Bank* v. *Otsego County,* 51 N. Y. 401.

All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion.

Case of the Chinese Laborers, 7 Sawy. 542, 13 Fed. 291.

General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.

United States v. *Kirby*, 7 Wall. 482, 19 L. ed. 278.

The liability of the United States to repay the $6,000 is such an interest as to render the United States liable for salvage for the saving of the sugar.

The 5 Steel Barges, L. R. 15 Prob. Div. 142, 9 Asp. Mar. L. Cas. pp. 163, 182.

Mr. Justice **Brown** delivered the opinion of the court:

This is practically a libel *in personam* for the salvage of government property, *viz.*, of $6,000 duties collected by the government upon a cargo of sugar saved from loss by fire while on board a lighter, in the harbor of New York.

The claim is prosecuted under what is known as the Tucker act (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, pp. 752, 753), the 1st section of which declares that "the court of claims shall have jurisdiction to hear and determine . . . all claims founded upon the Constitution of the United States, or any law of Congress, . . . or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

By the 2d section concurrent jurisdiction with the court of claims was vested in the district courts as to all claims not exceeding $1,000.

It is at least doubtful whether an ordinary claim for salvage can be said to arise upon contract, inasmuch as such services are rendered voluntarily, frequently in the absence of the owner of the property, and usually without a definite agreement for compensation. *The Liffey*, 6 Asp. Mar. L. [190] Cas. 255; **Five Steel Barges*, L. R. 15 Prob. Div. 142. A claim for salvage may undoubtedly be founded upon an express contract, but where the services are rendered, as in this case, without request of an officer of the government, and particularly where they are incidental to services rendered in the saving of private property, we do not think the claim can be said to arise upon any contract, express or implied, with the government of the United States. But the claim may properly be said to be one for unliquidated damages in a case "not sounding in tort," in respect of which the party would be entitled to redress in a court of admiralty, if the United States were suable.

The Tucker act also resolves any doubt which might arise as to the responsibility of government property for salvage service, since it was the very object of the act to give a direct recourse against the government. Indeed, that question was settled by this court in 1869, in the case of *The Davis* (*United States* v. *Douglas*) 10 Wall 15, 19 L. ed. 875, in which personal property of the United States, in transit from one port to another, was held liable to a lien for salvage services rendered in saving the property, following the rule laid down in England in *The Marquis of Huntly*, 3 Hagg. Adm. 247, and *The Lord Nelson*, Edw. Adm. 79. The same rule was adopted by Mr. Justice Story in *United States* v. *Wilder*, 3 Sumn. 308, Fed. Cas. No. 16,694, although both in England and in this country vessels belonging to the United States, or to a foreign sovereign, and engaged in the public service, are exempt from seizure. *The Exchange* v. *M'Faddon*, 7 Cranch, 116, 3 L. ed. 287; *The Charkieh*, L. R. 4 Adm. & Eccl. 59; *The Constitution*, L. R. 4 Prob. Div. 39; *The Parlement Belge*, 4 Asp. Mar. L. Cas. 234, L. R. 5 Prob. Div. 197.

The fact, however, that the property saved is not within the physical possession of the court, but is of an intangible nature, like freight or customs dues, does not prevent the maintenance of a libel *in personam* against the owner. Indeed, general admiralty rule No. 19 provides that "in all suits for salvage the suit may be *in rem* . . . or *in personam* against the party at whose request, and for whose benefit, the salvage services have been performed." In the case of freight the *practice is to require [191] its payment into court. *The Leo*, Lush. 444.

At the basis of the claim in this case lies the proposition that, although the duties had been actually paid before the services had been rendered, the Secretary of the Treasury was *authorized* to refund duties upon so much of the sugar as would have been lost by the fire had not the cargo been rescued by the salvors. The obligation to refund such duties is contained in the following sections of the Revised Statutes:

"Sec. 2984 (U. S. Comp. Stat. 1901, p. 1958). The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual [*industry*] [injury] or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, . . . or while in the custody of the officers of the customs, and not in bond, or while within the limits of any

port of entry, and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part as the case may be."

Provision for such abatements or refunds is made in:

"Sec. 3689 (U. S. Comp. Stat. 1901, p. 2460). There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriation shall be deemed permanent annual appropriations. . . . For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty while in the custody of the officers of customs, in any public or private warehouse. . . . or after their arrival within the limits of any port of entry, of the United States, and before the same have been landed under the supervision of the officers of the customs."

[192] *It was held by both courts below, and we think properly, that, if the government were liable to refund these duties in case the property had been destroyed by fire, it was under the same obligation to pay salvage on such duties as it would have been had property of the government of the same value been directly saved by the exertions of the salvors.

It is true that the language of § 2984 is permissive, and merely "authorizes" the Secretary of the Treasury to abate or refund duties collected upon merchandise injured or destroyed by accidental fire or other casualty, and does not in terms *require* that this shall be done. We do not find it necessary, however, to go deeply into the learning expended upon the distinction between permissive and mandatory clauses, or to determine whether, in a particular case, mandamus would or would not lie against the Secretary for refusing to refund or abate duties in that connection. *D. M. Ferry & Co.* v. *United States*, 29 C. C. A. 345, 54 U. S. App. 705, 85 Fed. 550. Under the circumstances of this case, as set forth in the petition and agreed findings of fact, we are entitled to assume that the Secretary of the Treasury would have refunded these duties in case of the accidental loss of this sugar by fire, since the authority to do so is found in § 2984, and the money is appropriated for such refunding by § 3689. In a particular case we can imagine that doubts might arise as to the propriety of such refunding, but, where a plain case is made in the findings of fact, and is not disputed, it would be an imputation upon the good faith of the Secretary to assume that he would refuse to return the duties, notwithstanding the language of the statute may be construed as permissive merely. We think the petitioner is entitled to build his case upon this assumption. *Rock Island County* v. *United States*, 4 Wall. 435, 18 L. ed. 419; *Galena* v. *Amy* (*Galena* v. *United States*) 5 Wall. 705, 18 L. ed. 560; *French* v. *Edwards*, 13 Wall. 506, 20 L. ed. 702.

It is insisted, however, that the government is under no greater liability to pay this claim than it would have been if the duties had not been paid, and that the law is well settled that when property is saved at sea and brought into port, it is *subject to [193] duty like other property, that the government owes nothing to the salvors, and, by parity of reasoning, that no insurer of goods saved, nor a creditor who has advanced money thereon, nor a seaman whose wages are preserved, can be made liable for salvage. The obvious reason for this is that the claim for salvage is founded upon the possession of the property saved at the time of the salvage service, and that the person incidentally benefited cannot be made liable under general admiralty rule 19, unless he has requested the salvage, or the service has been performed directly for his benefit. Interpreting this rule in the case of *The Sabine* (*The Mayflower* v. *The Sabine*) 101 U. S. 384, 25 L. ed. 982, it was held that a libel would not lie *in rem* against the vessel and *in personam* against the consignee of the cargo. But the mere possession of property may be in itself not only the origin of a right, but the creation of a liability,—as, for instance, in cases of money had and received or property lawfully acquired, but unlawfully detained. Had the duties upon these goods not been collected, the government could not have been held liable, since the services would not have been performed for its benefit, although, as a remote consequence therefrom, it might have been advantaged.

The case of *Five Steel Barges*, L. R. 15 Prob. Div. 142, is authority for the proposition that the remedy *in personam* is not confined to the legal owner of the property saved, but extends to one who has a direct pecuniary interest in such property. This was an action against five barges, two of which belonged to the government, with whom the defendants were under contract to build and deliver the barges. An action *in rem* was brought against the three barges, and an action *in personam* against the defendants, who had contracted with the gov-

ernment and given it possession of the two barges. The court sustained the action *in personam* thinking it "perfectly clear . . . that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost." Continuing, the president of the court, Sir James Hannen, observed: "I [194] think it exists in cases *where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved; that the owner of the property, who has had the benefit of it, shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property." This last sentence is particularly applicable to this case.

In the subsequent case of *The Port Victor*, 9 Asp. Mar. L. Cas. 163, the same court decided that where government stores were being carried at the risk of charterers, these charterers were liable to pay salvage in a *personam* action, apart from the liability of the stores *in rem*. The case was decided largely upon the authority of *Five Steel Barges* and *Duncan* v. *Dundee, P. & L. Shipping Co.* 5 Sc. Sess. Cas. 4th Series, 742, and was affirmed by the court of appeals in an opinion by Lord Alverstone (9 Asp. Mar. L. Cas. 182), in which great deference was shown to the decision of Sir James Hannen. See also Carver, Carriage by Sea, § 324*a*.

Although courts of admiralty have no general equity jurisdiction, and cannot afford equitable relief in a direct proceeding for that purpose, they may apply equitable principles to subjects within their jurisdiction, and, in the distribution of proceeds in their possession or under their control, may give effect to equitable claims. 2 Parsons, Shipping, 344. Bearing in mind that the duties in this case had been actually collected, were in the hands of the government, and had been saved to it by the exertion of the salvors, who had been awarded salvage for saving the sugars upon [195] which the duties had been *collected, a strong case is presented for the allowance of salvage, which should not be lost sight of in determining the principles applicable to the situation.

The case is clearly not one arising under the revenue laws as they are defined in *Nichols* v. *United States*, 7 Wall. 122, 19 L. ed. 125, since the sections of the Revised Statutes above quoted are only incidentally involved.

The decree of the Circuit Court of Appeals is, therefore, affirmed.

Mr. Chief Justice **Fuller** dissented.

JOSEPH J. DARLINGTON and George W. Gray, Executors of Philip A. Tracy, Deceased, *Appts.*

v.

ERLE H. TURNER, Wilmer Turner, Ashby Turner, and Lunette Turner, by Wilmer Turner, Next Friend.

(See S. C. Reporter's ed. 195–241.)

1. **Equity—jurisdiction—fiduciary relations.**—Such a fiduciary relation existed between the testator and one who had, through a series of years, invested and reinvested the moneys of the former, and who was directed in the will to distribute the proceeds of the testator's property equally between certain minor legatees, as makes a court of equity the proper forum in which to seek relief for the alleged wrongful transfer of such property to the father of the legatees, who devoted it to his own use and benefit.

2. **Evidence—variance.**—There is no such variance between the allegations of a bill seeking to charge with a trust certain property in the hands of the executors of the alleged trustee, and evidence that the latter had turned over the major portion of the property to one who was claimed to have had no authority to receive it, as requires the dismissal of such bill.

3. **Appeal—concurrent finding of facts.**—A concurrent finding of the two lower courts on a question of fact on which a conclusion of fraud is rested will be disregarded by the Supreme Court of the United States, on appeal, where such finding is without any support in the evidence, and rests upon a mistaken assumption.

4. **Parent and child—custody of infant's estate.**—The plenary power conferred upon the father by La. Civ. Code 1870, arts. 221, 223, 226, to administer, during marriage, the estate of his minor children, is wholly distinct from tutorship, and is not modified or controlled by the provision of art. 3350, that an inventory must be made and recorded before fathers and mothers who, by law, are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property, and enjoy the fruits and revenue thereof.

5. **Payment—to foreign guardian—validity.**—A transfer in the District of Columbia of the property of a testator, there situated, to the father of certain minor legatees residing in Louisiana, who was fully empowered to collect and receive the same by the

law of their domicil, is valid and binding on such minors, there being no showing of any creditors in Virginia, which was the domicil of the testator, although, if the property had been administered upon in that jurisdiction, the father would not have been entitled to receive or remove the property therefrom without an order made by a Virginia court, and the giving of satisfactory security.

6. **Wills—construction.**—A direction to hold and administer a testator's property for the benefit of certain minor legatees, which would forbid the transfer of the property to a lawfully appointed administrator or to one legally authorized to receive it, cannot be implied from a clause in the will appointing the holder of such property to distribute the proceeds equally between such legatees.

7. **Trusts—accounting by trustee.**—The estate of a trustee who has failed to account for an investment in real estate will be held liable in the sum originally realized therefrom, where that sum is definitely fixed, and it is impossible to determine with precision the ultimate fate of the investment.

[No. 196.]

Argued March 6, 7, 1906. Decided May 14, 1906.

APPEAL from the Court of Appeals for the District of Columbia to review a decree affirming, with a slight modification, a decree of the Supreme Court of the District, establishing the liability of the estate of the trustee to account to his *cestuis que trust*. *Reversed* and remanded, with directions to reverse the decree of the Supreme Court of the District, and to remand the cause to that court for the entry of a decree in conformity with the opinion.

See same case below, 24 App. D. C. 573.

Statement by Mr. Justice **White:**

In June, 1898, Philip A. Tracy died in the city of Washington, where he was domiciled. His will, executed in Washington on March 2, 1894, was duly probated in August, 1898. The will directed the executors to build a family monument, to cause to be inscribed thereon the names and the dates of the birth and death of the deceased, of his father and mother and of a brother and sister, in accordance with minute directions contained in a memorandum accompanying the will. A bequest of $1,000 was made to the Oak Hill Cemetery Company to perpetually care for the lot and the monument. In addition, after making several minor bequests, one of which was a gift of $100 to the Home for Incurables, $2,000 was given for a Sunday school building for the Trinity Episcopal Church in the city of Washington. The residue of the estate was bequeathed "to the trustees of the Epiphany Church Home in this city, to pay for the enlargement of the building now used as the home, or for the erection of another building for the same use and purpose." George W. Gray and J. J. Darlington, the executors named in the will, qualified.

Within one year, and before receiving notice of the claim which is the subject of this suit, the executors of Tracy had paid the debts, had discharged the minor legacies above referred to, and had in hand, to be applied to the other provisions of the will, $47,000 in money and securities and two unimproved lots in the city of Washington, of small value. The further execution of the will was prevented by a demand to pay the claim which forms the basis of this suit, and upon refusal to do so, on June 10, 1899, this bill in equity was filed to establish and enforce the claim. The complainants were Erle H. Turner and Wilmer Turner and Ashby and Lunette Turner; the [197] last two, being minors, were represented by Wilmer Turner as their next friend.

It was in substance averred in the bill that Silas H. Turner, a paternal uncle of the complainants, died in Fauquier county, Virginia, on September 21, 1888, leaving a will by which he bequeathed equally to complainants, who were the children of Thomas M. Turner all the property of which the testator died possessed, the will being as follows:

Washington, D. C., April 30, 1888.

I hereby give and bequeath to the four children of my brother Thomas M. Turner of Minden, Louisiana, all property, real and personal, owned by me, or in which I have any interest at the time of my death, and appoint Philip A. Tracy to distribute the proceeds of the said property equally between them.

S. H. Turner.

Witness: Philip A Tracy.
George G Fenton.

It was also alleged that this will was admitted to probate in Fauquier county, Virginia, on or about November 28, 1888. It was then alleged that Philip A. Tracy was the confidential agent and trustee of Turner, deceased, and in that capacity had in his possession money which, as agent and trustee, Tracy had invested for the benefit of said Turner. It was charged that shortly before the death of Turner, Tracy had given Turner a memorandum or list, entirely in the handwriting of Tracy, stating the dates and amounts of the promissory notes held by Tracy, belonging to said Turner, and the names of the makers thereof, and that the said notes aggregated $28,972.10. This memorandum or list, alleged to be wholly in the handwriting of Tracy, was copied in the bill, and it was averred

that after the death of Turner, Tracy had admitted the accuracy of said list and his possession of the notes which it embraced. It was then averred that the land records
[198] of the District of Columbia *disclosed that all the notes mentioned in the alleged memorandum or list and the accrued interest had been paid after the death of Silas H. Turner. It was averred that, with the exception of a sum of about $1,400, alleged to have been paid by Tracy to Erle H. Turner, no account had been rendered or distribution made by Tracy of the aforesaid property or of the proceeds thereof, and that, excluding the payment alleged to have been made, as above stated, to Erle H. Turner, "the entire trust fund, principal and interest and profits, had come into the possession of the defendants as executors of Tracy."

The paragraph of the bill immediately preceding the prayer was as follows:

"21. That the domicil and citizenship of the parents of complainants have always been, since the birth of these complainants, either in the state of Louisiana, which was their domicil until about the — day of August, 1889, or in the state of Texas, which has been since and is now the domicil of said parents and of all complainants, except complainant Erle H. Turner, whose domicil is now Philadelphia, Pennsylvania. Complainants are informed and believe and therefore aver that by the laws of Louisiana and of Texas the parents of minor children are not of right guardians of the estate of such minors, and no person is authorized to receive or demand the estate of any minor domiciled in either of said states, except such persons as shall be duly appointed by a court of the states having competent jurisdiction; and that neither the father nor the mother of any of these complainants nor any other person has ever been appointed by any court guardian of either the person or estate of any one of these complainants, and no one of these complainants has now or has ever had a legal guardian of the person or estate, and at no time has there been any person in being competent in law to demand or receive, in their behalf, any estate for any of these complainants, until, by reason of reaching their majority, two of these complainants have become *sui juris*."

[199] *Discovery was prayed of a paper which had been written and left by Tracy, containing representations regarding the claim of complainants. In substance the prayer was for a discovery and account in the premises, and for a decree distributing among the complainants the sum which might be found due upon the account. There was also a prayer for general relief.

The answer of the executors of Tracy was in substance as follows: That Silas H. Turner and Tracy had business relations was admitted; but in the main all the material averments of the bill were alleged not to be within the knowledge of the executors, and proof of such averments was demanded. It was expressly averred, however, that Tracy, after the death of Silas H. Turner, had fully accounted for any property which he had in his possession, by a transfer and payment made to Thomas M. Turner, the father of the complainants, as their natural tutor and agent, they being then minors, as evidenced by a receipt signed by Thomas M. Turner, and dated November 30, 1888, which receipt was copied in the answer. Answering the paragraph of the bill calling for the discovery in respect to the paper left by Tracy regarding the claim of complainants, the defendants set forth that there came into their possession the following paper:

Washington, D. C.,————1898.

To the executors of my last will and testament:

Some time in 1871, Silas H. Turner, of Virginia, whom I had known for a long time, of his own volition, and without solicitation from me, came to the city and asked me to aid him in investing some twelve thousand dollars ($12,000) in real estate notes. I consented, and in a few weeks the whole amount was invested, and he took the notes home with him. The interest was payable semiannually, and, for a time, he sent me notes by mail about the time the interest was due, so that it could be credited on the notes to satisfy the maker. This became irksome and, after a time, he brought me the notes, keeping a list of them, and asked me to keep them to *save him the [200] trouble of sending them to me by mail whenever the interest was due. I kept the notes in an envelope with his name upon it, and about twice a year sent him a memorandum of interest paid, and when the amount reached several hundred dollars I would buy another note, and send him a memorandum of the same. Also when a note was matured and paid, I would buy another note, unless he needed the money, which he rarely did, and send him a memorandum of it. This condition continued until 1888, when he died in Virginia, leaving his entire estate to the three minor children of his brother then living in Louisiana. In his will he named me to settle up the estate and divide the money among the children; but, as the laws of Virginia require two witnesses to a will, and says neither of them shall be an executor, I could not qualify, and, as the father, if appointed, could not have given the bond, I handed him the package of notes, advised him to deposit them in the Second

National Bank of Washington, District of Columbia, which he did, and agreed to look after them and have them all paid, he being out of the city. His other relations, a sister — some nephews and nieces, were much displeased with the will, and threatened to attempt to have it set aside, but have not done so. The father, a good, honest man, took the money or most of it, went to Texas and bought a farm, and was doing well until the panic of 1893 came on. Since then they had a hard time, getting little or nothing for their farm products, and have written me some heartrending letters, wishing they had left the money here. The children are of age, but of course the father could not pay them their parts of the estate, and though not a word has been said about it, I thought perhaps after my death, if they hear of it in time, some of them might attempt to hold me responsible, and if they should make such an attempt, I hereby authorize and direct my executors to employ the best counsel in the city to defend my estate in the district courts and in the Supreme Court of the United States, if it be necessary to appeal the case to that court, and to pay all costs and lawyers' fees out [201] of my estate. *I suppose someone would have to qualify as administrators under the will before any action could be taken. My turning the property over to the father helped to keep it in possession of those to whom it was left, and to discourage and shut out the dissatisfied relatives, for if anyone had qualified, the matter would have been open for a year, and they would undoubtedly have made an attempt to have the will set aside. This is a plain statement of the case, intended for the private ears of my executors.

Referring to the prayer for discovery in other respects, it was averred that the only papers concerning business dealings between Tracy and Silas H. Turner which had come into the possession of the executors were the receipt given by Thomas M. Turner, as already stated, the memorandum of Tracy addressed to his executors, and various letters and receipts signed by Erle H. Turner. The executors specially alleged that, to their knowledge, none of the proceeds of any of the notes referred to in the alleged memorandum or list averred in the complaint had ever come into the hands of the executors, and that they had no knowledge of any disposition made of any property belonging to Silas H. Turner which might have been in the hands of Tracy, except as shown by the receipt of November 30, 1888, signed by Thomas M. Turner as natural tutor and agent of his minor children. The laches of the complainants was expressly set up as depriving them of the right to any of the relief asked for. Denying knowledge of where Thomas M. Turner was domiciled at the time of the signing of the receipt, or the lawful powers of Turner as to signing the receipt, the court was asked to determine the rights of the executors in the premises.

After joinder of issue and the taking of general evidence the case was heard in the supreme court of the District.

In substance, the court in its opinion declared that Tracy and Thomas M. Turner, the father of the complainants, had conspired to despoil them, they being then minors, of their rightful share of their uncle's estate; that the receipt given by *Turner to [202] Tracy did not protect Tracy or his estate, because Turner had not qualified in accordance with the laws of Louisiana so as to entitle him to represent his minor children, but even if he had so qualified, Tracy had no authority to pay from the fund in his hand except in the due course of administration. The court also observed that the words of the will appointing Tracy to distribute the proceeds of the property bequeathed equally between the four children of Thomas M. Turner imposed the duty upon Tracy of qualifying as executor, or, if he was unable or unwilling to do so, of applying to the court for the appointment of a suitable person. And the fraud and wrong of Tracy in turning over the property to the father was emphasized by the statement that Tracy wrote the will of the deceased and was then informed by the latter that his object was to prevent his estate from coming into the hands of the father of the children because of his spendthrift character. Although the court concluded that the estate of Tracy was liable, it did not fix the amount for which the estate was accountable, but referred the matter to an auditor to state an account and to take further evidence in respect to the expenditures properly chargeable against the share of each of the complainants upon the principles expressed in the opinion.

The auditor heard additional testimony bearing upon the expenditures made by Thomas M. Turner for the maintenance of his children out of the fund which he had received from Tracy. An account as of February 1, 1894, was stated to the court. On this account the receipt given by Thomas M. Turner was disregarded. The sum in the hands of Tracy and due to the estate of Silas H. Turner was fixed by the alleged list set out in the bill. The ground upon which this was done was thus stated by the auditor in his report:

"After the death of Silas Turner there was found among his papers an envelope or jacket indorsed 'Notes belonging to S. H.

Turner, 1888;' it contained a list, in the handwriting of Tracy, of the notes, giving the date, name of maker, and amount. The date of the last note on the list is given
[203] at *March 12, 1888. The aggregate principal of these notes is $28,972.10.

"Evidently all of these securities were in Tracy's possession as late as March 12, 1888.

. . . . . .

"It being conclusively shown that within six months before Turner's death Tracy had nearly $29,000.00 principal of securities in his possession as agent or trustee of Turner, the inevitable presumption of law is that of continued possession and accountability."

Making certain deductions and additions, which it is unnecessary presently to refer to, the auditor found the amount due from Tracy's estate on February 1, 1904, principal and interest, to be $48,601.44, which was attributed in varying proportions to the complainants, depending upon the amount which the report found each one of them was bound to contribute for maintenance or sums received out of the fund. The report was excepted to, exceptions were overruled, and a decree was entered adjudging the sums found due to the complainants in accordance with the report, giving the right to collect the deficiency out of further assets, if any were discovered. An appeal was prosecuted. The court of appeals affirmed the decree (24 App. D. C. 573) with a slight modification, rendered necessary by the allowance of an increased charge against Erle H. Turner. The court of appeals, in its opinion, in effect expressed views similar to those which had been stated in the opinion of the court below and in the report of the auditor. The receipt of Thomas M. Turner was disregarded. Taking into consideration the testimony, the paper alleged in the bill as a list was treated as being all in the handwriting of Tracy, and as being but a single document, and, therefore, as fixing the amount for which the estate of Tracy was accountable.

Messrs. **Clarence R. Wilson** and **Nathaniel Wilson** argued the cause and filed a brief for appellants:

A complainant can recover only upon the case, and the theory of the case stated in his bill must be applied. The complainants in this case cannot be allowed to introduce new issues of fact in the testimony or arguments, nor can they recover on a theory different from that set out in the bill.

Small v. *Owings*, 1 Md. Ch. 363; *Manchester* v *Matthewson*, 3 R. I. 237; *Crockett* v. *Lee*, 7 Wheat. 525, 5 L. ed. 514; *Eyre* v. *Potter*, 15 How. 42, 14 L. ed. 592; *Ferraby* v. *Hobson*, 2 Phill. Ch. 255; *Glascott* v. *Lang*, 2 Phill. Ch. 310; *James* v. *M'Kernon*, 6 Johns. 543; *Peckham* v. *Buffam*, 11 Mich. 529; *Bradley* v. *Converse*, 4 Cliff. 366, Fed. Cas. No. 1,775.

The relationship between Turner and Tracy was not that of trustee and *cestui que trust*, but merely of principal and agent.

Ashley v. *Denton*, 1 Litt. (Ky.) 86; *Adair* v. *Winchester*, 7 Gill & J. 114; *Warner* v. *McMullin*, 131 Pa. 370, 18 Atl. 1056; *Knox* v. *Gye*, L. R. 5 H. L. 656; 2 Pom. Eq. Jur. 2d ed. §§ 1044, 1046; *Kershaw* v. *Snowden*, 36 Ohio St. 181; *Douglass* v. *Martin*, 103 Ill. 25.

A trust is where there is such a confidence between the parties that no action at law will lie, but is merely a case for the consideration of a court of equity.

Sturt v. *Mellish*, 2 Atk. 612.

Upon the death of Silas Turner, Tracy did not become trustee for complainants, the beneficiaries under Silas Turner's will.

Doyle v. *Murphy*, 22 Ill. 502, 75 Am. Dec. 165.

According to the laws of Louisiana, Thomas M. Turner, as father of the complainants, had the right to the possession and enjoyment of the estates of his minor children during their minority.

Cleveland v. *Sprowl*, 12 Rob. (La.) 172; *Handy* v. *Parkison*, 10 La. 92; *Greenwood* v. *New Orleans*, 12 La. Ann. 426; *Snow* v. *Copley*, 3 La. Ann. 610; *Gates* v. *Renfroe*, 7 La. Ann. 569; *Allen's Succession*, 48 La. Ann. 1240, 20 So. 683.

Courts look with favor upon the private settlement of estates, where there are no debts or where the claims of creditors are satisfied.

Akin v. *Akin*, 78 Ga. 24, 1 S. E. 267; *McCracken* v. *McCaslin*, 50 Mo. App. 85; *Roberts* v. *Messinger*, 134 Pa. 298, 19 Atl. 625; *Foote* v. *Foote*, 61 Mich. 181, 28 N. W. 90; *Filbey* v. *Carrier*, 45 Wis. 469; *Burton* v. *Brugier*, 30 La. Ann. 479.

The case is exactly similar to those involving payments to foreign executors, in which it is almost uniformly held that a voluntary payment to a foreign executor is a good discharge to the person making the payment, even as against a subsequent demand by an executor appointed by the court in the jurisdiction in which the property was situated.

Doolittle v. *Lewis*, 7 Johns. Ch. 45, 11 Am. Dec. 389; *Williams* v. *Storrs*, 6 Johns. Ch. 353, 10 Am. Dec. 340; *Parsons* v. *Lyman*, 20 N. Y. 103; *Citizens' Nat. Bank* v. *Sharp*, 53 Md. 521; *Wilkins* v. *Ellett*, 9 Wall. 740, 19 L. ed. 586; *Rand* v. *Hubbard*, 4 Met. 252; *Hutchins* v. *State Bank*, 12 Met. 421; *Stevens* v. *Gaylord*, 11 Mass. 256; *United States ex rel. Mackey* v. *Coxe*, 18

How. 104, 15 L. ed. 301; *Trecothick* v. *Austin*, 4 Mason, 16 Fed. Cas. No. 14,164.

If a paper be produced at a trial, the identity of which is made doubtful by its appearance, and which has evidently been mutilated or altered, the party producing it must satisfactorily explain its changed condition and the alterations that have been made, and if he fails to do so the paper cannot be used in evidence in his favor, for his advantage.

1 Greenl. Ev. 15th ed. § 564; 1 Phillips, Ev. 4th ed. 606; 2 Wharton, Ev. 2d ed. § 1264; *Babb* v. *Clemson*, 10 Serg. & R. 419, 13 Am. Dec. 684.

The false testimony given by Thomas Turner in respect of his concealment of the will of his brother is of itself sufficient to warrant the court in rejecting his testimony *in toto*.

The Santissima Trinidad, 7 Wheat. 283, 5 L. ed. 454; *Huber* v. *Teuber*, 3 MacArth. 484, 36 Am. Rep. 110.

Mr. **William G. Johnson** argued the cause and filed a brief for appellees:

Where one receives money or property from a person to apply it to the uses of a third person, not a party to the transaction, a trust is thereby created of which equity has jurisdiction.

McKee v. *Lamon*, 159 U. S. 317, 40 L. ed. 165, 16 Sup. Ct. Rep. 11; *Taylor* v. *Benham*, 5 How. 233, 274, 12 L. ed. 130, 149; *Keller* v. *Ashford*, 133 U. S. 610, 620, 33 L. ed. 667, 671, 10 Sup. Ct. Rep. 494; *Clews* v. *Jamieson*, 182 U. S. 461, 479, 480, 45 L. ed. 1183, 1192, 1193, 21 Sup. Ct. Rep. 845.

Payment to a father is no discharge at common law.

Dagley v. *Tolferry*, 1 P. Wms. 285; *Cooper* v. *Thornton*, 3 Bro. Ch. 96; *Miles* v. *Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *Perry* v. *Carmichael*, 95 Ill. 519; *Tripp* v. *Gifford*, 155 Mass. 111, 31 Am. St. Rep. 530, 29 N. E. 208; *Pittsburg C. C. & St. L. R. Co.* v. *Haley*, 170 Ill. 610, 48 N. E. 920.

Turner had no power, under Louisiana laws, to receive payment.

He was not a "natural tutor," as he describes himself in signing the receipt. At that time his wife, the mother of the children, was living and the parents were not divorced. During the marriage there cannot be a "natural tutor."

State v. *Orleans Parish Judge*, 6 La. 363.

Turner never complied with the requirements of Louisiana law made a condition precedent to the right of possession.

Arlaud's Succession, 42 La. Ann. 548, 8 So. 389.

Louisiana laws have no application to property without the state.

Moise v. *Mutual Reserve Fund Life Asso.* 45 La. Ann. 737, 13 So. 170.

Laws of Virginia, the domicil of testator, control and exclude laws of Louisiana.

Harrison v. *Nixon*, 9 Pet. 483, 9 L. ed. 201.

Looking to the common-law interpretation of this instrument, it will be found that much less positive language than is employed in this will is held to constitute Tracy the sole and exclusive trustee of the fund, with the obligation himself to distribute it directly to the parties, beneficiaries thereunder.

Cooper v. *Thornton*, *supra*.

The right of usufructuary claimed for Thomas Turner, under the laws of Louisiana, in this case, is not an official character in which he is representative of the Louisiana legatees and claims the legacy in their behalf, but is a beneficial interest in himself, in right of his parentage,—a part of the Louisiana law of domestic relations, applying to persons and property within the state, and can clearly have no application to property never in the state.

Texas & P. R. Co. v. *Humble*, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526.

The concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous.

Brainard v. *Buck*, 184 U. S. 99, 104, 105, 46 L. ed. 449, 452, 453, 22 Sup. Ct. Rep. 458.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

As no reference was made to the subject in the opinions below, and as we construe the argument at bar as not seriously pressing such question, we assume, for the purposes of the case, the right of the complainants to maintain, under the averments of their bill, a direct action or suit to recover the fund in controversy. *To come to the substantial merits we summarily dispose of certain preliminary contentions. First. We are of opinion that, upon the pleadings and proof, the court of appeals did not err in holding that such fiduciary relation existed between Silas H. Turner and Philip A. Tracy as made a court of equity the proper forum to seek relief. Second. We also think that, under the circumstances of the case, the contention that the bill should be dismissed because of the variance between the allegations and the proof is untenable. [207]

In proper sequence the questions for decision are threefold: First. Was the transfer of the property of the estate of Silas H. Turner, made as shown on the receipt given to Tracy by Thomas M. Turner, as the representative of his minor children, lawful and binding upon such minors? Second. If the payment referred to was binding, did

the receipt and the paper contemporaneously executed by Tracy, in connection with the proof, establish that he or his estate was liable for the value of the investment in real estate shown by the receipt and the paper in question to have been retained in the control of Tracy? Third. Did the receipt, if binding, and the paper in connection with it, embrace all the property held by Tracy as the trustee of Silas H. Turner? or, in other words, did Tracy, at the time the receipt was given, honestly account for the property in his hands, or did he fraudulently retain for his own benefit a large amount of property of the estate which should have been paid over, and for which Tracy or his estate is therefore liable?

Whilst in logical order the questions for decision are as stated, we shall consider them inversely. In other words, we shall first dispose of the alleged fraudulent retention by Tracy of a large portion of the trust fund at the time he made the payment and transfer of property to Thomas M. Turner as the representative of his minor children. We do this because the charge of conspiracy and fraud as pressed, not only in the argument at bar, but in the opinions below, was treated as affecting the question of the binding nature of the transfer made by Tracy to Turner; and by first disposing of that [208] branch of the case, *we shall, in a great measure, disentangle the question of the binding efficacy of the transfer and payment to Thomas M. Turner from the alleged fraud.

It will be useful, before particularly considering the facts upon which the alleged fraud on the part of Tracy immediately depends, to state the antecedents of Tracy and of the two Turners, the dealings between them, and the results which followed therefrom, so far as they are uncontroverted.

Philip A. Tracy was born in Fauquier county, Virginia, in 1835. He was living in Washington soon after the close of the Civil War, was a bookkeeper in a mercantile house, and later became an employee of the Postoffice Department, and so continued, if not to, at least up to a short time prior to, his death. He never married. As far as it may be inferred from the testimony in the record, taking no present concern of the charges of fraud made in the bill, the conviction is irresistibly conveyed to our minds that Tracy was a reasonably intelligent, moral, industrious, and circumspect person, of a religious tendency of mind, careful in money matters, particular as to details, and of a kindly, though somewhat eccentric, nature.

Silas H. Turner was also a native of Virginia, and whilst little is shown by the record of his antecedents and character, it is established that he was also a man of thrift and of some business capacity, having been at one time a railroad agent, a dealer in merchandise and cattle, a clerk and an accountant, accustomed to the settlement of estates. Between Tracy and Turner there existed an association and friendship, taking its origin, if not in a boyhood acquaintance, at least one that related back to many years before the death of Turner. As a result of this friendship, Turner, trusting in the capacity and integrity of Tracy, began, in 1871, to confide his savings to the latter for investment. Tracy, loaning money upon the security of real estate, was first in the habit, when a loan was made, of sending the notes of the borrowers to Turner, who, as the interest payments were about to fall due, would send the notes to Tracy, to have payments of interest credited thereon. After *a time this practice of [209] sending and returning the notes became irksome, and Turner sent the notes to Tracy, who thereafter kept them in his custody. As money came into the hands of Tracy, either from the payments of principal or of interest upon the notes, he reinvested the money in other notes, sending Turner a memorandum of the new investments as made. There is nothing produced either from the papers of Tracy or of Turner showing that formal accounts were ever exchanged between the parties. Certain it is, that on April 30, 1888, Turner was in Washington and in personal communication with Tracy. At the desk of Tracy in the Postoffice Department, at the request of Turner, the will probated as mentioned in the statement of facts was written by Tracy for Turner, and by the latter executed. How long Turner remained in Washington at this time the record does not disclose, nor does it accurately show his movements or exhibit any letters passing between Tracy and Turner from the time of the making of the will up to the death of Turner.

Some time during the summer of 1888, Turner—an ill man, suffering with Bright's disease—went to the residence of Mrs. Rust, a niece, living in Fauquier county, Virginia, near Warrenton, where he remained until his death on September 21, 1888. At his death Turner left surviving him a maiden sister, who lived in Frederick, Maryland,—Miss Henrietta Turner,—a brother, Thomas M. Turner, living in Minden, Louisiana, and various nephews and nieces, children of deceased brothers and sisters.

Between Thomas M. Turner, the brother living in Louisiana, and Silas H. Turner, it would seem, there had been little or no intercourse for more than thirty years, Thomas having left Virginia when quite a young man. Notified of the serious illness of his

brother, Thomas M. Turner, about a month and a half before the death of Silas, came to the house of Mrs. Rust, and there remained until the death. Thomas M. Turner had had at that time quite a varied experience of men and affairs. Leaving Virginia as a [210] youth, he went to Memphis, Tennessee, *for the purpose of establishing a school. Not succeeding there, he went to Missouri, and became a bookkeeper for a commercial firm. At the outbreak of the war, he joined the Confederate army. At its termination, he established himself at Minden, Louisiana, and began merchandising, and also operated a steamboat landing. He married, bought a farm near the town of Minden, where he lived, and was for a year bookkeeper for a large business house; afterwards became a division superintendent of education; was subsequently a clerk of the state district court,—a court of unlimited general jurisdiction; was the parish treasurer and treasurer of the school board; for a time served as a justice of the peace, worked for lawyers in making up legal accounts, prepared the collectors' tax duplicates, etc.; afterwards became deputy clerk, and held the latter office at the time he was called to Virginia on account of the illness of his brother. At the time he came to Virginia he left at Minden his wife and five children, all minors and the issue of the marriage, the youngest being an infant, who lived but a comparatively short time. The name and date of birth of the other children were as follows: Erle H., born on October 21, 1868; Wilmer, born on October 11, 1875; Ashby, born on February 3, 1880, and Lunette, born on December 19, 1882.

Omitting reference to the controverted question as to what passed between Silas and Thomas preceding the death of the former, certain it is that after the death of Silas there was found in a trunk belonging to him some few personal effects, the will which was afterwards probated, and an envelope containing papers,—the so-called list set out in the bill and referred to in the report of the auditor and in the opinion of the court of appeals.

On September 28, 1888, Thomas M. Turner came to Washington, and, in company with Eppa Hunton, Jr., Esq., a member of the Virginia bar, had an interview with Tracy. Whatever took place at this interview forms, we think, one of the principal controversics [211] of the case, and we shall have occasion *hereafter to fully advert to it. Certain it is upon that day Turner received from Tracy in cash a little over $400, and Turner returned to Virginia. From that time (September 28, 1888) up to November 26, 1888. except a letter written by Tracy to Turner on October 10, 1888, there is nothing in the record showing any relations between Tracy and Turner concerning the property in the hands of Tracy. On the date last named (November 26, 1888) Mr. Hunton offered the will of Silas H. Turner for probate in the county court of Fauquier county; a commission was issued to take the testimony of Tracy and the other attesting witness to the will, and the commission was executed on November 28, in the city of Washington, immediately taken to Warrenton, and on the same day the will was admitted to probate.

The next day after the probate of the will, Turner appeared in Washington and called upon Tracy. Tracy handed to Turner a list of the notes, cash, and other property in his possession, which he proposed to turn over as belonging to the estate of Silas H. Turner. Turner took the list and examined it over night, returned the next morning, received the notes and the additional cash mentioned in the receipt, and, as to a piece of real estate specified in the list, received the following certificate from Tracy:

I hereby certify that I have invested three thousand six hundred dollars ($3,600.00) in ground on Maryland avenue between 9th and 10th streets N. E., at 55 cents per square foot, and that Silas H. Turner is entitled to one half of the proceeds derived from the sale of the same, after deducting the cost of grading, subdividing, and examining titles, etc.

Philip A. Tracy.

The entire question of fraud on the part of Tracy depends upon the statements of Turner as to what took place between himself and Tracy when he gave the foregoing receipt, and as to the conduct of the latter concerning the so-called list which *has been [212] previously referred to. This we shall consider when we come to the controverted questions.

At the suggestion of Tracy, the notes, covered by Turner's full receipt, were placed in a bank at Washington for collection, Tracy introducing Turner to the bank, and assisting him in opening the account. Turner went to Virginia, with some of the cash received paid the funeral expenses and the debts of his brother, took his sister and a niece with him to Louisiana, and from Louisiana he went to Texas with his family and also with the sister and niece just referred to. In Texas, Turner bought a lot in a town called Vernon, boarded his family until he built and furnished a house, bought and partially paid for a ranch consisting of 640 acres, and equipped it with stock and machinery. In the summer of 1890 he brought his entire family to Virginia, leaving his son Erle H., who had then become of age, on

the farm in Texas as manager. He bought, in his own name, a house and lot in Front Royal, Virginia, the possession of which he turned over to his niece, Mrs. Rust, telling her that it was hers, and that it was done in accordance with directions given before his death by his brother Silas. Whilst in Virginia, he visited Washington and saw Tracy. In the fall of 1890 Turner went to Texas, leaving his family in Virginia. He remained in Texas but a short time, coming back to Virginia either in the late fall of 1890 or early winter of 1891. In February, 1891, he drew on the proceeds of the notes which had been deposited a check for the sum of $4,800 and carried the money away on his person, stating in his testimony that one reason why he did so was that he did not want the heirs in Virginia to know where the property was; that he was trying to keep it concealed as much as he could; that he was managing his own affairs, and did not want anybody to know anything about it, and that he was trying to get the money away from Washington entirely. In April, 1891, Erle H. Turner, the son, left the farm in Texas and came to Virginia. He visited Washington with the father, who introduced
[213] him to Tracy. The *father paid the son out of the proceeds of the notes in bank $1,200, and delivered to him two of the notes previously turned over by Tracy, which had not been collected, of the face value of $525. The father testified that this payment to the son was made on account of some small indebtedness which he owed the son for money received for safekeeping from him whilst a boy, and in discharge of a debt which the father declared he owed the son for managing the farm, which it had been agreed was to be compensated for by a half interest in the proceeds of two crops. One of the crops had been harvested and the other was still on the land and ungathered when the settlement was made.

From the date of the delivery by Tracy to Turner of the notes to the time of the payment made to Erle H. Turner, as just stated, all the notes delivered by Tracy to Turner, and deposited to the credit of the latter, had been paid, principal and interest, except the two which were turned over to Erle H. Turner on the alleged settlement with the father. During this time the record shows letters written by Tracy to Turner of a friendly character, advising Turner concerning the progress of the collections, and suggesting business methods for overcoming difficulties which arose, without the slightest intimation in any of the letters that there was in Tracy's mind even an impression of a difference between himself and Turner, or that Tracy supposed that there was any claim against him resulting from the transfer which had been made to Turner on November 30, 1888, except as indicated on the receipt then signed by Turner, and the accompanying certificate, relative to the Maryland avenue lots.

As the consequence of the settlement made with Erle H. Turner, practically all that remained of the money coming from the proceeds of the notes delivered by Tracy to Turner had been checked out by Turner, and it is true to say that the record leaves no question that, in effect, substantially all the family living and traveling expenses, the disbursements for the residence lot in Texas, the cost of the erection and the *furnishing [214] of the dwelling, the cost of the farm and of fencing, and for stock and machinery bought for use thereon, had been defrayed out of the fund transferred by Tracy, as also the cost of the Virginia residence bought for Mrs. Rust, and various gifts of money made by Turner to nieces and nephews.

Not only during the period whilst the notes were being collected by the bank for the account of Turner, and he was drawing out the proceeds,—indeed, up to shortly before the bringing of this suit.—Turner swore that he intentionally concealed from his wife and children, and from everybody concerned, the fact that his brother's will had been made in favor of the children, or that he had received under that will any property belonging to them. His testimony on this subject is so vital to the cause that we quote it.

On his direct examination, he was interrogated, and answered as follows:

Q. You stated the other day that while you were East in the fall of 1888, at the time of your brother's death, you wrote home to your wife during that absence? *A.* Yes, sir.

Q. I want to know whether or not you told your wife in any of your letters of the fact that your brother had left an estate? *A.* I think I did. I am not positive.

Q. I want you to state whether or not you told her that he had, by his will, left the property to your children? *A.* I did not tell her that.

Q. Was that omission intentional or accidental? *A.* It was intentional, sir.

Q. After your return to Louisiana, after your brother's death, when did you and your family leave there? *A.* We left there in the summer of 1889.

Q. Up to that time had you told anybody of the character and contents of your brother's will? *A.* No one, sir, except Mr. Hunton.

On cross-examination, the witness testified as follows:

Q. Did you, within a few days after sign-

ing that, write to your wife and tell her
[215] that your brother had left his property *to you? *A.* I don't think I did, sir. I can't say that I did. I have no memory of writing such a thing. I may have written to her that my brother had left property to us. I don't know what I wrote. It has been a long time, and I can't tell you.

Q. Did you write to her in such a way as to conceal from her the truth, and intend to do so? *A.* I didn't intend that my children should know the property was left to them.

Q. Why? *A.* Well, sir, it was my opinion that it would not be well for them to know it.

. . . . . .

Q. When did your wife first know the terms of the will of your brother? *A.* I don't know, sir.

Q. When did you first communicate to her the fact that you had obtained the property or the estate of your brother? *A.* I never communicated it to her, sir.

Q. And she never knew it? *A.* I don't know whether she knew it or not, but I never told her.

Q. Do you know that she did know at any time? *A.* I can't tell you, sir. I don't know that she did.

Q. Did you intentionally conceal the fact from your wife that you had received the estate of your brother? *A.* I guess I did sir. intentionally.

Q. And never up to the present time have you ever told her that you did receive your brother's estate? *A.* Oh, I don't remember whether I had or not. I couldn't say positively, sir.

Q. Have you any knowledge yourself as to the time, or any time before the bringing of this suit, when she knew that you had and had received your brother's estate? *A.* No, sir.

Q. You cannot say? *A.* I can't say.

Erle H. Turner, the son, after his introduction to Tracy, evidently inquired from Tracy concerning the estate of Silas Turner, and he expressly declares that Tracy then informed him that the property had been left to the children, and also told him of the investment in his hands arising from the Maryland avenue lots. It is plainly to be in-
[216] ferred that Erle *Turner communicated this fact to his mother, and, whilst there is no direct proof as to her consequent interference, it is inferable that both the mother and the son questioned the right of Tracy to make further payments to Thomas M. Turner. Undoubtedly, shortly thereafter, Thomas M. Turner called upon Tracy to pay over the proceeds arising from the Maryland avenue lots investment, which Tracy refused to do because of legal advice which he had received, unless Turner would qualify as an administrator, which he declined to do. It is also inferable that Erle H. Turner at that time made some demand upon the father concerning the estate, since the latter gave to him an order on Tracy for about $2,500, delivering to the son the certificate as to the investment in real estate, which had been made by Tracy and given to Turner at the time of the transfer on November 30, 1888. Erle H. Turner did not return to Texas, but remained East, occasionally visiting Washington and calling upon Tracy, receiving money from him and corresponding with him from time to time in the most friendly way.

Thomas M. Turner, having exhausted the proceeds of the notes which he had received from Tracy, never again came in personal contact with the latter. He went to Texas, leaving his family in Virginia. In January, 1893, under a power of attorney, he sold the farm near Minden, which he had transferred in 1870 to his wife. The expressed consideration for the sale on behalf of the wife was $1,000. In January, 1894, Turner went to Virginia and took his family back to Texas. In September, 1894, Turner and his wife executed and put of record a deed conveying to Wilmer, Ashby, and Lunette Turner the Texas farm, and reciting as the consideration thereof "the sum of $6,400 to me in hand paid by Philip A. Tracy, executor of the last will and testament of my deceased brother, Silas H. Turner, in trust for the use and benefit of my children, *viz.*, Wilmer Turner, Ashby Turner, and Lunette Turner, minors, which said trust fund, together with other similar trust funds, was turned over to me without bonds and *have [217] been used by me for my own use and benefit, said consideration being in payment of so much of said trust fund."

It appears that the land embraced in the farm had originally been acquired by the grantor of Thomas M. Turner as school land from the state of Texas. Turner failing to pay the $60 interest due on deferred payments, the land became forfeited to the state. Subsequently Turner repurchased it from the state at a reduced value, *viz.*, $1 per acre. In August, 1895, having previously mortgaged the dwelling house property in Vernon, Turner and his wife conveyed said property to the mortgage creditor in cancelation of the then-existing indebtedness. At about this time Mrs. Turner wrote Tracy, asking for money. Her letter is not in the record, but the reply of Tracy

(copied in the margin †) clearly shows that the letter was a request from Mrs. Turner to him to pay the proceeds of the Maryland avenue lots referred to in the receipt and embraced by the certificate already referred
[218] to. A *letter written by Tracy to Mrs. Turner five months afterwards manifests his kindly interest in the welfare of the family, and renders greater the certitude that no thought was in Tracy's mind that the parties deemed that he had perpetrated a fraud upon them, or that they had any claim upon him otherwise than in respect of the Maryland avenue lots investment. And this is entirely corroborated by the intimate and friendly letters written by Erle Turner to Tracy up to a short period before his death, which show clearly that Erle Turner considered that Tracy was accountable only for the lots referred to, and that he, Erle Turner, had received more than his share of the same. One of such letters—omitting purely irrelevant matter—is copied in the margin. ‡

Evidently, in consequence of the legal advice given him at the time objection was made by Erle Turner and his mother to the payment of the proceeds of the Maryland avenue lots to the husband and father, Tracy, as his health became impaired, grew to have an anxiety concerning the technical legality of the transfer of property which he had made to Thomas M. Turner, as shown by the receipt of November 30, 1888; and as a consequence he had prepared the statement on that subject produced by his executors. From 1895 until the death of Tracy in June, 1898, the record does not contain even the slightest proof tending to show any demand made upon Tracy or a suggestion of liability concerning the fraud and wrong charged in bill in this case. That bill, as we have seen, was only filed in 1899, after the death of Tracy.

In March, 1901, Thomas M. Turner, as shown by his testimony, *sold the Texas farm. [219]
The following is a statement made by Turner of the amount claimed to have been realized and the disposition made by him of such proceeds:

"I sold the place, and the consideration was $5,000. There was a deed of trust for $400 on the property, which the purchaser assumed. I owed the purchaser $205. That from the $5,000 left $4,395. I paid $200 in debts from that, which left $4,195. I owed my wife her home in Louisiana that I sold in 1893, I believe $1,000, and eight years' interest at 10 per cent, which is the legal rate in Texas. That made $1,800. I used of my wife's individual money, about the year 1870, $200. Interest on that to the present time would make altogether $680. That would be $2,480 that I paid my wife, that was due her. That left $1,715. I owe about $100 in small debts there that I will have to pay out of that, which would leave $1,615 now that is community property between myself and my wife. According to the laws of Texas she would be entitled to half of it and I half. I have that much in money."

Explaining why he appropriated for his own and his wife's benefit the proceeds of the sale, to pay his alleged debt, despite the conveyance of the farm previously made by himself and wife to the minor children, Turner declared that while it was the same farm, yet that it had become forfeited to the state, and he had reacquired it, and re-

†Washington, D. C., Aug. 21, 1894.

Dear Mrs. Turner:—

I was out of the city, and, therefore, did not get your letter until yesterday. I could not comply with your request. There is no money in my hands belonging to the estate of S. H. Turner.

After you and Erle raised a fuss because he had not gotten his share, I became alarmed and consulted a lawyer, and he advised me not to turn over another dollar of the estate money until Mr. Turner qualified for the full amount of the estate. I informed your husband of the fact, and he declined to qualify (the bond would be over $50,000) and he and Erle agreed that I should invest the money so that it might be earning something while in my hands.

I then invested the money in what was then good real estate paper, but the panic came on last year, the indorser of the notes failed in business, and the land has depreciated in value, so that if it were sold now I do not think it would bring half the amount of the notes. I have over $1,400 of my money in the same land. If times should ever get good again (which I doubt) the land would be ample security for the notes. I have let Erle have some $600 of my funds since I invested the estate money, but I cannot see my way clear to increase the amount in such times as these. I was surprised at his coming North, without money, in such times as these. He and his father knew the condition of the estate money, and I had twice advised him not to come until times got better. He told me he had over $2,000 loaned out in Vernon, and that after July he would have money.

Yours truly, etc.
Philip A. Tracy.

‡Phila., April 4th.

Dear Mr. Tracy:—

Yours rec'd. I wrote you a hurried note to tell you that I w'd send the receipt 7 A. M. to-morrow per instructions. I have not been well. . . . . A friend of mine told me that as you had paid me more than ¼ of the balance left in your hands this should clear you, as the balance would go to the other children, so I just made the suggestion. . . . .

Yours, & etc.,
E. H. Turner.

P. S.—If you write or wire me hurriedly address for 2 weeks 1820 Susquehanna ave. I am going to change my room soon but will let you know.

E. H. T.

garded it as community property belonging to himself and his wife, although the money which had been originally used in buying and improving the farm had come from the proceeds of the estate of his brother, and belonged to the children.

With these facts in mind we come more directly to consider the fraud alleged to have been committed by Tracy at the time he made the transfer of property and took the receipt of Thomas M. Turner. The principal ground upon which the auditor and both courts below rested their conclusion that Tracy had been guilty of such fraud was a discrepancy which it was assumed existed between a so-called list in Tracy's handwriting of notes in his hands, which list had
[220] been found *among the effects of Silas H. Turner at his death, and the correctness of which it was concluded was acknowledged by Tracy to Thomas M. Turner after the death of Silas H. Turner. In approaching the question of fraud we bear in mind the rule that where both courts below have found a particular state of facts, we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence. Now, coming to consider the evidence in the light of this rule, we are constrained to the conclusion that the premise upon which the courts below acted, that is, the existence of a list of notes left by Tracy, is without any support in the evidence, and, indeed, rests but upon a mere mistaken assumption.

True it is that an envelope was found among the papers of Silas H. Turner with an indorsement upon it in the handwriting of Tracy, reading as follows: "Notes belonging to S. H. Turner, 1888." True also is it that two sheets of paper were produced with memoranda of notes upon each in the handwriting of Tracy. But to assume that these two sheets were one list made by Tracy and possessed as one list by Turner at the time of his death is to disregard the uncontroverted fact that the two separate sheets did not in and of themselves, as they existed at the death of Silas H. Turner, necessarily import that they constituted a single document. To treat them as such a document would oblige us to disregard the uncontradicted testimony of Thomas M. Turner, that he brought the two papers together so as to cause them to appear to be one after the death of Tracy, that he placed on the first sheet the pencil footing and the line above the same and on the second the carrying forward of the same footing, as also the new footing and the line above the same, by which alone on the face of the sheets apparent unity was produced between them. We copy in the margin † the two sheets, with the additions *which, as above [221] stated, were made after the death of Silas H. Turner.

So far as the face of these separate sheets, as they stood at the death of Silas H. Turner, indicate, they do not at all exclude the implication that the items on the second sheet were but the statement of reinvestments made by Tracy of money coming into his hands as the result of the payment to him of notes which were enumerated on the first sheet. Nor, on the face of the papers, does the fact that an envelope was produced with the words in the handwriting of Tracy written thereon, "Notes belonging to S. H. Turner, 1888, necessarily give rise to a contrary deduction. For *non constat* but that this envelope was marked by Tracy on delivering to Silas H. Turner the second sheet, or, that when it was marked, it contained *the [222] first sheet, exhibiting the property in the hands of Tracy at the beginning of the year 1888. When the course of business between the parties as stated by Tracy in the memorandum addressed to his executors is recalled, the greater probability is not only that the two sheets were not received by Silas H. Turner at one time, but that the second sheet was a mere memorandum of investments of items stated on the first sheet. The mode of dealing, as stated by Tracy, was this: He kept the notes belonging to Turner in an envelope. Periodically he would send a general statement to Turner, and

†S. H. Turner.

Nov.	18, 82.	(W. Z. Partello) paid	$0.000 00
Nov.	1, '79.	Susan W. McNamee	1,700 00
Jan.	19, '81.	Edwin F. Jones....	1,000 00
April	7, '75.	J. H. Hollidge.....	800 00
March	22, '84.	John B. Taylor....	1,000 00
March	22, '84.	John B. Taylor....	1,000 00
July	12, '81.	Flora V. Andrews (2)	1,000 00
June	6, '85.	Jennie J. West.....	3,400 00
April	3, '85.	Caroline Isdell (2)	1,335 20
Dec.	15, '85.	Eliz. V. Lee.....	600 00
Dec.	15, '85.	Eliz. V. Lee.....	600 00
Jan.	8, '86.	Mary J. Lewis (3)	1,200 00
Dec.	30, '85.	John L. Carusi....	1,350 00
May	19, '86.	Julius Rehwold (4)	2,200 00
Dec.	24, '85.	Rufus A. Morrison..	1,500 00
Oct.	30, '86.	John B. Avery (4)	800 00
Oct.	2, '86.	Thomas R. Benton (15)	1,800 00
June	1, '86.	G. H. La Fetra....	1,036 90
April	18, '87.	L. A. Grant.....	300 00
Aug.	20, '85.	D. B. Groff.....	1,500 00
		(Footing in lead pencil).....	24,122 10

Second Sheet.

1888.		Am't for'd (in lead pencil)..	24,122 10
Feb.	18.	C. W. Baldwin.....	2,500 00
Jan.	27.	A. H. Nixon (3).....	1,350 00
March	12.	D. B. Groff.....	1,000 00
			28,972 10

when sufficient money was in his (Tracy's) hands, arising from accumulations of interest or payment of a note, he would reinvest, and send or give Turner a memorandum of the new investment. Now, the condition of the first sheet justifies the presumption that it related to a general statement of the investments in the hands of Tracy at the end of the year 1887. The notes on this sheet, although grouped in disregard of chronological order, include notes dated from 1875 to and including 1887. On the other hand, the second sheet is but an enumeration of three notes executed in 1888, the last dated on March 12. This second sheet in no way corresponded, therefore, to a general statement between the parties, but is exactly responsive to the conception of a memorandum of reinvestments made in accordance with the custom described by Tracy. And, by comparison of some of the items on the separate sheets, cogency is added to the reasonable presumption that the second and separate sheet was but a statement of reinvestments made after January 1, 1888. Thus, on the first sheet is the following item: "Dec. 30, '85. John L. Carusi, 1350." Now if this note matured on December 30, 1887, and was paid shortly after its maturity, Tracy, early in January, 1888, would have had that amount for reinvestment. Looking at the second sheet we find upon it an item showing an investment of precisely the amount of the principal of the Carusi note, as follows: "Jan. 27, 1888. A. H. Nixon (3) 1350.00."

[223] *As Turner and Tracy met in Washington on April 30, 1888, and in view of the reasonable probability that Turner must have been in possession of prior general statements of the investments made by Tracy, the inference is persuasive that the memorandum embraced on the second sheet may have been delivered by Tracy to Turner at that time.

It is insisted that as Thomas M. Turner testified that he exhibited the two sheets as one paper to Tracy, and that Tracy told him that he had all of the notes described on both of the sheets in his possession and that they were "as good as gold," therefore the sheets were proven to be one, and the liability of the estate of Tracy to account on that hypothesis was established. But, in view of the state of the uncontroverted proof which we have previously noticed concerning Turner and his acts of omission and commission, we are constrained to the conclusion that he has so discredited himself as to make it impossible for us to accept his uncorroborated statements as establishing the alleged fraud and dishonesty of Tracy; although, in reaching this conclusion, we do not exclude the possibility that Turner may have harbored a suspicion that Tracy had not fully accounted, and communicated his suspicions to others. And even putting out of view the acts of commission and omission of Turner and the consequent inability to rely upon his testimony as to the commission by Tracy of the alleged fraud, the unexplained failure of the complainants to make certain proof, and the proof as made, clearly demonstrate that Tracy could not have been guilty of the fraud charged against him, and we, under separate headings, state our reasons for this conclusion.

1. The interview between Tracy and Turner, at which the alleged admission by Tracy was made concerning the list and his possession of all the notes shown on the two sheets, was the one had a week after the death of Silas H. Turner, at which Thomas M. Turner testifies that Mr. Hunton, his counsel, was present and heard the alleged statement made by Tracy. Yet *the[224] testimony of Mr. Hunton was not taken. Besides, the bill contained an express averment that the land records of the District of Columbia established that the notes embraced on the first sheet which were omitted from the receipt signed by Turner had been paid after the death of Silas H. Turner, but no proof on that subject was offered. On the contrary, it was stipulated, on the taking of evidence, that five of the notes which were on the first sheet had been paid and the releases of trust executed after March 12, 1888, the date of the oldest executed note shown on the second sheet of the list, and before the death of Silas H. Turner, a fact which clearly rebuts the presumption that Tracy could have admitted to Turner on September 28, 1888, that he possessed notes which were good as gold, although they were not then in existence.

2. The face of the receipt itself (which is copied in the margin)† considered in

†Full List of Notes and Cash in the Hands of Philip A. Tracy, Belonging to S. H. Turner, Deceased, Nov. 30, '88.

Date of notes.	
Mar. 22, '84. Two notes of John B. Taylor for $1,000 each.....	2,000
May 19, '86. Two notes of Julius Rehwold, $300 each.....	600
May 19, '86. Two notes of Julius Rehwold, $800.....	1,600
April 18, '87. One note of Louisa A. Grant	300
March 12, '86. One note of Diller B. Groff	1,500
March 12, '86. One note of Diller B. Groff	1,000
Dec. 15, '85. Two notes of Eliza U. Lee, $600 each.....	1,200
June 13, '88. One note of Roth & Moore	325
Jan'y 19, '81. One note of Edwin F. Jones	1,000

[225] the light of the uncontroverted facts *which we have stated, and other circumstances to which we shall advert, we think equally rebut the statements of Turner as to the alleged admissions of Tracy. It will be observed that the aggregate of both sheets of the so-called list was $28,972.10. The notes embraced upon the receipt given by Turner aggregated $22,802.50,—a difference between the two footings of $6,169.60. Now, admitting that the two items of cash payments figuring in the receipt, amounting to $776.89, may be treated as interest, besides the notes, the receipt of Turner specified an investment of $1,800 in the Maryland avenue lots, for which at the time Tracy delivered to Turner the certificate to which we have referred in stating the uncontroverted facts, and which Turner turned over to his son Erle. Deducting this $1,800, which Tracy admitted he owed, left only a difference of $4,369.60. How, under this condition of things, it could be found that Tracy admitted he was appropriating for his own benefit more than $6,000 we cannot conceive, since on the face of the transaction, under the most favorable view of the testimony for the complainants, Tracy was paying over or acknowledging his liability for everything but about $4,000 of notes. And yet more incredible does the theory of a fraudulent retention of over $6,000 by Tracy become when it is considered that Tracy permitted Turner to retain what would have been conclusive evidence of his fraud if the theory of the previous admissions of Tracy as to one list and its correctness, propounded by the complainants and found by the courts below, were true. If Tracy was [226] infamous *enough to conceive the spoliation which is charged to have been committed by him, it would be certainly fair enough to presume that he would have exercised reasonable precautions to destroy the evidence of his wrongdoing.

Moreover, a comparison of the receipt with the two sheets supports the conviction that the second sheet was but a statement of reinvestments, and therefore that it was impossible that Tracy should have admitted that he was in fact stealing from or denying his liability to the estate of his dead friend in respect to the sum which he was either actually paying over or admitting his responsibility for. Now, the receipt embraced all of the notes mentioned on the second sheet, aggregating $4,850. It embraced certain notes found on the first sheet, aggregating $11,600. The receipt also embraced notes not appearing on the first sheet,—in other words, replacing those omitted (and included the Maryland avenue lots),—indicating by their dates that they were acquired after the date of the last investment appearing on the second sheet of the list, *viz.*, March 12, 1888, and after April 30, 1888, when Silas Turner was in the office of Tracy and made his will. These last items aggregated $8,152.50. The total of the various items footed up $24,602.50. Now, this sum was slightly in excess of the notes shown on the first of the two sheets of the so-called list, going to demonstrate that the settlement between the parties was based not upon any deduction of an impossible sum of $6,000, but upon the fact that the second sheet represented reinvestments of items appearing on the first sheet. And the cogency of this conclusion becomes manifest when it is considered that there is not an iota of evidence tending to show where Tracy could have gotten the money to invest in the notes which he turned over, acquired after March 12, 1888, unless it was from collections of the notes appearing on the first sheet of the so-called list, which, in consequence of their payment, were represented in the receipt by the new investments.

3. That, at the time the receipt was given, there was some *conversation on the [227] subject of a probable charge by Tracy for his services rendered to Silas H. Turner, we think persuasively appears. In May, 1892, after the refusal of Turner to qualify as administrator of the estate, and the refusal of Tracy to turn over the proceeds of the Maryland avenue lots to Turner unless he

Feb. 18, '88. One note of Charles W. Baldwin	2,500
Jan'y 27, '88. Three notes of Alban H. Nixon, $450 each	1,350
July 12, '81. Two notes of Flora V. Andrews, $500 each	1,000
Oct. 30, '86. Three notes of John B. Avey, $200 each	600
Oct. 22, '86. Seventeen notes of Thomas H. Benton, $120 each	2,040
Aug. 25, '88. One note of Frank W. Paige	3,000
Oct. 17, '88. Three notes of J. L. Burns, $462.50 each	1,387.50
Nov. 6, '88. One note of E. V. Jarvis	200
Nov. 19, '88. Two notes of C. S. McEwen (600 each)	1,200
Nov. 19, '88. Two lots on Md. Ave. N. E.	1,800
Sept. 28. Cash, T. M. T.	439.25
Nov. 30. Cash, T. M. T. in full	537.64
(In'st now due)	600
	$25,379.39

Nov. 30, '88.—Received the above-described notes and cash in full under the will of S. H. Turner, deceased.

T. M. Turner, Natural Tutor and Agent for My Minor Children.

did qualify, Tracy wrote Turner a letter, which is copied in the margin.†

It is true that Turner, in producing the letter, whilst acknowledging its receipt, declared that it was the first he had ever heard of any such charge or intention to charge; but Turner in no way intimates that he took issue with Tracy, by letter or otherwise, concerning the right of Tracy to make the charge,—a line of conduct wholly inexplicable if the theory of a fraudulent retention by Tracy of $6,000 had foundation in fact. Having regard to the context of Tracy's letter, we consider it as implying an intention to deduct, for the benefit of the sister of Silas H. Turner, the sum of the charge which Tracy had made or then proposed to make, from the proceeds of the investment remaining in his hands. And, we [228]*may remark, in passing, that there is proof tending to show that Tracy subsequently made remittances to the sister in question.

4. As we have said in stating the uncontroverted facts, Turner came from Louisiana to the house of Mrs. Rust, where his brother Silas was lying dangerously ill, about a month and a half before the death of Silas. The proof leaves no doubt that whilst there he frequently met his niece, Mrs. Rust, and other Virginia relatives, and had ample occasion to be aware of their frame of mind. There is no proof whatever showing that Tracy, whose home was in Washington, had any connection whatever with the Virginia relatives of Silas Turner, or was in a position to form an opinion concerning the probable conduct of those relatives as to a contest of the will of Silas Turner. And yet Turner swears that one of the principal causes of his yielding to the fraud of Tracy was the danger which Tracy persuaded Turner would arise in consequence of the purpose of the Virginia relatives to contest the will. Further, although the first interview between Tracy and Turner after the death of Silas was on September 28, 1888, the settlement between Turner and Tracy was not had until more than two months thereafter, *viz.*, November 30, 1888. Now the only explanation Turner gives for this delay is that Tracy told him at the interview on September 28, 1888, that he was about to absent himself on a two weeks' leave, and upon his return would inform Turner, and they would have a settlement,—a reason wholly inadequate to explain the long delay between that and the next meeting. That Tracy expected to make a settlement, and desired to keep in in touch with Turner, is shown by a letter written to Turner on October 10, 1888, from Old Point Comfort, advising Turner of his (Tracy's) whereabouts. Several of the Virginia relatives who were in contact with Turner during the considerable interval which elapsed between the first visit of Turner to Tracy and the final settlement testified to statements made in their presence by Turner, that he was awaiting the necessary papers from Louisiana showing his authority to represent his children, and that just before Turner *went to Wash- [229]ington to make the settlement with Tracy, Turner stated to them that he had the required authority. This shows that the matter of Turner's right to represent his children was, in all probability, the cause of the long delay in making the settlement, and is corroborated by a passage contained in a letter written by Turner to his daughter Wilmer, in 1899, in which communication, referring to the occurrences at the final settlement with Tracy, Turner said:

"Tracy then informed me that, as my brother owed no debts, there was no use to have an administration; that he would not qualify as executor of the will, and that I need not delay to be appointed guardian for my children; that he would turn the notes over to me, and I could place them in bank, to be collected as they matured."

True it is that Turner testified that the words which he affixed to his name in signing the receipt, describing his representative capacity, *viz.*, "Natural tutor and agent for my minor children," were dictated by Tracy, but, in view of the probable ignorance of Tracy of the Louisiana law, and the expe-

†Postoffice Department, Office of the First Assistant Postmaster General.

Washington, May 7, '92.

Dear Turner:

I wrote you some time ago, but have not received any reply to my letter. I was in Phila. a short time ago, and called to see Erle, but was told he had left there, and gone to Balto. The interest on the $2,600, in my hands has not yet been paid though I expect it soon. It is invested in good paper and is drawing 8 per cent though after the present notes are paid I do not think I can get over 6 per cent for it.

As I am now all alone in the world and have not much use for much money I have thought something of transferring to Miss Henrietta a part or perhaps all of the commission I charged on your brother's estate (5 per cent) as she was left out of the will, and is poor as I understand it, and getting along in years.

If you will confer with her upon the subject, and ask her to write to me, I think the arrangement can be arranged.

This amount of my charge for attending to the business for 16 years ($120 a year) will stand.

I would like to hear how your wheat turned out? How much did you make and how much did you get for it.

Yours, truly, &c.,

Philip A. Tracy.

P. S.—I have not been well since the death of my sister.—T.

rience and familiarity which Turner possessed on that subject, the statement cannot be accepted as true.

Considering all the evidence, our conclusion is that the proof not only completely fails to establish the commission of fraud or wrong by Tracy, but that, on the contrary, it clearly shows honesty and fair dealing on his part. Indeed, so far as concerns the transfer of property made to Thomas M. Turner without provoking an administration either in Virginia or in the District of Columbia, whatever may be its legal consequence, which we shall hereafter consider, we think the clear preponderance of the proof gives rise to the inference that that payment was made without administration because of Tracy's knowledge that there were no debts, and because of the representations made by Turner that he was entitled, under the law of Louisiana, to receive the transfer on behalf of his minor children, and that, if it were not made to him without legal proceedings, there would [230] be much unnecessary expense resulting *from a contest, and thus the purpose of the testator towards the beneficiaries of his will would be in part frustrated.

This brings us to consider the proposition of law whether the payment by Tracy to Thomas M. Turner, as the representative of his children, was adequate to prevent the estate of Tracy from being compelled to pay a second time.

It is undoubted that at the time of Silas H. Turner's death the children, who were the beneficiaries under his will, were minors, and were domiciled with their father and mother, who were both alive and residing in the state of Louisiana. It is at once conceded that, under the law of Louisiana, a father or mother entitled to qualify as natural tutor (guardian) must be recognized by a court, and, as a condition precedent to such recognition, must have complied with the requirements of the law. Under the law of Louisiana such precedent requirements are the taking of the inventory, the recording of an abstract thereof, and an oath of office. As it is established that Thomas M. Turner performed none of these requirements and was never recognized by a court as the natural tutor of his children; it is insisted that he was wholly without power to represent them or to receive the bequests made to them by the will of Silas H. Turner. But the proposition is inapposite and is based upon a misconception of the law of Louisiana, resulting from the assumption that, under that law, the rules governing the qualification and appointment of natural tutors after the death of one of the spouses applies to the case of a father, during marriage, representing and acting for and on behalf of his minor children.

In the Civil Code of Louisiana of 1870, title 7, chapter 5, treating of father and child, it is provided as follows:

"Art. 221. The father is, during the marriage, administrator of the estate of his minor children.

"He is accountable both for the property and revenues of the estates, the use of which he is not entitled to by law, and for the property only of the estates, the usufruct of which the law gives him.

*"This administration ceases at the time of [231] the majority or emancipation of the children."

And in the same title and chapter it is further provided:

"Art. 223. Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation."

Moreover, in the same chapter, it is also provided:

"Art. 226. This usufruct shall not extend to any estate which the children may acquire by their own labor and industry, nor to such estate as is given or left them under the express condition that the father and mother shall not enjoy such usufruct."

These provisions of the Code of 1870 have obtained in that state from an early date. The first of them was in the Code of 1825, as article 267, under the title treating of minors and their tutorship, and under the same title the provision was contained in the Code of 1808, in § 2 of chapter 8, article 5. And, as the inevitable result of these provisions of the Code, it has long been settled in Louisiana that the plenary power of the father as administrator, during marriage, of the estate of his minor children, born of the marriage, was wholly distinct from tutorship, did not depend upon previous judicial recognition, and was not subjected to the precedent requirements essential to give rise to tutorship. In *Cleveland* v. *Sprowl* (1845) 12 Rob. (La.) 172, the court said (p. 173):

"Now, it is well known, that no tutorship exists, during the marriage, over the children issued from it, but that a child remains under the authority of his father and mother until his majority or emancipation. Civil Code, art. 234. The father is, during the marriage, administrator of the estate of his minor children; he is accountable both for the property and revenues of the estates, the use of which he is not entitled to by law, and for the property only of the estates, the usufruct of which the law gives him; and such administration ceases at the time of the majority or emancipation of the *chil- [232] dren. Art. 267. The natural tutorship only

takes place after the dissolution of the marriage, by the death of either of the spouses, and belongs of right to the surviving one. Art. 268. Thus it is clear that the legal mortgage resulting from the tutorship is not applicable to the administration of the minor's property, given by law to the father, during the marriage. He is not a tutor; his duties and responsibilities are very different; and the law does not appear to have intended that, while the minor's estate remains under his father's administration during the marriage, his child should have a legal mortgage upon his father's property, as a security for the said administration."

As a result, it was expressly decided that neither the legal mortgage resulting from tutorship nor the security generally required by law from usufructuaries were applicable to a father as administrator of the estates of his minor children during the marriage. Our attention has not been called to, nor have we been able to find, any decision of the supreme court of Louisiana modifying in the slightest degree the principles thus announced. On the contrary, in *Gates* v. *Renfroe* (1852) 7 La. Ann. 569, whilst the subject was not directly at issue, the court in its opinion assumed the law of Louisiana concerning the power of the father in administering the estates of his minor children, as previously stated, to be elementary.

It is certain that the article relating to the power of the father to administer during marriage, which was originally enacted in the Code of 1808, was drawn from the Code Napoleon. We say this is certain, because not only did the article as enacted in the Codes of 1808 and 1825 exist in the Code Napoleon in absolutely identical words, but it was also in that code placed, as it was in the two earlier Louisiana codes, under the heading of minors and their tutorship. Code Napoleon, art. 389.

The fact that the provision should more properly have been classed under the chapter [233] of the Code treating of paternal *authority has been recognized in France. In commenting upon this subject Demolombe says (vol. 6, No. 409):

"It is evident that this article appropriately belongs to the title treating of paternal power, because, during the marriage, tutorship does not exist. It is alone in virtue of the paternal power that the father (or the mother, in the case of the father's incapacity) is charged with the administration of the goods belonging to his minor children."

The same commentator thus expounds the spirit of the article (ibid. No. 415):

"During the marriage, the father and the mother are present and co-operating with each other, consulting with each other, supervising, as it were, each other with that instinctive tenderness which is the result of their relation to their offspring. This the law assumes to be an assured and certain security for the children, founded, at the same time, upon both paternal and conjugal affection, of which the children are the pledge, and of which they are the most potent links for the perpetuation of the union. . . . Let us add that the conflicts between interests of the children and those of the parent which often arise from the death of one of the parents do not usually exist whilst both the parents are alive. These are the family considerations upon which the article is founded, and tradition plainly confirms them. Thus, in our ancient jurisprudence the distinction between the legal administration of a father and tutorship was well established. The first rested upon an agency created by law alone, based upon the confidence which the law reposed in paternal affection, from which it resulted that the powers of administration given to the father were broader and more comprehensive than those which the law conferred upon a tutor. Comp. Merlin, Rep. VII., V° Légitime administration; Coquille, sur l'art. 2, de la Coutume de Nivernais, de Laurière sur Loisel, Inst. Cout. livre 1, titre IV., régle 1."

And when the genesis of the enactment which passed from the Napoleon Code into the codes of Louisiana is considered, the accuracy of the observations of the commentator just cited *is made clear. In the [234] draft of the Napoleon Code which was first submitted, the provision subsequently contained in article 389 of that code was not found. The enactment of the article into the Code was the result of a recommendation by the Tribunat, its report on the subject expressly saying (Locré, Legislat. Civ. t. VII., p. 215):

"We think that the first article of the chapter should express in precise terms what, during the marriage, should be the authority of the father over the personal goods of his minor children. . . . Never up to this time has it been exacted that a father should be obliged to qualify as the tutor of his children before the dissolution of the marriage. If, while the marriage exists, the law did not make a distinction between the father and mother and a tutor, in the proper sense of the word, it would follow that the father would be, as to the personal goods of his minor children, subjected during marriage to all the conditions and burdens which the law imposes upon a tutor. The father would then be, as to his minor children, under the supervision of an under tutor, would depend upon the advice of a family meeting, etc., etc., all of

which would be repugnant to the accepted conceptions of paternal authority. It seems fitting that up to the dissolution of marriage the only title which the father should have is that of administrator, and it is for this reason that we recommend the adoption of the article."

And the views which were thus expounded have been substantially applied by the decided cases in France, and are concurred in by the practically unanimous opinion of the theoretical writers. The result of those decisions and the opinions of the writers on the subject adequately portray the plenary power conferred upon the father as the administrator of all the property of his minor children during marriage, and the distinction between that authority and the narrower power as to the natural tutorship arising only after the dissolution of the marriage. The authorities will be found exhaustively collected in the notes to article [235] 289 of the Napoleon Code in *the Fuzier-Herman edition of that code, published at Paris in 1885.

Much reliance in argument is placed upon the terms of article 3350 of the Louisiana Code of 1870, which reads as follows:

"Art. 3350. Before fathers and mothers, who, by law, are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property and enjoy the fruits and revenues thereof, they shall cause an inventory and appraisement to be made of such property, and cause the same to be recorded in the mortgage book of every parish in the state where they or either of them have immovable property."

This article was not contained in any of the previous codes. Its origin is this: Prior to the Louisiana Constitution of 1868 the moneyed obligations of natural tutors towards their minor children, of husbands to their wives, and some other pecuniary obligations expressly provided for by law, were secured by what was known to the Louisiana law as legal and tacit mortgages. Those mortgages existed by operation of law, and without registry. No such provision, however, ever obtained, as we have seen, concerning a father administering upon the estate of his minor children during the marriage. The Louisiana Constitution of 1868 (art. 123) provided that all legal, tacit mortgages should cease after a specified date, and expressly imposed upon the legislature the duty of providing by law for a mode of registry in order to preserve existing and future mortgages of that character. By an act passed in 1869, entitled an act to carry out this article of the Constitution and "to provide for recording all mortgages and privileges," the legislature sought to comply with this constitutional direction. La. Acts 1869, p. 114. The act in question contained specific directions for recording mortgages of the character referred to, the mode of registry which was adopted as to these mortgages being the making of an abstract of an inventory showing the amount of the minor's property, and the putting of the same of record. Section 12, the last section *of the act, contained the ex- [236] act provision subsequently embodied when the Code of 1870 was adopted, in article 3350, except that § 12 of the act of 1869, moreover, had these words, which are not found in the article of the Code referred to: "Which recordation shall operate a mortgage on such property until a final settlement of the administration of said property." In other words, when the Code of 1870 came to be adopted, the compilers omitted the words of § 12 of the act of 1869 just quoted, but placed in the Code the remainder of the section providing for the registry of an abstract of the inventory in the case stated. It is difficult to determine exactly the reason which impelled the compilers of the Code of 1870 to omit the provision as to mortgages found in § 12 of the act of 1869, conceding that that provision was constitutional despite the title of the act, and to re-enact the remainder of the section providing for the registering of an abstract of an inventory in the case named, since, by the omission of the provision as to mortgage, no possible security could arise from the recording of an abstract of an inventory in the case provided for. For, certain it is that neither under the codes as they existed prior to 1870, nor in that code, was or is there any provision for a legal mortgage securing the minors against loss resulting from the enjoyment by either parents, during marriage, of a usufruct. The intention of the compilers of the Code of 1870 not to change the powers of administration of the property of his minor children, conferred upon the father by the prior codes, is expressly shown by the re-enactment, without change, of those provisions, and is cogently exemplified by the further fact that, in re-enacting the provisions in question, they were removed from the chapters of the Code referring to tutorship, and were transferred to the chapters of the Code relating to paternal authority. As the full significance to be given to article 3350 is a question of local Louisiana law, which we are not called to decide, except so far as is essential to the determination of the case before us, we content ourselves with saying that we think it is clear that that *article in no way modi- [237] fies or controls the full power of the father to administer, during marriage, the estates

of his minor children, so well settled under the Louisiana law. In any event, we think that article 3350 simply implies that unless an inventory is made and an abstract recorded, the usufruct which otherwise would exist shall not obtain. But giving this effect to the article in no way modifies the powers of the administration conferred upon the father during marriage, to which we have referred, because, as clearly pointed out by the authorities which we have previously cited, the administration is wholly independent of the usufruct, and applies to the minor's property during marriage, whether or not there be a right of usufruct.

As, then, by the law of their domicil, the minors were represented by their father as administrator, with full power under that law to receipt for and administer the property for their account, was the transfer of property made by Tracy in the District of Columbia to Thomas M. Turner, as the administrator or representative of his minor children, valid and binding? It is said that it was not, because Turner, the testator, was domiciled in Virginia, and if the property had been administered upon in that jurisdiction, never mind what was the power of the father under the law of Louisiana, he would not have been entitled to receive or remove the property from the jurisdiction without an order made by a Virginia court, and upon the giving of satisfactory security. But the property in question was in the District of Columbia, and, in the absence of all showing that there were creditors in Virginia, the probate court of the District of Columbia would have had power, under the circumstances disclosed, if administration had been had in the District, to direct the delivery of the property to the person lawfully entitled to represent the minors, without compelling the transmission of the funds to Virginia. Under these circumstances, we are of opinion that the payment in the District of Columbia to the father of the complainants as administrator of their estate, fully empowered [238] to collect and *receive the same by the law of their domicil, is controlled by the cases of *Wilkins* v. *Ellett*, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641, 9 Wall. 740, 19 L. ed. 586. It is, however, urged that although, as a general principle, the cases referred to are decisive of this, the terms of the will and the knowledge which Tracy had of the intentions of the testator made the delivery by Tracy to the father of the children a violation of the terms of the will, and operated a fraud upon the rights of the children, which, it is claimed, takes this case out of the general rule. The unsoundness of the first of these contentions, which rests upon the terms of the will, we think is demonstrated by its mere statement. The proposition is that the words of the will, "and appoint Philip A. Tracy to distribute the proceeds of said property equally between them" (the minor children of Thomas M. Turner), implied a direction to Tracy to hold and administer the property for the benefit of the children, and not to pay it over to a lawfully appointed administrator or to one legally authorized to receive it. The second contention rests upon the assumption that, as a matter of fact, the proof establishes that Tracy had knowledge that the purpose of Silas H. Turner in making his will was to exclude the administration by Thomas M. Turner of the property bequeathed to his children, because Thomas M. Turner was a spendthrift and the testator lacked confidence in him. And this assumption of fact, as we have seen, was adopted by the trial court. Conceding, for the sake of argument only, that the existence of such knowledge on the part of Tracy would have caused it to be a fraud for him to turn over the property to the lawful administrator of the minors, we can find no reliable proof whatever in the record justifying the premise of fact upon which the contention is based. The sole and only possible basis for such an assumption is a statement made by Erle H. Turner in the course of his examination in chief, where, in purporting to give his recollection of a conversation had with Tracy, he said:

"Tracy himself wrote the will; and he said that he had suggested to uncle to leave it to my father, and, I remember, *his [239] answer was no, he would spend it, or something like that; and then he suggested that he leave it to his children, and that idea suited uncle, and he wrote the will."

We shall not stop to point out the conflict between this statement made by Erle Turner and the intimate and friendly relations as exhibited by his correspondence, continuing almost up to the time of the death of Tracy, or the conflict between the statements and the various parts of his testimony and his letters. We do not pause to do these things, because, in our opinion, the proof introduced by both parties beyond question establishes that Silas H. Turner entertained no such feeling towards his brother as the quoted testimony of Erle Turner implies. Thus, the complainants' own proof showed that Thomas M. Turner was summoned to the bedside of his dying brother and there remained for a month and a half; that during that time he was in constant and close relation with the brother, without the slightest intimation of any want of confidence between them. On the contrary, Thomas M. Turner made repeated statements and declarations in the course of

his testimony, to the effect that his brother referred to the will, and informed him that he expected him to administer the property, etc., etc. That Tracy regarded Thomas M. Turner as honest is demonstrated by his whole course of conduct, and is illustrated by his allusions to Thomas M. Turner in the memorandum which he left for the information of his executors.

The receipt being binding, the only question remaining for consideration is whether any liability rests upon the estate of Tracy growing out of the investment in real estate referred to therein. From an inspection of the receipt it will be seen that that subject was thus described: Lots on Maryland avenue N. E. $1,800; and, as we have also previously stated, at the time of the giving of the receipt, Tracy delivered to Thomas M. Turner a certificate, which we have heretofore reproduced, and which, as we have said, Turner subsequently turned over to his son Erle.

[240] *The evidence shows that the investment in question was represented by shares of stock of the Mutual Investment Company, which had acquired square 937 in the city of Washington. On September 3, 1888, Tracy subscribed to twenty-five shares of the stock of the par value of $150 per share, making a total liability of $3,750. He had paid assessments aggregating only $85 per share, when, on February 6, 1890, the land was sold at a profit of $60 on each share of stock. It may, of course, be presumed that during the interval between the subscription to the stock and the winding up of the venture Tracy retained possession of the balance, upon which he was liable on the subscription over and above the sums actually paid on assessment calls, so as to be ready to respond to calls up to the par value of the stock. Twelve of the subscribed shares would represent an investment of $1,800, the exact amount stated in the receipt. The profit on the twelve shares amounted to $720. This profit, with the principal of the investment, aggregated, therefore, on February 6, 1890, $2,520. Tracy, however, received but a trifling amount in cash, the greater part of the sum due him on the settlement being paid in notes of the purchaser of square 937, secured by trust deed. When the notes were paid, as shown in a letter written by Tracy to T. M. Turner on May 7, 1892, heretofore reproduced in the margin, the investment had realized $2,600. On account of the refusal of Tracy, in the spring of 1891, to pay over this sum to Thomas M. Turner, then living in Texas, unless he qualified as administrator of the estate, Tracy invested the amount in real estate notes, which were in Tracy's possession on May 7, 1892. Thomas M. Turner testified that prior to the spring of 1891 Tracy told him that the estate had realized from the investment in the Maryland avenue lots the sum of $2,750, although he does not claim to have taken issue with the statement in Tracy's letter that the amount was $2,600. The auditor, however, fixed the amount at $3,069.65, and held the estate of Tracy liable to account for that sum from February 6, 1890.

*It appears from statements in the record [241] that, following the panic of 1893, payments of interest on this loan ceased and the security became impaired, and, from passages in letters of Tracy, it may be conjectured the loan was secured by a second mortgage, and a sale was had under the first mortgage, which failed to realize more than sufficient to pay the primary encumbrance. It being, however, impossible from the record to determine with precision the ultimate fate of the investment in question, and as the sum originally realized therefrom is fixed with sufficient accuracy and has not been accounted for, we think the estate of Tracy should be held liable as of February 6, 1890, for the sum of $2,520, with legal interest. From this amount, however, there is to be deducted the one-fourth proportion of Erle H. Turner, as the sums admitted to have been paid to him by Tracy on account of this asset exceeded his proportion of the principal and interest. In other words, therefore, the estate of Tracy will be held accountable to complainants other than Erle H. Turner in equal proportions for the sum of $1,890, with legal interest thereon from February 6, 1890.

The decree of the Court of Appeals is reversed and the cause is remanded with directions to reverse the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court, with directions to enter a decree in conformity with this opinion. The costs in this court as well as in both the courts below are to be paid by the complainants, and before distribution of the sum for which the estate of Tracy is held accountable.

Mr. Justice **Brown** took no part in the consideration and decision of this case.

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*TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, [242]

v.

MUGG & DRYDEN, a Partnership Composed of J. A. Mugg and J. A. Dryden.

(See S. C. Reporter's ed. 242-245.)

Interstate commerce—right to charge rates scheduled with Interstate Com-

merce Commission.—A common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the Interstate Commerce Commission and posted in the stations of such carrier, as required by the interstate commerce act, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted.

[No. 233.]

Submitted April 18, 1906. Decided May 14, 1906.

IN ERROR to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the County Court of Tarrant County, in that state, in favor of plaintiffs in an action against a common carrier, founded on the exaction by the carrier of the rate for interstate shipments scheduled with the Interstate Commerce Commission, after having quoted a lower rate to the shippers, under which the shipment was made. *Reversed* and remanded for further proceedings.

See same case below, 98 Tex. 352, 83 S. W. 800.

Statement by Mr. Justice **White:**

The railroad company, plaintiff in error in this record, appealed to the court of civil appeals of the second supreme judicial district of the state of Texas from a judgment which had been rendered in favor of Mugg & Dryden, defendants in error herein. The appellate court certified to the supreme court of Texas the question of the liability of the railroad company, upon a statement of facts which correctly set forth the controversy, and which was as follows:

"The cause originated in the justice court, from which it was appealed to the county court of Tarrant county, where a trial was had on the following statement of appellees' cause of action, to wit: 'Statement of plaintiffs' cause of action. Damages in the sum of $140.18, as follows: By reason of defendant making and quoting to plaintiffs a rate of $1.25 per ton on two cars of coal and $1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Arkansas, to Weatherford, [243] Texas, on which rates so made and *quoted plaintiff relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of $2.75 per ton on said two cars, and $2.85 on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to obtain said coal and deliver the same in compliance with sales previously made. That plaintiffs' loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiff the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of said three cars of coal shipped and sold thereafter, and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of $140.18, on said three cars of coal, thereby causing plaintiffs loss and damage in the said sum.'

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Arkansas, to Weatherford, Texas, at the rate alleged in appellees' statement; and further, that if it ever quoted any such rate to appellees, such quotation was a violation of the interstate commerce act, and was a lower rate than the interstate rate in effect at the time shipment was made, which had been duly published, printed, and posted in its depot and stations, as required by the terms of the act; and further, that it collected from appellees the exact rate prescribed for such commodity under such act, and that such contract, if any was made, was in violation of law, and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Arkansas, to Weatherford, Texas, as shown in appellees' statement of cause of action, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas & Pacific Railway Company *on file with the [244] Interstate Commerce Commission, and posted in the stations of said railway company, as required by the interstate commerce act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

The supreme court of Texas having answered that the railroad company was liable "for damages occasioned by the misrepresentation of the rate of freight as shown by the statement of facts" (98 Tex. 352, 83 S. W. 800), the court of civil appeals affirmed the judgment against the railroad company. Thereupon this writ of error was prosecuted.

Messrs. **John F. Dillon, Winslow S. Pierce, David D. Duncan,** and *Thomas J. Freeman* submitted the cause for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

This case is within the principle of and is ruled by the decision in *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802. Upon the authority of that case the supreme court of Alabama denied the liability of a railroad company in a case of similar character to that under review. *Southern R. Co.* v. *Harrison*, 119 Ala. 539, 43 L. R. A. 385, 72 Am. St. Rep. 936, 24 So. 552. The opinion of Chief Justice Brickell so aptly reviewed and declared the effect of the decision in the Hefley Case that we adopt the same in disposing of the present controversy. The Alabama court said:

"In *Gulf, C. & S. F. R. Co.* v. *Hefley*, *supra*, the plaintiff sued to recover damages for the refusal by the carrier to deliver goods consigned to him, after tender of payment of the stipulated charges named in the bill of lading. The goods, a lot of furniture, had been received by the carrier at St. Louis, Missouri, for transportation to Cameron, Texas, at a stipulated rate, speci-
[245] fied in the bill of lading, of 69 cents per *100 pounds, the charges amounting to $82.80, whereas the published schedule rate in force at the time was 84 cents, and the charges should have been $100.80; and the plaintiff, as in this case, was ignorant of the fact that the rate obtained was less than the schedule rate. It was held, in an opinion by Brewer, J., that the plaintiff was not entitled to recover. It is true that the only question discussed in the opinion was whether or not the interstate act superseded the Texas statute, which prohibited a common carrier from charging or collecting from the owner or consignee of freight a greater sum than that specified in the bill of lading, and this question was decided in the affirmative. . . . But this was not the only effect of the decision, and it is by its effect on the rights of the parties to such a contract, by whatever process of reasoning the decision may be reached, that the state courts are bound. The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other states are bound."

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

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*SECURITY MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,
v.
HENRY E. PREWITT, Insurance Commissioner of the State of Kentucky.
(No. 178.)
[246]

TRAVELERS INSURANCE COMPANY of Hartford, Connecticut, *Plff. in Err.*,
v.
HENRY E. PREWITT, Insurance Commissioner of the State of Kentucky.
(No. 184.)

(See S. C. Reporter's ed. 246-269.)

Foreign corporations—revocation of license for removing cause to a Federal court.—A state may provide by its legislation that if a foreign insurance company shall remove to a Federal court a case which has been commenced in a state court, the license of such company to do business within the state shall thereupon be revoked.

[Nos. 178, 184.]

Petitions for rehearing received and distributed to the court in No. 178, April 2, 1906, and in No. 184, April 4, 1906. Decided May 14, 1906.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which reversed a judgment of the Circuit Court of Jefferson County, in that state, canceling the revocation of a permit to do business in the state, granted to a foreign insurance company. *Affirmed.* And—

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Jefferson County, in that state, dis-

NOTE.—*On recognition or exclusion of foreign corporation*—see note to Cone Export & Commission Co. v. Poole, 24 L.R.A. 289.

As to exclusion of foreign corporations as an interference with interstate commerce—see note to Kindel v. Beck & P. Lithographing Co. 24 L.R.A. 311.

missing, on demurrer, a petition to enjoin the threatened revocation of a permit to do business in the state, granted to a foreign insurance company. *Affirmed.*

See same case below, 26 Ky. L. Rep. 1239, 1 L.R.A.(N.S.) 1019, 83 S. W. 611; dissenting opinion, 27 Ky. L. Rep. 77, 84 S. W. 527.

The facts are stated in the opinion.

Messrs. F. W. Jenkins, Julien T. Davies, Charles S. Grubbs, and *William Marshall Bullitt* for plaintiff in error in No. 178.

Messrs. John G. Johnson, and *Edmund F. Trabue* for plaintiff in error in No. 184.

Mr. J. H. Hazelrigg for defendant in error in both cases.

For contentions of counsel on the merits see the briefs reported in *Security Mut. L. Ins. Co.* v. *Prewitt, ante,* 545, and *Travelers' Ins. Co.* v. *Prewitt, ante,* 549.

Mr. Justice **Peckham** delivered the opinion of the court:

Motions for rehearing have been presented by plaintiffs in error. The cases were commenced in the proper state court in Kentucky, and were argued here on their merits in January of this term, and the writs of error were dismissed (200 U. S. 446, *ante,* 545, 26 Sup. Ct. Rep. 314) because, as appeared from the record, only abstract questions remained to be decided, the licenses to do business within the state of Kentucky in both cases, which had been granted on July 1, 1904, for one year, having expired since issuing the writs of error.

In No. 178 the petition stated that the permission or authority to continue to do business in Kentucky had been renewed and extended from year to year by the state insurance commissioner, and that he had, on July 1, 1904, "continued the authority to the Security Mutual to transact the business of life insurance," as evidenced by the permit "for a period of one year from July 1st, 1904." It was also averred that the permit had been revoked in September, 1904, and the company asked to have the revocation canceled.

In No. 184 the petition stated that the company had been granted authority to transact business in the state of Kentucky for the period of one year then next ensuing, that is, from July 1, 1904. The petition showed that the permit had not then (October, 1904) been revoked, but it was alleged that the superintendent of insurance threatened to revoke it (on grounds substantially similar to those set forth in the *Security Case,* in 200 U. S., *supra, viz.,* the removal to a Federal court of a case commenced against the company in the state court), and an injunction was asked to prevent the revocation of the permit on that account.

On these motions for a rehearing it is now shown, what did *not appear in the [248] records, that the permits in fact had been renewed for another year, from July 1, 1905, to July 1, 1906, for the purpose, as it would seem, of having the point involved reviewed by this court. Neither party adverted to this fact on the argument, and the cases were fully presented by counsel on both sides, on the merits, and the question treated as still existing.

As the dismissal was ordered on a mistaken assumption of fact, justified by the records, that the permits had expired by lapse of time and had not been renewed, the applications for rehearing are granted and the judgments of dismissal set aside, and the cases will be decided upon the arguments already made in full by counsel for both parties.

The facts upon the main question sufficiently appear in the report in 200 U. S. 446, *ante,* 545, 26 Sup. Ct. Rep. 314. The court of appeals of Kentucky held the statute valid. 26 Ky. L. Rep. 1239, 1 L. R. A. (N. S.) 1019, 83 S. W. 611; dissenting opinion, 27 Ky. L. Rep. 77, 84 S. W. 527.

The matter to be now determined is whether a state has the right to provide that if a foreign insurance company shall remove a case to the Federal court, which has been commenced in a state court, the license of such company to do business within the state shall be thereupon revoked.

The statute under which the question arises is known as § 631 of the Kentucky statutes, and reads as follows:

"Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and, if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court *of this state, remove said suit [249] or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation

in some newspaper of general circulation published in the state."

A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Allgeyer* v. *Louisiana*, 165 U. S. 578-583, 41 L. ed. 832, 833, 17 Sup. Ct. Rep. 427; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389-395. 44 L. ed. 1116-1122, 20 Sup. Ct. Rep. 962; *John Hancock Mut. L. Ins. Co.* v. *Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.

Having the power to prevent a foreign insurance company from doing business at all within the state, we think the state can enact a statute such as is above set forth.

The question is, in our opinion, settled by the decisions of this court. In *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365, a statute of Wisconsin, passed in 1870, in relation to fire insurance companies, after providing for certain conditions upon which the foreign company might do business within the state, continued:

"Any such company desiring to transact any such business as aforesaid by any agent or agents in this state shall first appoint an attorney in this state, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

While that statute was in force the Home Insurance Company of the state of New York established an agency in Wisconsin,
[250] *and, in compliance with the provisions of the statute, the company duly filed in the office of the secretary of state of Wisconsin the appointment of one Durand as their agent, upon whom process might be served. The power of attorney was filed, containing the following agreement: "Said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or Federal courts."

After doing business in the state for some time, the company issued a policy to Morse, and a loss having occurred, Morse sued the company in one of the state courts of Wisconsin to recover the amount alleged to be due on the policy. The company entered its appearance in the suit and filed its petition to remove the case, which petition was in proper form, and was accompanied by the required bond and bail. Being presented to the state court of Wisconsin, in which the suit was brought, that court held that the statute justified the denial of the petition to remove the case into the Federal court, and a trial having been had in the state court, it gave judgment for the plaintiff on a verdict found in his favor. Upon a review of the judgment by the supreme court of Wisconsin, it was affirmed. Thereupon the insurance company sued out a writ of error from this court, and the sole question was whether the statute and agreement were sufficient to justify the state court in refusing to permit the removal of the case to the Federal court, and proceeding to judgment therein. This court held that the agreement was void, inasmuch as, if carried out, it would oust the Federal courts of a jurisdiction given them by the Constitution and statutes of the United States. It was said that the statute of Wisconsin was an obstruction to the right of removal provided for by the Constitution of the United States and the laws made in pursuance thereof, and that the agreement of the insurance company derived no support from the unconstitutional statute, and it was void as it would have been had no such statute been passed. The Chief Justice, with whom concurred Mr. Justice Davis, dissented, holding that, as *the state had the right to ex- [251]
clude foreign insurance companies from the transaction of business within its jurisdiction, it had the right to impose conditions upon their admission, which was a necessary consequence from the right to exclude altogether.

It will be seen the statute provided that in the power of attorney, appointing an agent for the company within the state, there should be an agreement that the company would not remove a case to a Federal court, and the statute was held to be void.

Subsequently the case of *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148, involving the same statute, came before this court. In that case the court reaffirmed the decision of the *Morse Case, supra*, as to the invalidity of the agreement. But, in distinguishing the two cases, it was said, in the course of the opinion, that, as the state had the right to entirely exclude such company from doing business in the state, the means by which it caused such exclusion or the motives of its action were not the subject of judicial inquiry; that the conclusion reached in the *Morse Case*

that the statute of Wisconsin was illegal was to be understood as spoken of the provision of the statute then under review; *viz.*, that portion thereof requiring a stipulation against transferring cases to the courts of the United States; that the decision was upon that portion of the statute only, and that other portions thereof, when presented, must be judged on their merits. The court further said that the *Morse Case* had not undertaken to decide what the powers of the state of Wisconsin were in revoking a license previously granted, as no such question had arisen upon the facts therein, and was neither argued by counsel nor referred to in the opinion; but that in the case then before the court (that of Doyle) the point as to the power of the state to revoke a license was distinctly presented. It is stated in the opinion, as follows:

"We have not decided that the state of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint [252]agents, keep *offices, and issue policies in that state. On the contrary, the case of *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357, where it is held that such conditions may be imposed, was cited with approval in *Home Ins. Co.* v. *Morse*."

The opinion concludes as follows:

"It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the state may compel the foreign company to abstain from the Federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there. This is the whole point of the case and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the state, is infringed; and this is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court."

In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the Federal court was void, whether made pursuant to a statute of the state providing for such agreement, or in the absence of such statute; but that the state, having power to exclude altogether a foreign insurance company from doing business within the state, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to a Federal court, its right to do business within the state should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not.

The case of *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, has been cited *as [253] overruling the *Doyle Case*, and as holding that a statute of the nature of the one in question here is void as a violation of the Federal Constitution. In that case a statute of Iowa was under consideration. It is set out in the report. The first section provides for an application by the foreign company to the secretary of state, requesting that a permit may be issued to the corporation to transact business in the state. It also provides that the application shall contain a stipulation that the permit shall be subject to each of the provisions of the act. The 3d section provides that if any cases commenced in a state court were removed by the corporation into a Federal court, the corporation should thereupon forfeit any permit issued or authority granted to it to transact business in the state. The 4th section provides for punishing the agents, officers, or servants of the corporation for doing business as such in the state, if the corporation had not complied with the statute and taken out and retained a valid permit to do business within the state. The corporation had not, in fact, taken out a permit. Barron, the plaintiff in error, was a servant of the corporation, and was engaged as engineer in running a train of the corporation, which started from Chicago and was running in the state of Iowa. He was arrested in Iowa for acting as the agent of the company in that state, while the company had no permit. Having been arrested, he applied to the supreme court of the state for a writ of habeas corpus, which was issued and a return made, and the case heard upon an agreed statement, containing the above facts. The state court upheld the validity of the statute, and the case was brought to this court by writ of error, where the judgment was reversed and the statute held invalid.

In the opinion delivered in this court it will be observed that the agreement or stipulation provided for in the statute was the material fact upon which the court proceeded, and it was held that the statute

did require such agreement. The various requirements mentioned in the 1st section of the statute were referred to as forming in fact but one proceeding, and as indis-
[254] solubly *bound up with the application for a permit that could not be issued unless the stipulation was given which made the permit specially subject to each of the provisions of the act, including the provision not to remove. It is clear from the whole case that the stipulation not to remove was regarded as the material part, and the case was decided on that foundation. Mr. Justice Blatchford said:

"The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the secretary of state, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the state, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute and its substantial provision is the requirement of the stipulation not to remove the suit into the Federal court."

For this reason the statute was held void.

Reference is then made in the opinion to the *Morse Case*, *supra*, wherein it was stated that agreements in advance to oust the court of a jurisdiction conferred by law were illegal and void, and that parties could not bind themselves in advance by such an agreement thus to forfeit their rights at all times and on all occasions, whenever the case might be presented.

The *Doyle Case*, *supra*, was also referred to, and Mr. Justice Blatchford said in regard to it as follows:

"The point of the decision seems to have been, that, as the state had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Home Ins. Co.* v. *Morse*, must be regarded as not in judgment."

This is the language which it is contended
[255] overrules the *Doyle* *Case. We do not think so. A reference to the *Doyle Case* will show that the first part of the above-quoted statement is inaccurate, as the case does not seem to have been decided upon the proposition that an injunction was improper from a court of the United States to state officers. The *Morse Case* was referred to and approved, and the court held there was nothing inconsistent between the two cases. The Doyle opinion proceeds upon that theory.

If it had been the intention of the court in *Barron* v. *Burnside* to overrule the *Doyle Case*, it was easy to have said so. Instead of that, the opinion rests upon the ground of the agreement to be exacted as a condition of granting the permit, and that the statute was not separable into parts, and it was held that the requirement of such a stipulation was void. It was not held that such a statute as the one of Kentucky, now under consideration, was void. Such statute exacts no agreement or stipulation in any form or in any part of the statute.

In *Southern P. Co.* v. *Denton*, 146 U. S. 202, 207, 36 L. ed. 942, 945, 13 Sup. Ct. Rep. 44, the same principle was stated, although the question was not directly involved, as the case was brought in the Federal court and the corporation contended it was not served with process in the proper district, and that the court was, on that account, without jurisdiction. The court, *per* Mr. Justice Gray, in the course of the opinion, remarked that a statute requiring the corporation *as a condition precedent* to obtaining a permit to do business within the state, to surrender a right and privilege secured by the Federal Constitution and laws, was unconstitutional and void. (Page 207, 36 L. ed. 945, 13 Sup. Ct. Rep. 44.) It was the same, in substance, as the Iowa statute, which was held void on account of the exaction of the agreement.

In *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526, Justice Gray, in delivering the opinion of the court, again stated what was regarded as the holding in the two cases of *Home Ins. Co.* v. *Morse* and *Barron* v. *Burnside* and said that "statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into *the courts of the United [256]
States suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void." It was the exaction of a stipulation or agreement that rendered the statute illegal.

It is also said in *Blake* v. *McClung*, 172 U. S. 239, 255, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165, that a statute providing that a stipulation should be made that the company would not remove a case into a Federal court was void because it made the right to do business under the license or permit depend upon the surrender by the corporation of a privilege secured to it by the Constitution.

It is urged that the Iowa and Texas stat-

utes do not require an agreement not to remove. But those statutes do require such agreement. The Iowa statute provided that the application for a permit should contain a stipulation that the permit should be subject to each of the provisions of the act, among which was one that the corporation should forfeit the permit if it should remove the case. This was held to be, in effect, a stipulation not to remove, exacted as a condition for granting the permit. And so the court said:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void." *Barron* v. *Burnside*, 121 U. S. 200, 30 L. ed. 919, 1 Inters. Com. Rep. 299, 7 Sup. Ct. Rep. 936.

In other words, the statute was regarded as exacting an agreement in advance not to remove a case, and, such being the fact, it was held that the statute was void. The Texas statute is to the same effect as that of Iowa.

The most that can be contended for is that the *Barron Case* holds that where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. That principle, as we have said, does not touch this case, as there is no exaction of a stipulation at any time.

It has not been decided that a statute [257] which has no requirement *for a stipulation or agreement not to remove is void if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

Counsel for the companies, in their brief, admit that the state "has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the state in so doing, even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the state any longer than it chose to allow; and the statute would not abridge any right of removal—for, as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence."

Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a Federal court its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove *a case into a Federal court, [258] your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the *Doyle Case* we think is good.

The orders heretofore entered dismissing the writs of error in these cases are set aside, and *the judgments of the Court of Appeals of Kentucky are affirmed.*

Mr. Justice **Day** (with whom concurs Mr. Justice **Harlan**), dissenting:

In view of the importance and far-reaching effect of the decision just announced, and being unable to concur therein, we have deemed it not improper to briefly state the grounds upon which our objection to the decision of the court rests.

Certain principles of constitutional law are firmly settled by the decisions of this court, and need no citation of cases in their support. The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the states of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different states is created by, and exercised under authority of, the Constitution of the United States, which secures to citizens of another state, when sued by a citizen of a state in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress

enacted to effect that purpose. This principle was announced in terms in *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365, has never been questioned, and is affirmed in frequent decisions of this court. No state regulation in hostility to this principle can be recognized without endangering the supremacy of the national Constitution.

The Kentucky statute imposes but a sin-[259]gle condition necessary *to be now considered upon the right of foreign corporations to do business in that state. It says in effect to a company not yet licensed to transact business within its borders, there is no objection to the company transacting business in this state; on the other hand, it is desirable that it shall do so, subject to the condition that the company cease to do business in the state and its license be revoked the moment it attempts to avail itself of its constitutional right to remove a controversy into the Federal court under the terms of the Federal statute passed to make the constitutional right effectual. From that time its further right to do business shall cease and determine and its license be revoked. To companies lawfully within the state, as are the plaintiffs in error in these cases, it makes the like proposition: You may carry on your business, having complied with other conditions, but the moment you undertake to exercise the constitutional right of removal to a Federal court, your license shall be revoked, and all authority to do business in the state shall cease. That this can be constitutionally done is affirmed in the decision of the court in these cases, because of the principle that the state, having the right to exclude foreign corporations from its borders, may do so for any reason, although such action, as in the present case, is based solely upon the denial of the right of removal in proper cases by a nonresident citizen, of cases coming within the act of Congress, to the Federal courts.

As a general proposition it is undoubtedly true that a state may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders, and may impose restrictions upon the right to transact local business as it may see fit. But this right, in our opinion, is not without limitation. It is the established doctrine of this court that a restriction of this power is found in the denial of the right to a state to impose a condition in direct conflict with the Constitution of the United States, in requiring a corporation, as a sole condition of doing business within the state, to surrender the right of removal created and enforced by the Federal Constitution *and laws in advance,[260] or give it up after its admission to do business in the state.

The question came directly before this court in the case of *Home Ins. Co.* v. *Morse*, *supra*, in which it was held that a state might not require a foreign corporation, as a condition of doing business within its borders, to file an agreement that such company would not remove the suit for trial into a United States circuit court or other Federal court. The act was held to be repugnant to the Constitution of the United States and the laws passed in pursuance thereof, as it denied the right of removal secured to the citizens of another state by the Constitution and laws of the United States. The question arose again in the case of *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148. In that case it was held by the majority of the court, Mr. Justice Bradley, Mr. Justice Miller, and Mr. Justice Swayne dissenting, that the state of Wisconsin might lawfully enact a statute providing that if any foreign insurance company should transfer a suit brought in the state to a Federal court, its license to do business would be canceled and revoked, and the doctrine was laid down that as a state had the right to exclude the company for any reason, the means by which it should cause such exclusion or the motives of her action were not the subjects of judicial inquiry. Thus the decisions of this court stood until the case of *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, was brought to its attention, in which it was held that a statute of Iowa, requiring a foreign corporation, as a condition of doing business in the state, to stipulate that it would not remove cases into the Federal court, which it had the right, under the laws of the United States, to remove, was void. And the case of *Home Ins. Co.* v. *Morse*, *supra*, was approved, and *Doyle* v. *Continental Ins. Co.* *supra*, qualified and explained. In this case Mr. Justice Blatchford delivered the unanimous opinion of the court. It is apparent from its perusal that the principle stated in *Home Ins. Co.* v. *Morse* and in the dissenting opinion in the *Doyle Case* was recognized and affirmed, and the unqualified right of exclusion denied. After *show-[261] ing that the right to remove was the creation of the Federal Constitution and laws, and could not be impaired without deprivation of a Federal right, the ground of the decision was stated to be:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws

of the United States, the statute requiring the permit must be held to be void."

And further, in speaking of the *Doyle Case:*

"The point of the decision seems to have been that, as the state had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion, which appears to be in conflict with the adjudication in *Home Ins. Co.* v. *Morse,* must be regarded as not in judgment."

And that the court did not regard the right of a corporation in that respect as differing from that of an individual is shown in the observation:

"Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the 3d section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the state of Iowa might as well pass a statute to deprive an individual citizen of another state of his right to remove such suits."

In concluding the decision the court said: 'In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. *Lafayette Ins. Co.* v. *French,* 18 How. 404, 407, 15 L. ed. 451, 452; *Ducat* v. *Chicago,* 10 Wall. 410, 415, 19 L. ed. 972, 973; *Home Ins. Co.* v. *Morse,* 20 Wall. 445, 456, 22 L. ed. 365, 369; *St. Clair* v. *Cox,* 106 U. S. 350, 356, 27 L. ed. 222, 225, 1 Sup. Ct. Rep. 354; *Fire Asso. of Philadelphia* v. *New York,* 119 U. S. 110, 120, 30 L. ed. 342, 347, 7 Sup. Ct. Rep. 108."

[262] *It is thus apparent that the decision was made to turn, not upon the question of whether the agreement not to remove had been required in advance, or imposed as a condition of remaining in the state after entry therein, but rested upon the doctrine that, conceding the right of the state to exclude foreign corporations, its right to do business within the state could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured. The doctrine of *Barron* v. *Burnside* is, in our judgment, decisive of the contention made in the present case. If it be true, as specifically declared in that case, that the right to exclude a foreign corporation could not be made to depend solely upon the surrender by the foreign corporation of this constitutional right and privilege, it irresistibly follows that its application is fatal to the constitutionality of the statute here in question. The right of the insurance company under the present statute to do business within the state of Kentucky turns upon its willingness to surrender this privilege. If it will do so, it may continue to do business with the state; if it will not, its license will be revoked, and its right to do local business destroyed. In short, it may continue to do business within the state if it will consent to the surrender of a Federal right. We think this brings the case squarely within the limitations of the right of the state to exclude foreign corporations from its midst, and, to sustain the statute, permits a state, because of the exercise of a constitutional right, to close its gates to corporations equally entitled with private citizens in this respect to the protection given by the Constitution. The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a state is at war with that instrument, and if adopted or sanctioned by all the states would nullify the supreme law of the land in some of its most essential provisions.

An examination of the decisions subsequent to *Barron* v. *Burnside, supra,* is con- [263] vincing to the effect that it has been accepted by the courts, national and state, as decisive of the proposition therein announced, that a state statute giving the right to do business or to terminate a business already instituted, upon the sole condition of the surrender of a Federal right, secured by the Constitution, is void and of no effect. The case, thus interpreted, has been cited and followed in subsequent cases in this and other Federal courts.

In *Southern P. Co.* v. *Denton,* 146 U. S. 202, 207, 36 L. ed. 942, 945, 13 Sup. Ct. Rep. 44, 46, Mr. Justice Gray, delivering the unanimous judgment of this court and referring to a statute of Texas similar to the one now under consideration, said: "That statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions,"—citing *Home Ins. Co.* v. *Morse* and *Barron* v. *Burnside.* The same eminent judge, delivering again the unanimous judgment of this court in *Martin* v.

Baltimore & O. R. Co. (*Gerling* v. *Baltimore & O. R. Co.*) 151 U. S. 673, 684, 38 L. ed. 311, 315, 14 Sup. Ct. Rep. 533, 537, and again citing the *Morse* and *Barron Cases*, said: "The Baltimore & Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right, under the Constitution and laws of the United States, when so sued by a citizen of this state, to remove the suit into the circuit court of the United States, and could not have been deprived of that right by any provision in the statutes of the state." Again, upon the authority of the same cases, including the *Denton Case*, this court, by its unanimous judgment in *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526, 530, said: "So statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into the courts of the United States suits brought against [164] them in the courts of the *state, have been adjudged to be unconstitutional and void." To the same effect was the case of *Blake* v. *McClung*, 172 U. S. 239, 255, 256 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165, 171, in which it was said, upon the authority of the *Morse, Barron,* and *Denton Cases:* "It was accordingly adjudged in *Barron* v. *Burnside*, 121 U. S. 186, 200, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that state, to stipulate that it would not remove into the Federal courts suits that were removable from the state courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. . . . So statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void. In *Chattanooga, R. & C. R. Co.* v. *Evans*, 14 C. C. A. 116, 120, 31 U. S. App. 432, 441, 66 Fed. 809, 814, heard before Judges Taft, Lurton, and Severens, the circuit court of appeals for the sixth circuit, speaking by Judge Lurton, and referring to the *Morse* and *Barron Cases*, recognized the right of the state to prescribe terms upon which a corporation of another state or country may carry on business within its borders, but taking care at the same time to say: "That there are limitations upon this power is equally well settled, for it cannot impose as a condition that such nonresident corporation shall not resort to the courts of the United States."

In *Bigelow* v. *Nickerson*, 30 L. R. A. 341, 17 C. C. A. 9, 34 U. S. App. 275, 70 Fed. 121, Judge Jenkins, speaking for the circuit court of appeals, seventh circuit, after reviewing the cases in this court, said:

"We consider the question foreclosed and no longer open to discussion. No condition imposed upon a right granted by a state, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States, can be upheld."

*In *Reimers* v. *Seatco Mfg. Co.* 30 L. R. [265] A. 366, 17 C. C. A. 229, 37 U. S. App. 430, 70 Fed. 575, Judge Taft, speaking for the circuit court of appeals, sixth circuit, said:

"The right of a state to impose conditions upon foreign corporations doing business therein is not unlimited. In *Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. ed. 451, Mr. Justice Curtis, speaking for the supreme court, said:

" 'A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 10 L. ed. 274. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.'

"In *Southern P. Co.* v. *Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44. it was held that a law which permitted a nonresident corporation to do business within its territory on condition that it should forfeit such permit if it removed a suit brought against it into the court of the United States held within the state was unconstitutional and void, and could give no validity and effect to any agreement or action of the corporation in obedience to its provisions, because it thereby was compelled to surrender a right and privilege secured to it by the Constitution and laws of the United States, citing *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365, and *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931."

Notwithstanding these cases, it is now ad-

judged that so far as the Constitution of the United States is concerned, it is competent for any state to withdraw or cancel a license given to a corporation of another state to do business within its limits whenever and solely because that corporation, being sued in a state court, has the case removed to the Federal court for trial or hearing. If each state should enact a statute such [266]as the *one before us, the right secured to a corporation when sued in the courts of a state other than the one creating it, to invoke the jurisdiction of the Federal court, would be abrogated throughout the whole United States, although such right is secured by the Constitution and by valid acts of Congress. We cannot assent to this view. It amounts to a practical nullification in respect to such corporations of the supreme law of the land, and places important constitutional rights at the mercy of the several states.

In the state from which this case comes, after a full review of the decisions of this court, the same conclusion was reached in *Com.* v. *East Tennessee Coal Co.* 97 Ky. 238, 30 S. W. 608.

The same view of the effect of *Barron* v. *Burnside* has been accepted by the text writers. 2 Cook, Corp. 3d ed. 1675; Moon, Removal of Causes, 1901, §§ 30 and 31, and notes in which the author expresses the view that the *Doyle Case* has become obsolete and is practically overruled by *Barron* v. *Burnside* and subsequent cases in this court (§ 30, note 3); Curtis, Jurisdiction of U. S. Courts, 2d ed. by Merwin, 187.

The principles announced in *Doyle* v. *Continental Ins. Co.* and *Barron* v. *Burnside* are directly opposed the one to the other, and cannot both prevail. The former case was decided upon the principle that, as the state has the full right to exclude a foreign corporation, it may do so for any reason or for no reason. The latter case qualified this doctrine with the limitation that the exclusion may not be solely because the corporation was exercising, or would not yield the right to avail itself of, a privilege created and protected by the Federal Constitution.

After such repeated affirmance and general acceptance, we do not think the doctrine announced in *Barron* v. *Burnside* ought to be qualified or detracted from, and certainly it seems to us that the court should not return to the rejected doctrine of the *Doyle Case.*

If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from [267]*the state upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation, "You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws;" and so on through the category of rights secured by the Constitution, and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the *Doyle Case,* destroyed and overthrown, as we think, in *Barron* v. *Burnside,* which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and state, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution.

In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a state is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation *may be excluded solely because it exercises [268]a right secured by the Federal Constitution. For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exer-

cising a privilege belonging to the state, and, as we have pointed out, the state might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. Furthermore, it is stated in the prevailing opinion that while the state may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the state, because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional.

We think the distinction is without a substantial difference, and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the state because it will not consent to surrender the right given it under the Federal Constitution. While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

In the cases decided in this court subsequently to *Barron* v. *Burnside*, while the general proposition is affirmed that a state may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the state may exclude or expel such
[269] corporations because *they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution. The Federal authority gives no right to deny to the citizens of a state access to the local courts of a state. For wise purposes the Federal Constitution has provided courts for citizens of different states, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no state enactment can lawfully abridge this right or destroy it, directly or indirectly, by affixing heavy penalties to its assertion by those lawfully entitled to its enjoyment. We think *Barron* v. *Burnside* was intended to overrule the contrary declaration, which is found only in the *Doyle Case*, which is inconsistent with or opposed to every other declaration directly upon the subject in the opinions of this court.

We are of opinion that the statute in question, so far as it authorizes the cancelation of a license given by a state to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a state court removed to the Federal court for trial, is unconstitutional and void.

For the reasons stated we are constrained to dissent.

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*GILA BEND RESERVOIR & IRRIGATION COMPANY, *Appt.*, [270]
v.
GILA WATER COMPANY.

(See S. C. Reporter's ed. 270–274.)

Judgments—validity—order for sale by receiver appointed in another action.—A judgment for the sale of property by a receiver appointed in an earlier action is not invalid for want of jurisdiction over the property because there was no formal order extending the receivership to the suit in which such judgment was rendered, where all the parties to the first suit were likewise parties to the second one, and both the court and the parties treated the causes as in fact consolidated, and the receivership as extended.

[No. 226.]

Argued and submitted April 12, 16, 1906. Decided May 14, 1906.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Maricopa County, in that territory, in favor of defendant in a suit to quiet title. *Affirmed.*

See same case below (Ariz.) 76 Pac. 990.

The facts are stated in the opinion.

Mr. **William C. Prentiss** argued the cause, and, with *Mr. Joseph K. McCammon*, filed a brief for appellant:

Suit No. 996 was a proceeding *in rem*.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135.

The proceedings in suit No. 1996 being *in rem*, it was essential to jurisdiction in the district court that the property be drawn into the hands of the court in that suit by actual seizure or some action equivalent thereto.

Heidritter v. *Elizabeth Oil Cloth Co. supra; Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. ed. 931. See also *Rose* v. *Himely*, 4 Cranch, 268, 269, 2 L. ed. 617.

Service of process upon the owner and parties interested does not create jurisdiction in such case, but is merely a step required by the constitutional guaranty of due process of law by way of giving opportunity to be heard.

Windsor v. *McVeigh*, 93 U. S. 279, 23 L. ed. 916. See also *Andrews* v. *Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237.

The property being already in possession of the receiver in suit No. 1728, it was a legal impossibility for the court to acquire jurisdiction over it in an independent suit, to which the receiver was not made a party.

Re Tyler, 149 U. S. 164, 181, 37 L. ed. 689, 694, 13 Sup. Ct. Rep. 785; *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019. See also *Hitz* v. *Jenks*, 185 U. S. 155, 46 L. ed. 851, 22 Sup. Ct. Rep. 598; *Davis* v. *Gray*, 16 Wall. 203, 217, 218, 21 L. ed. 447, 452; *Cohen* v. *Solomon*, 66 Fed. 411; *American Loan & T. Co.* v. *Central Vermont R. Co.* 86 Fed. 392.

This rule applies to suits in the same court.

Guaranty Trust & S. D. Co. v. *Green Cove Springs & M. R. Co.* 139 U. S. 137, 146, 35 L. ed. 116, 119, 11 Sup. Ct. Rep. 512; *American Loan & T. Co.* v. *Central Vermont R. Co.* 86 Fed. 390.

It being disclosed in the bill in No. 1996 that the property was in the hands of the receiver in No. 1728, such receiver was the only necessary party defendant, and the bill should have been dismissed for want of proper parties.

Southern Exp. Co. v. *Western North Carolina R. Co.* 99 U. S. 191, 198, 25 L. ed. 319, 320.

Suits can be consolidated only by a formal order.

Merrill v. *Petty*, 16 Wall. 346, 347, 21 L. ed. 501.

No presumption will be allowed contrary to the facts stated in the record.

Settlemier v. *Sullivan*, 97 U. S. 449, 24 L. ed. 1111; *Galpin* v. *Page*, 18 Wall. 366, 367, 21 L. ed. 962, 963; *Thompson* v. *Whitman*, 18 Wall. 466, 21 L. ed. 900; *Boswell* v. *Otis*, 9 How. 350, 13 L. ed. 170; *Robinson* v. *Fair*, 128 U. S. 87, 32 L. ed. 423, 9 Sup. Ct. Rep. 30.

The appellee cannot claim the benefit of a purchase at a sale made under color of judicial authority, but was put upon notice as to the authority of the receiver.

Koontz v. *Northern Bank*, 83 U. S. 202, 21 L. ed. 468; *Rinn* v. *Astor F. Ins. Co.* 59 N. Y. 143; *Re Mallory*, 18 N. Y. S. R. 499, 2 N. Y. Supp. 437; *Merritt* v. *Sparling*, 88 Hun, 491, 34 N. Y. Supp. 882; *Rogers* v. *Corning*, 44 Barb. 229; *Milwaukee & M. R. Co.* v. *Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co.* v. *Soutter*) 2 Wall. 609, 17 L. ed. 886; *Bethel* v. *Bethel*, 6 Bush, 65, 99 Am. Dec. 655; *Williamson* v. *Berry*, 8 How. 495, 542, 12 L. ed. 1170, 1190; *Webster* v. *Reid*, 11 How. 437, 13 L. ed. 761; *Mulvey* v. *Carpenter*, 78 Ill. 580; *Morris* v. *Hogle*, 37 Ill. 150, 87 Am. Dec. 243.

Mr. **C. F. Ainsworth** submitted the cause for appellee.

Mr. Justice **McKenna** delivered the opinion of the court:

The appellant and appellee are Arizona corporations. The former brought this suit in the district court of Maricopa county to quiet title to certain land and water rights against the appellee and the Peoria Canal Company, Valley Canal & Land Company, also Arizona corporations, and against the Arizona Construction Company, an Illinois corporation, and against certain persons, one of whom was a resident of the territory, *and the others nonresidents. The [271] complaint contained the usual allegations. All the defendants but the Gila Water Company, appellee herein, disclaimed title. The appellee answered denying appellant's title, and, in a cross complaint, set up title in itself. To the cross complaint appellant answered that appellee claimed title "under and by virtue of a certain judgment and decree of this court (district court of Maricopa county), rendered and entered November 20, 1894, and certain pretended receiver's deed or deeds made, executed, and delivered under and by authority of said judgment and decree and proceedings thereunder, or a certain deed or deeds of some person or persons deriving title under, through, and by virtue of said receiver's deed or deeds." And it was alleged that said judgment and the proceedings thereunder were void in that (1) the action in which the judgment was rendered was a proceeding *in rem* and that the court never acquired jurisdiction over the property or any part thereof; (2) that the judgment was rendered July 21, 1894, and appellant duly appealed from said judgment to the supreme court of the territory, and the district court thereby lost jurisdiction of the action, and yet, on the 20th of November, 1894, the district court entered a pretended amendment to the judgment and decree, which was pretended to be in lieu of the original decree of July 21, and that the only right and title appellee has to the property is under this "pretended, amended, and void judgment and decree."

It was further alleged that the receiver was duly appointed in another action and that he took possession of the property, and that during the time appellee claims

to have obtained title to any of said property the same and the whole thereof was in the custody of the court and in the possession of the receiver, and that prior to the commencement of the suit at bar the court and receiver ceased to have any custody or possession of the property.

The trial court found that the appellee was the owner in fee simple of the property, and adjudged that the claim of the [272] appellant *and all of the defendants in the question to be "invalid and groundless." The decree was affirmed by the supreme court.

The findings of fact of the supreme court are very general. They are only that the appellant had not, at the commencement of the action, any cause of action in respect to the property, and has not now any right, title, or interest therein; that the appellee was the owner in fee simple and in possession thereof.

The special rulings of the trial court, which were assigned as errors, and affirmed by the supreme court, appear in the opinion of the latter court and in the bill of exceptions. These rulings were made upon the introduction in evidence by the appellee to sustain its title of certain judgments rendered by the district court of Maricopa county. The facts as to these judgments are stated by the supreme court as follows:

"It appears that in the district court of Maricopa county, in the year 1893 the appellant brought suit against the Peoria Canal Company and the Arizona Construction Company, and applied for a receiver therein to take possession of the property in controversy in this action. Thereafter the court appointed one James McMillan as such receiver, who took possession of the property, and by leave of the court issued a large amount of receiver's certificates to meet the expense of necessary improvements upon the property. This suit was docketed as No. 1728. Pending this action, one W. H. Linn, and others, brought suit in the district court of Maricopa county, against the appellant and other defendants, alleging in their complaint, among other facts, the pendency of action No. 1728, the appointment of the receiver, and the issuing of the receiver's certificates, and praying, among other things, that the assets of the Gila Bend Reservoir & Irrigation Company be marshaled and that the receiver take possession of and be directed to sell the property of the said company and from the proceeds of said sale pay the debts adjudged due against it.

[273] *"All the parties to this suit, including the Gila Bend Reservoir & Irrigation Company, appeared and answered. A trial was had and judgment was rendered, in which the receiver was directed to sell the property. The record further discloses that a sale was made under this judgment by the receiver, which was affirmed by the court, and a deed executed by the said receiver to the purchaser, who was one of the grantors of the appellee. This judgment was appealed from to this court, where it was affirmed, and subsequently an appeal was taken by the appellant to the Supreme Court of the United States, where the judgment of this court was affirmed. 171 U. S. 685, 18 Sup. Ct. Rep. 942. The latter suit in the court below was docketed as No. 1996. The objection which the appellant urged in the court below to the judgment in cause No. 1996 was that it appears upon the face of the record that the judgment, ordering a sale of the premises by the receiver, was without jurisdiction and void for the reason that no order was made by the court extending the receivership in suit No. 1728 to cause No. 1996. In passing upon this objection the trial court pointed out that all the parties in cause No. 1728 were parties in cause No. 1996; that, when the latter suit was brought, the property was in the hands of the court, through its receiver, and that after the bringing of cause No. 1996 the record disclosed that the court and all the parties, including the Gila Bend Reservoir & Irrigation Company, treated the property in possession of the receiver appointed in cause No. 1728 as though it had been placed in his possession as a receiver appointed in cause No. 1996, and, further, that orders were made by the court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits, and no order was in terms made extending the receivership to the second suit, No. 1996, the receivership was in fact extended to the second suit, and that the court, by its action, ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit.

*"The view thus taken is amply justified [274] by an inspection of the record in the two suits, and upon this ground alone the action of the trial court in admitting the judgment was correct." [(Ariz.) 76 Pac. 990.]

We concur in this conclusion. The objection made by the appellant to it is, as we have indicated, that suit No. 1996 was a proceeding *in rem*, and that the court did not acquire jurisdiction of the property, for the reason that it was in the custody of the court in suit No. 1728, and that the court in the latter case did not extend the receivership to No. 1996 nor consolidate

the suits, and, therefore, had no power to order the sale of the property by the receiver in No. 1728.

This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action. It is clear from the record that the district court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases in fact as consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996. The provision of the decree entered July 21, 1894 (and of the amended decree of November 20, 1894), is as follows:

"It is further ordered, adjudged, and decreed by the court that James McMillan, the receiver heretofore appointed by this court, and now in possession of said premises under the orders of this court, proceed to advertise and sell said property and distribute the proceeds as directed in the decree."

This decree was affirmed by the supreme court of the territory and afterwards by this court. The assignments of error, therefore, are without foundation.

Decree affirmed.

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[275] *THOMAS H. HULBERT, *Plff. in Err.*,

v.

CITY OF CHICAGO.

(See S. C. Reporter's ed. 275–281.)

1. **Error to state court—Federal question—how raised.**—The mere claim of a right under the Constitution of the United States in the objections filed to the confirmation of an assessment for a public improvement, which was never afterwards brought to the attention of the trial court or the supreme court of the state, is not sufficient to sustain a writ of error from the Supreme Court of the United States to the state court.
2. **Error to state court—Federal question—how raised.**—Statements in the writ of error and the petition for citation are insufficient to show that a Federal question was raised and decided by a state court which will sustain a writ of error from the Supreme Court of the United States.
3. **Error to state court—Federal question—how raised.**—The fact that the chief justice of the highest state court allowed a writ of error from the Supreme Court of the United States does not help out the failure of the record to show that a Federal question was raised and decided.
4. **Error to state court—Federal question—how raised.**—Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned, or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis for a writ of error from the Supreme Court of the United States.

[No. 248.]

Submitted April 25, 1906. Decided May 14, 1906.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the County Court of Cook County, in that state, confirming an assessment for a public improvement. *Dismissed* for want of jurisdiction.

See same case below, 213 Ill. 452, 72 N. E. 1097.

The facts are stated in the opinion.

Mr. **George W. Wilbur** submitted the cause for plaintiff in error:

The question of jurisdiction is to be found by an inspection of the record; and if such inspection shows that a Federal question must, of necessity, have been before the appellate court for determination, although no reference is made to such question in the finding of the appellate court, then a Federal question is involved, and this court has jurisdiction.

Murray v. *Charleston*, 96 U. S. 432, 440, 24 L. ed. 760, 761; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 578, 28 L. ed. 1084, 1086, 5 Sup. Ct. Rep. 681; *Furman* v. *Nichol* (*Green* v. *Nichol*) 8 Wall. 44, 55, 19 L. ed. 370, 375; *Murdock* v. *Memphis*, 20 Wall. 590, 633, 22 L. ed. 429, 443; *Davidson* v. *New Orleans*, 96 U. S. 97, 102, 24 L.

NOTE.—*On the general subject of writs of error from United States Supreme Court to state courts*—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L.R.A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri *ex rel.* Hill v. Dockery, 63 L.R.A. 571.

ed. 616, 618; *Spencer* v. *Merchant*, 125 U. S. 345, 352, 31 L. ed. 763, 766, 8 Sup. Ct. Rep. 921.

Mr. **James Hamilton Lewis** submitted the cause for defendant in error. *Messrs. Charles H. Mitchell* and *Frank Johnston, Jr.*, were on the brief:

In order to give this court the power to re-examine the judgment of the state court, the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Sayward* v. *Denny*, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; *Levy* v. *Superior Court*, 167 U. S. 175, 177, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769; *Chicago & N. W. R. Co.* v. *Chicago*, 164 U. S. 454, 457, 41 L. ed. 511, 512, 17 Sup. Ct. Rep. 129; *Ansbro* v. *United States*, 159 U. S. 695, 698, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; *Hoyt* v. *Shelden* (*Hoyt* v. *Thompson*) 1 Black, 518, 521, 17 L. ed. 65, 66; *Keokuk & H. Bridge Co.* v. *Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

Although the state court may have decided a Federal question, it must appear that the particular Federal question sought to be raised here was also decided.

Capital City Dairy Co. v. *Ohio*, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

The fact that the opinion of the state court makes no reference to the particular question sought to be presented in this court may be considered in determining whether the question was called to the attention of the state court.

F. G. Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 653, 655, 41 L. ed. 1149, 1151, 1152, 17 Sup. Ct. Rep. 709; *Kipley* v. *Illinois*, 170 U. S. 182, 186, 42 L. ed. 998, 1001, 18 Sup. Ct. Rep. 550; *Chicago & N. W. R. Co.* v. *Chicago, supra; Michigan Sugar Co.* v. *Michigan* (*Michigan Sugar Co.* v. *Dix*) 185 U. S. 112, 113, 46 L. ed. 829, 830, 22 Sup. Ct. Rep. 581; *New York C. & H. R. R. Co.* v. *New York*, 186 U. S. 269, 273, 46 L. ed. 1158, 1160, 22 Sup. Ct. Rep. 916.

This court will recognize and be governed by the rule of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court.

Erie R. Co. v. *Purdy*, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605.

According to the well-settled rule of practice in the supreme court of Illinois, every error must be specifically pointed out in the assignments of error, and an error not assigned is not open to review.

Berry v. *Chicago*, 192 Ill. 154, 61 N. E. 498; *Skakel v. People*, 188 Ill. 291, 58 N. E. 1003; *Gibler* v. *Mattoon*, 167 Ill. 18, 47 N. E. 319.

The very error relied upon should be definitely and clearly presented, and the court should not be compelled to go beyond the assignment itself to learn what the question is.

Stanley v. *Chicago Trust & Sav. Bank*, 61 Ill. App. 257.

Errors assigned, but not noticed or relied on in the brief and argument of counsel, will be regarded as waived or abandoned.

Lewis v. *King*, 180 Ill. 259, 54 N. E. 330; *Dorn* v. *Ross*, 177 Ill. 225, 52 N. E. 321; *Keyes* v. *Kimmel*, 186 Ill. 109, 57 N. E. 851; *Harris* v. *Shebek*, 151 Ill. 287, 37 N. E. 1015.

Mr. Justice **McKenna** delivered the opinion of the court:

Error to the judgment of the supreme court of the state of Illinois affirming a judgment of the county court of Cook county, confirming an assessment to defray the cost of paving a street in the city of Chicago.

The proceeding was commenced by a petition filed by the city in the county court of Cook county, in accordance with law of the state. The petition recited an ordinance of the city providing for the improvement of the street, and prayed "that steps be taken to levy a special assessment for said improvements in accordance with the provisions of said ordinance, and in the manner prescribed by law."

An order was made in accordance with the prayer. An assessment and report thereon were duly made with an assessment roll attached, which exhibited the property of plaintiff in error as assessed and the amount for which it was assessed.

In pursuance of notice given to all parties to file objections to the confirming of the assessment roll, plaintiff in error filed objections thereto. Among his objections were the following:

"Said act concerning local improvements, passed June 14, 1897, and all amendments thereto, are not only contrary to the Constitution of Illinois, but they are also contrary to the Constitution of the United States and to the 14th Amendment thereof.

"Said act concerning local improvements, said ordinance, which is the basis of the present proceedings, and all documents and orders relating thereto, are contrary to the

Constitution of the United States, and to the 14th Amendment thereof, because such act, ordinance, document, and orders seek to deprive objector of property without due process of law.

[279] *"Said ordinance and proceedings are in other respects illegal, unconstitutional, and void.

"The proceedings herein and said act are contrary to the Constitution of the United States, and to the 14th Amendment thereof, because the petitioner herein, under and by virtue of said act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said act are also contrary to the Constitution of the United States, and to the 14th Amendment thereof, for the reasons set forth in the several foregoing objections."

The case came on for hearing before the court, the right of a jury on the question of benefits having been expressly waived.

Petitioner (defendant in error) introduced the petition, assessment roll, and notice. They were received in evidence, though objected to as not complying with or meeting the requirements of the statute.

Plaintiff in error, to sustain the issues "on the question of the legal objections," offered in evidence the various resolutions and proceedings before the board of local improvements. They are set out in the record, but it is not necessary to quote them. No other evidence was offered. The court overruled the objections.

On the question of benefits the same evidence was offered by the respective parties. Plaintiff in error objected to the documents offered by the city, on the ground that the ordinance was illegal and void, because the first resolution of the board of local improvements in regard to assessments did not contain an itemized estimate of the cost of the improvements, made by the engineer, in the manner and form required by the statute.

The objection was overruled and the assessment confirmed, with some modification, not necessary to notice. The judgment was affirmed by the supreme court of the state.

The bill of exceptions shows that plaintiff in error did not bring to the attention of the trial court that the act of the state under which the assessment was made, or

[280] any of the proceedings, *were contrary to the 14th Amendment to the Constitution of the United States, nor did he assign as error on appeal to the supreme court that the rulings of the trial court or its judgments infringed that amendment.

All the questions submitted to the supreme court and all the questions passed on by it depended upon the construction of the statute or the compliance of the proceedings with the statute, except that it was contended that the sections of the act which provided for the division of the assessment into instalments and the issue of bonds to anticipate the payment of the instalments, to bear 5 per cent interest, was unconstitutional, in that the legislature had no power to fix the rate of interest, and that by so doing a lower rate of interest was prevented, and plaintiff in error thereby deprived of his property without due process of law. The court decided against both contentions, holding that "the legislature had the right to fix the rate of interest which said instalments and bonds when issued should bear," and §§ 42 and 86 of the local improvement act "are not in conflict with the Constitution." That is, the Constitution of the state.

We do not think that the plaintiff in error complied with § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), in setting up a right under the Constitution of the United States. The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the supreme court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States.

It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the supreme court of the state of Illinois decided against such rights and privileges, and, it is further urged, that the chief justice of the court allowed the writ of error. This is not sufficient. *Marvin* v. *Trout*, 199 U. S. 212, 223, *ante*, 157, 161, 26 Sup. Ct. Rep. 31.

*Nor was a right under the Constitution [281] of the United States necessarily involved in the determination of the cause. And the supreme court was justified by its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court, an error not assigned is not open to review. *Berry* v. *Chicago*, 192 Ill. 154, 155, 61 N. E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. *Keyes* v. *Kimmel*, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605. It follows that this court has not jurisdiction of this writ of error. *Oxley Stave Co.* v. *Butler*

County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

Writ dismissed.

PETER PEARSON and Enoch Pearson, *Petitioners*,

v.

WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York.

(See S. C. Reporter's ed. 281–286.)

Alien immigrants—deportation—second hearing.— The second hearing before a board of special inquiry, as a result of which a deportation of certain British aliens was ordered, could be directed by the Secretary of Commerce and Labor, acting under the authority conferred upon him by the act of March 3, 1903 (32 Stat. at L. 1213, U. S. Comp. Stat. Supp. 1905, p. 284), § 21. to deport, within three years after landing or entry, an alien found to be unlawfully within the United States, although the first decision of the board of inquiry, at the time of landing, was unanimously in favor of the immigrants, and such decision is, by the express provisions of § 25, declared to be final.

[No. 237.]

Argued April 19, 20, 1906. Decided May 14, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed an order of the Circuit Court for the Southern District of New York, discharging, on habeas corpus, certain alien immigrants whose deportation was ordered as a result of a second hearing before a board of special inquiry. *Affirmed.*

See same case below, 136 Fed. 734.

The facts are stated in the opinion.

Mr. **Eugene Treadwell** argued the cause and filed a brief for petitioners:

Where the language of a statute is not ambiguous, its plain import must be followed, and there is no room for construction.

United States v. *Bowen*, 100 U. S. 508, 513, 25 L. ed. 631, 632; *Tompkins* v. *Hunter*, 149 N. Y. 117, 43 N. E. 532.

The rule of construction to be followed with regard to the present act is the same as with regard to the original act of February 26, 1885.

In construing these statutes we are to get at the spirit and meaning of the act, regarding the evil which it is designed to remedy, and looking at the situation as it existed, including the interpretation by the courts of the previous statutes as they were known to Congress at the time of the passage of the present act.

Church of the Holy Trinity v. *United States*, 143 U. S. 457, 463, 36 L. ed. 227, 229, 12 Sup. Ct. Rep. 511; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 657, 42 L. ed. 890, 894, 18 Sup. Ct. Rep. 456; *Re Eilis*, 124 Fed. 637.

In all of these cases hitherto arising under the contract labor laws the court held that, under the terms of the statute, the decision of the immigration officer was only final "when adverse to the alien."

Lem Moon Sing v. *United States*, 158 U. S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967; *Li Sing* v. *United States*, 180 U. S. 490, 45 L. ed. 636, 21 Sup. Ct. Rep. 449; *United States* v. *Lau Sun Ho*, 85 Fed. 422; *Chain Chio Fong* v. *United States*, 66 C. C. A. 220, 133 Fed. 154; *Japanese Immigrant Case* (*Yamataya* v. *Fisher*) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611.

Material change of expression imports change of intention.

26 Am. & Eng. Enc. Law, 2d ed. p. 652; *United States* v. *Bashaw*, 1 C. C. A. 653, 4 U. S. App. 360, 50 Fed. 749.

A change made after judicial interpretation of the previous enactment infers that the interpretation was before the legislature, and the change is presumed to have been made to obviate that interpretation.

United States v. *Mooney*, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304; *United States* v. *Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; *United States* v. *Le Bris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *Crawford* v. *Burke*, 195 U. S. 176, 190, 49 L. ed. 147, 152, 25 Sup. Ct. Rep. 9.

Terms which have acquired, through judicial interpretation, a well-understood legislative meaning, are presumed to be used by the legislature in the sense determined by the authoritative decisions.

The Abbottsford (*The Abbottsford* v. *Johnson*) 98 U. S. 440, 25 L. ed. 168; *Keppner* v. *United States*, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797; *H. Hackfeld & Co.* v. *United States*, 197 U. S. 451, 49 L. ed. 830, 25 Sup. Ct. Rep. 456; *Japanese Immigrant Case* (*Yamataya* v. *Fisher*) 189 U. S. 98, 47 L. ed. 724, 23 Sup. Ct. Rep. 611; *United States* v. *Yamasaka*, 40 C. C. A. 454, 100 Fed. 405; *Re Li Sing*, 30 C. C. A. 451, 58 U. S. App. 1, 86 Fed. 896.

NOTE.—*On the importation of contract labor* —see note to United States v. Parsons, 66 C. C. A. 133.

The present case presents an entirely different aspect, and the statutes now in force are significantly different from those involved under the earlier decisions.

A construction of the statute which would permit the Secretary, under warrant proceedings, to review proceedings already had under §§ 24, 25 of the act of March 3d, 1903, resulting unanimously in favor of the admission of the aliens, would make the act conflict with the recognized principles of justice, and, therefore, is not to be adopted.

Japanese Immigrant Case (*Yamataya* v. *Fisher*) 189 U. S. 99, 100, 47 L. ed. 725, 726, 23 Sup. Ct. Rep. 611.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.

Lau Ow Bew v. *United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; *Henderson* v. *New York* (*Henderson* v. *Wickham*) 92 U. S. 259, 23 L. ed. 543; *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

While the courts have held that they would not consider the question of the sufficiency of the evidence upon which the immigration officials have decided or issued their warrant, nevertheless, as the law required some evidence, the courts have always reserved the right to hold as matter of law that there was no evidence on which the conclusion could be rested or action based.

United States ex rel. Turner v. *Williams*, 194 U. S. 279, 284, 48 L. ed. 979, 981, 24 Sup. Ct. Rep. 719.

Messrs. Eugene Treadwell and *Edward Lauterbach* also filed a brief for petitioners.

Assistant Attorney General **Robb** argued the cause and filed a brief for respondent:

Repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them.

United States v. *Greathouse*, 166 U. S. 601, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701.

The finality of the board's decision upon right to land, and right of Secretary to deport excluded classes, allowed by board to land through fraud or mistake, are consistent.

United States v. *Lau Sun Ho*, 85 Fed. 422; *Chain Chio Fong* v. *United States*, 66 C. C. A. 220, 133 Fed. 154.

Congress has power to authorize the Secretary to deport aliens allowed by board to land.

Fong Yue Ting v. *United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here by certiorari. 198 U. S. 585, 49 L. ed. 1174, 25 Sup. Ct. Rep. 805. It is a writ of habeas corpus, addressed to the Secretary of Commerce and Labor and to the commissioner of immigration of the port of New York, on which the circuit court made an order discharging the petitioners, but the circuit court of appeals reversed the order by a divided court. 136 Fed. 734. The return to the writ discloses that the petitioners are British aliens, that they arrived in New York on February 1, 1904, were detained for examination by a board of special inquiry, were examined, and were allowed to land. The return further shows that afterwards, in March, they were arrested by order of the said Secretary, and after another hearing before a board of special inquiry were ordered to be returned to England, as being in this country in violation of the acts of Congress touching the matter. The only question is whether the Secretary had the right to direct the second hearing and to make the order of deportation under § 21 of the act of March 3, 1903, chap. 1012, when there had been an inquiry at the time of the petitioners' landing, and a decision in their favor under § 25, 32 Stat. at L. 1218, 1220 (U. S. Comp. Stat. 1905, Supp. pp. 284, 287). It is proper to add, as giving more dramatic force to the contention of the petitioners, that the proceedings upon both inquiries are incorporated into the return by reference, and that they appear to have been before the same persons, upon the same question, namely, whether the petitioners came to this country under contract to perform labor, contrary to the statutes of the United States. Act of February 26, 1885, chap. 164 (23 Stat. at L. 332, U. S. Comp. Stat. 1901, p. 1290); February 23, 1887, chap. 220 (24 Stat. at L. 414); March 3, 1891, chap. 551 (26 Stat. at L. 1084, U. S. Comp. Stat. 1901, p. 1294); March 3, 1903, chap. 1012 (32 Stat. at L. 1213, U. S. Comp. Stat. Supp. 1905, p. 274). See also acts of October *19, 1888, chap. 1210 (25 Stat. at L. [283] 566, U. S. Comp. Stat. 1901, p. 1294); March 3, 1893, chap. 206 (27 Stat. at L. 569, U. S. Comp. Stat. 1901, p. 1300); August 18, 1894, chap. 301 (28 Stat. at L. 390, U. S. Comp. Stat. 1901, p. 1303).

It is provided by § 24 of the above-mentioned act of 1903 that "every alien who may not appear to the examining immigrant in-

spector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry." The following section, § 25, directs the appointment of such boards as shall be necessary for the prompt determination of cases of aliens detained, to consist of three members, to be selected from the immigrant officials in the service. "Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported." They are to keep records, "and the decision of any two members of a board shall prevail and be final," subject to appeal by the alien or a dissenting member "through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration, to the Secretary of the Treasury" (now the Secretary of Commerce and Labor, act of February 14, 1903, chap. 552, §§ 4, 7, 10 [32 Stat. at L. 826, 828, 829, U. S. Comp. Stat. Supp. 1905, pp. 65, 69, 70]), "whose decision shall then be final." In this case the first decision of the board was unanimous, and the petitioners contend that it was final by the very words of the act.

On the other hand, it is provided by § 21 "that in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came," with details as to the method. It is insisted by the government that this power is not qualified or cut down by § 25. Of course, if the government is right on the construction of the act, there is no question of the validity of the provision. By that construction the finality given to the decision of the board is only a finality consistent with and subject to § 21, as, conversely, by that contended for on the other side, the power [284] of the Secretary is subject to § 25. *On the former view the United States admits aliens conditionally, and preserves that condition notwithstanding a preliminary decision in their favor by a board which it provides. The authority of Congress to impose such conditions hardly was disputed and is not open to doubt. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 543, 39 L. ed. 1082, 1084, 15 Sup. Ct. Rep. 967; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Japanese Immigrant Case*, 189 U. S. 86, 97, 99, 47 L. ed. 721, 724, 725, 23 Sup. Ct. Rep. 611. The only question is what it has done.

Some meaning must be found for § 21, no less than for § 25. For the petitioners it is said that § 21 is satisfied by confining the power of the Secretary to cases where a board of special inquiry has not acted. But this would limit his action to a very narrow scope, since the act provides for such a board in every case where the alien does not appear to the inspector "to be clearly and beyond a doubt entitled to land." Section 24, quoted above. Again, it would defeat, in great measure, the policy of the original act of October 19, 1888, chap. 1210, § 1 (25 Stat. at L. 566, U. S. Comp. Stat. 1901, p. 1294), (see also act of March 3, 1891, chap. 551, § 11 [26 Stat. at L. 1086, U. S. Comp. Stat. 1901, p. 1299]), which obviously was to give a chance for fuller investigation than is possible at the moment of landing, when any inquiry necessarily must be of a very summary sort. See *Japanese Immigrant Case*, 189 U. S. 86, 99, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611. Yet this policy is emphasized and reinforced by changing the period of probation from one year to three, while in other respects § 21 follows almost literally the words of the earlier act. The petitioners' construction also would empty the requirement in § 20 that "any alien who shall come into the United States in violation of law" shall be deported, of the greater part of its natural meaning, since it would limit it to such aliens only as appeared to the inspector to be entitled beyond a doubt to land, and for that reason escaped a board of special inquiry before they came in.

Turning now to § 25, that section seems to us to disclose additional reasons on the government's side. The board is an instrument of the executive power, not a court. It is made up, as we have mentioned, of the immigrant officials in the service, [285] subordinates of the commissioner of immigration, whose duties are declared to be administrative by § 23. Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense. *Nishimura Ekiu* v. *United States*, *supra*; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305, 46 L. ed. 917, 921, 22 Sup. Ct. Rep. 686; *Japanese Immigrant Case*, 189 U. S. 86, 98, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611; *United States* v. *Ju Toy*, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644. The decisions necessarily are made, as we have said, in a summary way, in order to reach the "prompt determination" declared by § 25 to be an object. The board has no power to compel witnesses to attend, but, as was said by the circuit

court of appeals, must decide upon such evidence as is at hand or is readily accessible. These are considerations against the likelihood that Congress meant such decisions to be binding upon the Secretary of Commerce and Labor, the superior officer of the members of the board. On the other hand, there is a plain and sufficient meaning for the words making their decision final, and that is, that it shall be final where it is most likely to be questioned,—in the courts.

It is true that the decision hardly will be questioned in the courts except when it is against the right to land. In the earlier acts the decision of an inspector was made final in terms, only "when adverse to such right." Act of March 3, 1891, chap. 551, § 8 (26 Stat. at L. 1085, U. S. Comp. Stat. 1901, p. 1298). Since then, it is said, Congress has gone on increasing the importance of the decision, first, by providing a board in cases of doubt, with a limited appeal (act of March 3, 1893, chap. 206, § 5 [27 Stat. at L. 570, U. S. Comp. Stat. 1901, p. 1302]), and then by enlarging the right of appeal and extending the finality of the ultimate decision to every case, by the present § 25. But this appears to us to strain and even pervert the conclusions to be drawn from the change. There can be no doubt, we think, that the provision of the act of 1891 referred to the courts. The adverse decision of an inspector would be followed by deportation unless that should
[286] be stopped by habeas corpus. To *prevent a retrial in that event the provision was passed. It is not likely that the purpose was changed when the words "when adverse to such right" were dropped. More probably they were omitted simply as superfluous. If the question ever could arise in the courts, except when the alien was ordered to be deported, there was no reason why the decision to admit should not be given an effect equal to that of a decision to exclude. If the question could arise only in the former case, there was no need of the omitted clause. But the matter which was before the mind of Congress presumably was that which had been before it on the former occasion, which had been the subject of judicial discussion (*Lem Moon Sing* v. *United States, supra; Fok Yung Yo* v. *United States*, 185 U. S. 296, 304, 305, 46 L. ed. 917, 921, 22 Sup. Ct. Rep. 686), and which was not quite disposed of until the last term of this court (*United States* v. *Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644).

There was a suggestion at the argument that the decision of the Secretary was not warranted by the evidence. But if, for the purposes of decision, we assume that question to be open, we do not think that it needs discussion. We are of opinion that the decision of the Circuit Court of Appeals was right.

Judgment affirmed.

Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Peckham** dissent.

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*OSCAR D. HALSELL, Oscar G. Lee, Leonidas L. Land, Daniel P. Wright, and Jean H. Everest, *Appellants*, [287]

v.

WILLIAM C. RENFROW and R. J. Edwards.

(See S. C. Reporter's ed. 287–295.)

1. Appeal—from territorial court—review of facts.—On an appeal from a judgment of a territorial supreme court, affirming the judgment of the court of first instance, which, after hearing the evidence, found all the issues in a suit for specific performance in favor of the defendants, the Supreme Court of the United States will ordinarily, in reviewing the facts, confine itself to questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached, where such is the practice in the territorial court.

NOTE.—*As to review by the United States Supreme Court of territorial decisions*—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On the effect of the defendant's inability to specifically perform upon the jurisdiction of chancery over the suit—see note to Morgan v. Bell, 16 L.R.A. 614.

On the sufficiency of the memorandum to satisfy the statute of frauds—see notes to Louisville Asphalt Varnish Co. v. Lorick, 2 L.R.A. 212; Mentz v. Newwitter, 11 L.R.A. 97; Lewis v. Wood, 11 L.R.A. 143; and Barry v. Coombe, 7 L. ed. U. S. 295.

On part performance to justify specific performance of a verbal contract—see notes to Frame v. Frame, 5 L.R.A. 323, and De Soilar v. Hanscome, 39 L. ed. U. S. 956.

Undelivered deed as memorandum to satisfy statute of frauds.

A sharp conflict exists on the question whether an undelivered deed will satisfy the statute of frauds. Cases answering the question in the affirmative are Jenkins v. Harrison, 66 Ala. 345; Griel v. Lomax, 89 Ala. 420, 6 So. 741; Johnston v. Jones, 85 Ala. 286, 4 So. 748; MaGee v. Blankenship, 95 N. C. 563; Bowles v. Woodson, 6 Gratt, 78.

Some authorities take the same view where the deed supplies the terms of the contract, taken in connection with other writings. Thayer v. Luce, 22 Ohio St. 62; Work v. Cowhick, 81 Ill. 317.

Under this view an undelivered deed is not, of its own motion, and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of

2. Appeal—from territorial court—review of facts.—A judgment of the supreme court of the territory of Oklahoma, affirming the judgment of the court of first instance, which, after hearing the evidence, found the issues in a suit for specific performance in favor of the defendants, must be affirmed on appeal, where there is evidence which would sustain a finding in favor of the defendants upon an issue in the pleadings as to whether the property covered by the agreement had been conveyed to a third person for value and without notice.

3. Specific performance—effect of sale to third person.—Specific performance of an agreement to convey land cannot be decreed where the vendor has sold the property to one who is free from all equities.

4. Contracts—statute of frauds—memorandum.—The vendor's execution of the deed and his written communication to the vendees that he had deposited such deed in a bank, for delivery to them upon payment of the purchase price, does not satisfy the requirement of Okla. Laws 1897, chap. 8, § 4, that no contract relating to real estate "shall be valid until reduced to writing and subscribed by the parties thereto," even assuming that a memorandum to be gathered from connected documents may be sufficient, where the vendees were unwilling to accept the deed unless given a fuller and more undisputed possession than could be given at the time.

5. Specific performance — statute of frauds—part performance.—There has been no such part performance as justifies specific performance of an oral agreement to convey land where all the steps looking toward performance were disputed by a lessee in possession.

[No. 254.]

Submitted April 20, 1906. Decided May 14, 1906.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment for defendants in an action tried before a judge of that court for the specific performance of an agreement to convey land. *Affirmed.*

See same case below, 14 Okla. 674, 78 Pac. 118.

The facts are stated in the opinion.

Mr. **Jean H. Everest** submitted the cause for appellants. *Mr. Henry H. Howard* was on his brief:

A complete contract, binding under the Oklahoma statute, may be gathered from letters, writings, and telegrams between the parties, and relating to the subject-matter of the contract.

Beckwith v. *Talbot*, 95 U. S. 289, 24 L. ed. 496; *Ryan* v. *United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; *Bibb* v. *Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950.

A deed delivered only for purposes of examination, or if the previous memorandum of sale had been, for any reason, fatally defective under the statute of frauds, is competent for the purpose of showing the precise location of the property which the memorandum of sale was intended to embrace.

Ryan v. *United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

There is no such thing as a specialty or distinction between that and a simple contract under our law, and no statute of frauds requiring the consideration to be expressed in any case where the contract is required to be in writing, in view of which, a sufficient consideration being expressed, the true consideration may be shown by parol where the contract is sought to be avoided under the statute of frauds, as well as in any other case.

Kickland v. *Menasha Wooden Ware Co.* 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; *Williams* v. *Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Gass* v. *Hawkins*, Thomp. Tenn. Cas. 238; *Whitby* v. *Whitby*, 4 Sneed, 473; *Thornburg* v. *Masten*, 88 N. C. 293.

The statute requiring the authority of the agent to be in writing refers to the agent of the vendor, and not of the vendee. And the agent of the purchaser may make a good contract within the statute of frauds without disclosing his principal, and the true relation may be shown by parol.

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frauds, where it does not recite the terms of the contract. Kopp v. Reiter, 146 Ill. 437, 22 L.R.A. 273, 37 Am. St. Rep. 156, 34 N. E. 942.

The great weight of authority, however, is to the effect that an undelivered deed, whether or not the terms of the contract are fully recited in it, will not of itself constitute a memorandum of the contract which will satisfy the statute of frauds. Sands v. Thompson, 43 Ind. 18; Graham v. Thels, 47 Ga. 479; Cagger v. Lansing, 43 N. Y. 550, Reversing 57 Barb. 421; Allebach v. Godshalk, 116 Pa. 329, 19 W. N. C. 445, 9 Atl. 444; Hawkins v. Holmes, 1 P. Wms. 770; Sullivan v. O'Neal, 66 Tex. 433, 1 S. W. 185; Henderson v. Beard, 51 Ark. 483, 11 S. W. 766; Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162; Overman v. Kerr, 17 Iowa, 485; Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22; Comer v. Baldwin, 16 Minn. 172, Gil. 151; Parker v. Parker, 1 Gray, 409; Day v. Lacasse, 85 Me. 242, 27 Atl. 124; Thomas v. Sowards, 25 Wis. 631; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427; Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093; Freeland v. Charnley, 80 Ind. 132; Popp v. Swanke, 68 Wis. 364, 31 N. W. 916, and see note to Kopp v. Reiter, 22 L.R.A. 273, where these cases are discussed.

The more recent cases take the same view,—that an undelivered deed will not take the contract out of the statute of frauds. Schneider v. Vogler, 5 Neb. (Unof.) 246, 97 N. W. 1018; Wilson v. Winters, 108 Tenn. 398, 67 S. W. 800; Morrow v. Moore, 98 Me. 373, 99 Am. St. Rep. 410, 57 Atl. 81.

Tewksbury v. *Howard*, 138 Ind. 103, 37 N. E. 355; *Roehl* v. *Haumesser*, 114 Ind. 311, 15 N. E. 345; 2 Parsons, Contr. 7th ed. p. 680.

The conduct of the parties took the transaction out of the statute.

Anson, Contr. p. 82; *Allen* v. *Moore*, 30 Colo. 307, 70 Pac. 682; Lawson, Contr. § 475; *Overstreet* v. *Rice*, 4 Bush, 1, 96 Am. Dec. 279; *Ryan* v. *Dox*, 34 N. Y. 307, 90 Am. Dec. 696.

Messrs. **John W. Shartel** and **James R. Keaton** submitted the cause for appellees. *Mr. Frank Wells* was on the brief:

Either the act of April 7th, 1874, applies to Oklahoma so far as to require that, on appeal, a statement of the facts in the nature of a special verdict be made by the court below, and that, in the absence of such a statement, the evidence will be assumed to sustain the judgment, or this court stands in the position of the supreme court of the territory, without power to weigh the evidence.

Comstock v. *Eagleton*, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210; *Oklahoma City* v. *McMaster*, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; *Ellison* v. *Beannabia*, 4 Okla. 352, 46 Pac. 477; *Sanford* v. *Sanford*, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666.

If the latter be true, then a general finding, as there was in this case, in favor of the appellees, includes a finding of all the necessary facts to constitute the claim of the party in whose behalf the decree is rendered.

Gardenhire v. *Gardenhire*, 2 Okla. 484, 37 Pac. 813.

Specific performance is a matter of discretion, and the ruling of the trial court and the supreme court of the territory should not be interfered with unless there has been an abuse of discretion.

26 Am. & Eng. Enc. Law, 2d ed. p. 62; *McCabe* v. *Matthews*, 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190.

Two papers, to make one memorandum, must contain a reference in one of them to the other.

Reed, Stat. Fr. § 344; *Tice* v. *Freeman*, 30 Minn. 389, 15 N. W. 674; *Devine* v. *Warner*, 76 Conn. 229, 56 Atl. 563.

The check does not purport on its face to be given as part payment on any contract whatever. The greatest effect that can be given it is to treat it as a receipt given by Shields to Land for $500.00, without stating upon what account it was to be applied or for what purpose it was given.

Williams v. *Morris*, 95 U. S. 444, 24 L. ed. 360; *Fox* v. *Easter*, 10 Okla. 527, 62 Pac. 283.

The telegrams do not constitute a valid contract under the statute, for the reason that they do not name the purchaser.

Grafton v. *Cummings*, 99 U. S. 100, 25 L. ed. 366; *Breckinridge* v. *Crocker*, 78 Cal. 529, 21 Pac. 179; *Lewis* v. *Wood*, 153 Mass. 321, 11 L.R.A. 143, 26 N. E. 862.

The telegrams are invalid as a contract, because they do not describe in any way the land.

Ferguson v. *Blackwell*, 8 Okla. 489, 58 Pac. 647; *Preston* v. *Preston*, 95 U. S. 200, 24 L. ed. 494.

The deed executed by Renfrow to Halsell cannot be considered as a memorandum, under the statute of frauds, for the reason that it was never delivered, and was not executed in accordance with the contract appellants are attempting to enforce.

Day v. *Lacasse*, 85 Me. 242, 27 Atl. 124; *Steel* v. *Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Parker* v. *Parker*, 1 Gray, 409; *Comer* v. *Baldwin*, 16 Minn. 172, Gil. 151; *Johnson* v. *Brook*, 31 Miss. 17, 66 Am. Dec. 547; *Wier* v. *Batdorf*, 24 Neb. 83, 38 N. W. 22; *Cagger* v. *Lansing*, 43 N. Y. 550, Reversing 57 Barb. 421; *Allebach* v. *Godshalk*, 116 Pa. 329, 9 Atl. 444; *Morrow* v. *Moore*, 98 Me. 373, 99 Am. St. Rep. 410, 57 Atl. 81.

A contract is not signed by both parties, where a part of it is signed by one party and a different part is signed by the other.

McCormick v. *Bonfils*, 9 Okla. 605, 60 Pac. 296.

The obligation, if any, created by the writings, was not binding upon the appellants, and, therefore, the contract was invalid for want of mutuality.

Rutland Marble Co. v. *Ripley*, 10 Wall. 339, 19 L. ed. 955; 22 Am. & Eng. Enc. Law, p. 1019; *American Cotton Oil Co.* v. *Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Missouri, K. & T. R. Co.* v. *Bayley*, 60 Kan. 424, 56 Pac. 759.

If there was a written contract, appellants are not seeking to enforce it, but are trying to enforce a parol modification thereof.

Swain v. *Seamens*, 9 Wall. 254, 19 L. ed. 554.

There was never even an oral contract between the parties, the terms of which all agreed upon.

De Sollar v. *Hanscome*, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; *Krum* v. *Chamberlain*, 57 Neb. 220, 77 N. W. 665; *Minnesota Tribune Co.* v. *Associated Press*, 27 C. C. A. 542, 55 U. S. App. 136, 83 Fed. 350.

There was not a sufficient part performance to take the case out of the statute of frauds.

Pom. Spec. Perf. § 110; *Buttz* v. *Colton*, 6 Dak. 306, 43 N. W. 717; Fry, Spec. Perf. § 599; Pom. Contr. p. 139.

Edwards is an innocent purchaser, and therefore no specific performance can be had. 2 Sugden, Vend. & P. pp. 529, 551, 567.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for the specific performance of an alleged agreement to convey land, brought by the appellants against the appellees. The case was tried before a judge of the supreme court, and all the issues were found for the defendants. It then was taken before the full court, upon a transcript of the evidence and proceedings, and the judgment for the defendants was affirmed. 14 Okla. 674, 78 Pac. 118. Thereupon it was brought here by appeal.

It is assumed by the parties that the statement of facts prefixed to the opinion in the record is not the finding required by the act of April 7, 1874, chap. 80, § 2, 18 Stat. at L. 27, and we assume, for purposes of decision, that under the act of May 2, 1890, chap. 182, § 9, 26 Stat. at L. 81, 86, no such finding of facts was necessary. See *Oklahoma City* v. *McMaster*, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; *De la Rama* v. *De la Rama*, 201 U. S. 303, *ante*, 765, 26 Sup. Ct. Rep. 485. But when, as here, the court of first instance saw the wit-
[292] nesses, the full court of *the territory would deal with its finding as it would with the verdict of a jury, and would not go beyond questions of the admissibility of evidence, and whether there was any evidence to sustain the conclusion reached. *Ellison* v. *Beannabia*, 4 Okla. 347, 352, 46 Pac. 477. This court naturally would go no further unless in an unusual case. See *Sanford* v. *Sanford*, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666.

In view of these preliminaries, if any statement is necessary here when the judgment sets forth that the court "finds the issues in said cause in favor of the defendants," a single matter would be enough. It appears from the petition that after the defendant Renfrow, who was the owner of the land, had broken off his dealings with the plaintiffs, he conveyed the premises to the defendant Edwards. In Edwards's answer it is alleged that he purchased for value and without notice. The answer of Renfrow, though less specific, is to like effect. This was one of the issues in the cause which was found for the defendants, as, upon the evidence, it well might be. Therefore it is not necessary to go further in order to show that the judgment cannot be reversed. For, of course, specific performance is impossible where the party to the contract has sold the property to one who is free from all equities. However, as the full court put its affirmation of the judgment upon other grounds, we will not stop at this point.

The full court sustained the single judge on the ground that under the Oklahoma statute in force at the time no contract relating to real estate, other than for a lease for not over one year, "shall be valid until reduced to writing and subscribed by the parties thereto" (Laws of 1897, chap. 8, § 4), and that the statute had not been satisfied, or the case taken out of it by part performance. This statute, if taken literally and naturally, goes further than its English prototype. It is not satisfied by a memorandum made with a different intent, but requires an instrument drawn for the purpose of embodying the contract, and, in the case of an agreement to buy and sell, the subscription of both the buyer and seller, not merely that of "the party to be charged therewith." *McCormick* v. *Bonfils*, 9 Okla. 605, 618, 60 Pac. 296. *There[293] was no such instrument. We rather infer that the court below inclined toward the foregoing construction, but its discussion suggests that possibly a memorandum to be gathered from connected documents might be enough, and, therefore, again, we do not stop here.

The case for the plaintiffs is this: Shields, an agent without authority in writing, as required by the Oklahoma statute, made an agreement to sell the land for $10,000, and received a check for $500. Material additions were made to this check afterwards by the plaintiffs, so that it is a question, at least, whether it was admissible in evidence. Wilson's Stat. Okla. 1903, § 831. See *Bacon* v. *Hooker*, 177 Mass. 335, 337, 83 Am. St. Rep. 279, 58 N. E. 1078. The agent telegraphed to Renfrow that he had sold "the 40 acres, ten thousand cash, five hundred forfeit," and Renfrow telegraphed back confirming the sale. Later it turned out that a parcel of 50 by 100 feet had been conveyed to a third person. The parties met and it was agreed orally that $200 should be taken from the price for this. It was found further that one Springstine had or claimed possession of a part of the land under a lease. Renfrow was willing to convey and to take proceedings to turn Springstine out, but the plaintiffs refused to take a conveyance or to pay unless they were put into possession in thirty days. While matters stood thus, Renfrow signed a deed of the land, excepting the conveyed parcel, expressed to be in consideration of $10,000, sent it to a bank, and wrote to the plaintiff Halsell that he had done so, and had instructed the bank to deliver the deed upon his depositing $9,500 to Renfrow's credit and $500 to the credit of Shields within two days. This is the near-

est approach to a memorandum that was made. Halsell replied to Renfrow that he had made a tender of $9,300, and that this with the $200 agreed to be allowed for the strip conveyed and the $500 held by Shields would make the $10,000. He further stated that he had requested delivery of possession, which had been refused, and that Renfrow could not expect the money without
[294] *giving possession. Renfrow replied, stating that he had been willing to give such possession as he could, suggesting that he would have arranged in another way as to the $200, and that he regretted the termination of the matter. That was the end of the dealings, and directly afterwards the sale to Edwards took place.

As the plaintiffs were unwilling to accept the deed unless a fuller and more undisputed possession were given than could be given at the time, Renfrow was justified in selling to another who would take the risk or rely upon his covenants. In fact, Edwards paid $500 to get possession, in addition to Renfrow's price of $10,000. Moreover, the plaintiffs' unwillingness shows that apart from the differences as to consideration, there was no agreement with regard to an essential term of the conveyance when the deed was sent to the bank. There may have been a previous oral agreement, such as is suggested by the letter and deed, but before any memorandum was made, and while Renfrow still was free, the plaintiffs were informed that Renfrow would undertake to do only what he could, and what we have stated. So far, therefore, as the writings convey the notion of an absolute undertaking to convey a present clear possession, they do not express the modified bargain to which Renfrow was willing to assent. The delivery of the deed was authorized only upon payment of the price, and acceptance of it would have been an assent to Renfrow's terms. But there was no such assent. The plaintiffs say now that the differences were only trifles, not going to the essence of the contract, but they were enough at the time to make them unwilling to accept the deed.

In view of the findings of the trial judge it is difficult to see what is open as to part performance. As there was no agreement at the last stage, there can have been no part performance then. The few steps, if any, that were taken, while everything rested in parol, before the modification as to the amount of land and the price, and the arising of the difficulty as to possession, were disputed and obliterated by Springstine
[295] under his adverse *claim as a lessee. We think that this matter does not deserve discussion at greater length.

It is said that the defendant Renfrow is estopped by the payment of $500 to Shields by force of the act of 1897, chap. 8, § 7, to the effect that any person "having knowingly received and accepted the benefits, or any part thereof, of any conveyance, mortgage, or contract relating to real estate shall be concluded thereby, and estopped to deny the validity of such conveyance, mortgage, or contract, or the power or authority to make and execute the same, except on the ground of fraud." But here again we are met by the findings and the facts. The check given to Shields was not a payment to Renfrow. Shields had not even oral authority to convey or to receive the purchase money. The terms of Renfrow's letter to Halsell about the deed show that he had not accepted the delivery of the check as a payment then, and since then it would seem that neither party to the litigation has been willing to accept the money.

It appears to us unnecessary to amplify further the reasons for affirming the judgment below.

Judgment affirmed.

MERCHANTS' NATIONAL BANK OF CINCINNATI, *Plff. in Err.*

v.

THERESA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, *et al.*

(See S. C. Reporter's ed. 295–302.)

1. Error to state court—Federal question—how raised.—A showing at every stage of the litigation in the state courts of the intention of a national bank to rely upon the United States banking laws for immunity against liabilities arising out of its ownership of shares in a partnership is sufficient to sustain the appellate jurisdiction of the Supreme Court of the United States, although the bank did not, in the first in-

NOTE.—*On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L.R.A. 329.

On the power of a national bank to take corporate stock in satisfaction of a debt by way of security—see note to First Nat. Bank v. Converse, *ante*, 537.

As to estoppel of a corporation to set up plea of ultra vires—see notes to Miller v. American Mut. Acci. Ins. Co. 20 L.R.A. 765, and Wood v. Corry Waterworks Co. 12 L.R.A. 168.

stance, anticipate the specific and qualified form in which the immunity finally was denied,—especially where the highest state court, by a certificate, made part of its record and judgment, stated that the Federal question was involved.

2. **Corporations—ultra vires—national bank.**—A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold.

3. **Corporations—ultra vires as defense by national bank.**—The want of authority of a national bank to become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold, is a valid defense to an action against it founded upon its liability for the partnership debts.

[No. 256.]

Argued April 26, 1906. Decided May 14, 1906.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment affirming, on a second writ of error, a judgment of the Circuit Court of Hamilton County, in that state, establishing the liability of a national bank for the debts of a partnership because of its ownership of shares in such partnership, represented by transferable certificates. *Reversed.*

See same case below, on first writ of error, 69 Ohio St. 160, 68 N. E. 1004.

The facts are stated in the opinion.

Mr. **W. C. Herron** argued the cause and filed a brief for plaintiff in error:

The whole question of the effect of the plaintiff in error's becoming the owner of the shares *de facto*, and of the effect of the defense of *ultra vires*, whether it renders the whole contract void, or whether it may form the basis for some consequential liability, is a Federal question.

California Nat. Bank v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831.

If the plaintiff in error took these shares intending to be a partner, and to have an interest only in the net profits of the syndicate, and if the plaintiff in error had no power to take the shares in that way, no title to the shares passed to it at all, the whole transaction was void, and no liability of any sort can be imposed upon the plaintiff in error.

Ibid.

The plaintiff in error had no power, even to secure a pre-existing indebtedness, to take title to shares in a partnership dealing in land, or to make itself liable for any part of the indebtedness of such a partnership.

First Nat. Bank v. *Converse*, 200 U. S. 425, *ante*, 537, 26 Sup. Ct. Rep. 306.

Mr. **C. Bentley Matthews** argued the cause and filed a brief for defendants in error:

The mere ordinary making of contracts and conducting the business of the bank and the obligations that ensue either from contract or from torts are not Federal questions. Nobody denies that a corporation, whether under the revised acts of the United States, or other acts of the state legislature, cannot perform acts *ultra vires*, but U. S. Rev. Stat. § 5136, U. S. Comp. Stat. 1901, p. 3455, expressly permits the making of contracts, and the exercise of all powers appertaining to such companies that are usual and incidental to the carrying on of the business for which they are chartered, and the application of the rules of common law and equity to its acts follows as a matter of course. The application of these rules does not raise a Federal question.

Inez Min. Co. v. *Kinney*, 46 Fed. 832.

The reasoning in *Texas & P. R. Co.* v. *Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703, and *Texas & P. R. Co.* v. *Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, does not apply in this case because of the deprivation of the right to litigate in the United States court from the mere fact that the party is a national bank.

Where the judgment of the state court rests on two grounds, one involving a Federal question and the other not, and it does not appear on which of the two the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction.

Allen v. *Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; *Leonard* v. *Vicksburg, S. & P. R. Co.* 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

Persons may, by their acts or omissions to act, waive rights which they might otherwise have under the Constitution and laws of the United States; and the question whether they have or have not lost such rights by their failure to act, or by their action, is not a Federal question.

Leonard v. *Vicksburg, S. & P. R. Co. supra; Pierce* v. *Somerset R. Co.* 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Seneca Nation of Indians* v. *Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; *Gillis* v. *Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Speed* v. *McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

The rules of common law and equity, or the rule established by local custom or

statute, equally fail to give rise to any such question provided the validity of the statute, or construction of the statute itself, is not in question.

Pennsylvania R. Co. v. *Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132.

In *Chicago, I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200, it is held that if the highest state court fails to consider the question because it has not been properly made in the court below, then this court will not review its judgment unless it appears that the validity of the statute was necessarily involved.

And in *Western Electrical Supply Co.* v. *Abbeville Electric Light & P. Co.* 197 U. S. 299, 49 L. ed. 765, 25 Sup. Ct. Rep. 481, where it was claimed that service upon an agent of a corporation was not sufficient service, which contention, though upheld by the inferior state court, was denied by the higher court, and thereupon it was claimed that the agent was not such an agent as to bring the corporation, which was a foreign corporation, into court, and was not due process of law, but the appellate court declined to consider the question, presumably because it had not been made prior to its first decision, this court refused to review it, because, even though it were a Federal question, the state supreme court might very well decline to consider it when not made in time.

In *Harding* v. *Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176, it is said that this court will not reverse the judgment of a state court holding that an alleged Federal constitutional objection was waived, where the record discloses that no authority was cited or argument advanced in support of such objection, and it is clear that the decision was based upon other than Federal grounds.

An adverse suit authorized by the statutes of Congress in the case of mining property is not sufficient necessarily to vest jurisdiction in the Federal courts.

Shoshone Min. Co. v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

The jurisdiction of this court in cases brought up by writ of error to a state court does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.

Telluride Power Transmission Co. v. *Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

The validity of a statute is not drawn in question, every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.

Cook County v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635–653, 34 L. ed. 1110–1116, 11 Sup. Ct. Rep. 435.

In this case, the papers executed by the parties made out a partnership.

Clagett v. *Kilbourne*, 1 Black, 346, 17 L. ed. 213; *Yeoman* v. *Lasley*, 40 Ohio St. 190; *Hulett* v. *Fairbanks*, 40 Ohio St. 233; *McFadden* v. *Leeka*, 48 Ohio St. 513, 28 N. E. 874; *Chester* v. *Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Batty* v. *Adams County*, 16 Neb. 44, 20 N. W. 15; *Robbins* v. *Butler*, 24 Ill. 387; *Ludlow* v. *Cooper*, 4 Ohio St. 1.

A partnership may exist with transferable shares.

Wadsworth v. *Duncan*, 164 Ill. 360, 45 N. E. 132; *Wells* v. *Wilson*, 3 Ohio, 425; *Rianhard* v. *Hovey*, 13 Ohio, 300; *Jones* v. *Clark*, 42 Cal. 180; Lindley, Partn. 363, § 5.

In such a partnership, the indebtedness of the partnership follows the interest transferred like a transfer of a share of the stock, as is said in *Brown* v. *Hitchcock*, 36 Ohio St. 667; Lindley, 6th ed. 665, *Companies; Mayhew's Case*, 5 DeG. M. & G. 848; *Wells* v. *Wilson*, *supra*.

A party cannot, when a case is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, but is restricted to the theory on which the cause was prosecuted for defendant in the court below.

Ohio & M. R. Co. v. *McCarthy*, 96 U. S. 258, 24 L. ed. 693.

This in itself was sufficient to induce the supreme court of Ohio to ignore the change of front at that period.

Bullock v. *Kilgour*, 39 Ohio St. 543; *Baltimore & O. R. Co.* v. *Smith*, 54 Ohio St. 562, 44 N. E. 240.

Messrs. J. H. Ralston, Joseph B. Kelley, and *Ralston & Siddons* filed a separate brief for defendant in error, Theresa J. Wehrmann:

We concede that if the bank had acquired the ownership in the syndicate property otherwise than by taking it in payment of, or as security for, a previously contracted valid indebtedness, the transaction would have been *ultra vires* and void, and could not be confirmed or ratified.

Earle v. *Carson*, 188 U. S. 52, 47 L. ed. 378, 23 Sup. Ct. Rep. 254.

But we do contend that if the bank, in order to secure, and in payment of, a valid debt due it, acquires ownership either of personal or real property, creates an indebtedness in handling or putting the same in salable condition, or in placing it on the market to realize its original debt, it is not an *ultra vires* act, that it can escape liability for its own acts. And an action can be maintained in the state courts to recover

such indebtedness under the act of August 13, 1888. The principle is not new or novel.

John A. Roebling v. *First Nat. Bank*, 30 Fed. 744; *Cockrill* v. *Abeles*, 30 C. C. A. 223, 58 U. S. App. 648, 86 Fed. 505; *Cooper* v. *Hill*, 36 C. C. A. 402, 94 Fed. 582; *Libby* v. *Union Nat. Bank*, 99 Ill. 622; *Upton* v. *National Bank*, 120 Mass. 153; *Reynolds* v. *First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679.

A very wide latitude is given to a bank to take property to prevent the loss of a debt, and to use and improve it temporarily until an advantageous disposition can be made of it.

5 Cyc. Law & Proc. p. 591.

Mr. **William J. Shroder** also filed a brief for defendant in error, Floris A. Sackett:

This court is without authority to revise the second judgment of the supreme court on the ground that the bank was denied any right or immunity properly claimed "in apt time."

DeLamar's Nevada Gold Min. Co. v. *Nesbitt*, 177 U. S. 527, 44 L. ed. 873, 20 Sup. Ct. Rep. 715; *Chapin* v. *Fye*, 179 U. S. 129, 45 L. ed. 121, 21 Sup. Ct. Rep. 71; *Home for Incurables* v. *New York*, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84; *Powell* v. *Brunswick County*, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; *Loeber* v. *Schroeder*, 149 U. S. 585, 37 L. ed. 859, 13 Sup. Ct. Rep. 934; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Pim* v. *St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Sayward* v. *Denny*, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *California Powder Works* v. *Davis*, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260; *Western Electrical Supply Co.* v. *Abbeville Light & P. Co.* 197 U. S. 299, 49 L. ed. 765, 25 Sup. Ct. Rep. 481.

The decision of the supreme court to the effect that, by reason of its ownership of the shares, the bank was an owner in severalty of the property, did not present a Federal question; it was a decision of the law bearing upon the rights and liabilities of a share owner upon the facts of the case of real property in Ohio.

Cramer v. *Wilson*, 195 U. S. 416, 49 L. ed. 258, 25 Sup. Ct. Rep. 94.

The facts establish the following points:

1. That the bank became the actual owner of the shares which represented its proportionate ownership of the property.

2. That such ownership was acquired in order to secure a previously contracted debt due it.

3. That it participated with its co-owners in the management of the property.

The acquisition of the shares under these conditions was within the powers of the bank.

Fleckner v. *Bank of United States*, 8 Wheat. 351, 5 L. ed. 634; *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679; *Wylie* v. *Northampton Nat. Bank*, 119 U. S. 361, 30 L. ed. 455, 7 Sup. Ct. Rep. 268; *John A. Roebling Sons' Co.* v. *First Nat. Bank*, 30 Fed. 744; *Cockrill* v. *Abeles*, 30 C. C. A. 223, 58 U. S. App. 648, 86 Fed. 505; *Royal Bank of India's Case*, L. R. 4 Ch. 252.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill for the dissolution of a partnership, a receiver and an account. The partnership was formed to purchase, improve, divide into lots, and sell a leasehold. There were forty shares in the firm, represented by transferable certificates. The plaintiff in error took nine of these shares as security for a debt, and afterwards became the owner of them in satisfaction of the debt, subject to the question whether the transaction was within the powers of a national bank. It was found at the trial that the partners must contribute to pay the debts of the firm, and, some of them being insolvent, the bank was charged with the full share of a solvent partner. The supreme court of the state held this to be wrong, but decided that the bank became a part owner of the property, and that, *as it joined in the management of the [299] same, it was liable for nine fortieths of the expenses, which constituted the debts of the firm. 69 Ohio St. 160, 68 N. E. 1004. A decree was entered to that effect, and the bank brought the case here.

It is objected at the outset that this court has no jurisdiction because the specific question was not raised sufficiently upon the record. But at the trial the bank objected that under the statutes of the United States it could not be held liable as a partner, following the frame of the bill and meeting the ruling of the court. Then, when the supreme court, after discussion of the statutes, imposed the modified liability and sent the case back, it objected that under the same statutes it could not be held liable for any proportion of the debts of the firm, and took this question on exceptions again to the supreme court. It showed at every stage its intention to rely upon the United States banking laws for immunity, and it would be an excessive requirement to hold the bank bound in the

first instance to anticipate the specific and qualified form in which the immunity finally was denied. In addition to the foregoing facts, all of which appear on the record, the supreme court made a certificate part of its record and judgment, to the effect that it became and was material to consider whether the bank had power under Rev. Stat. §§ 5136, 5137, U. S. Comp. Stat. 1901, pp. 3455–3460, to become liable for the nine fortieths, as above stated, and that the decision was against the claim of the plaintiff in error. *Marvin* v. *Trout*, 199 U. S. 212, 223, *ante*, 157, 161, 26 Sup. Ct. Rep. 31; *Cincinnati, P. B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179, *ante*, 428, 26 Sup. Ct. Rep. 208. Of course such a claim of immunity under the laws of the United States, if sufficiently set up, can be brought to this court. *California Nat. Bank* v. *Kennedy*, 167 U. S 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831. See *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

The question of substantive law presented is not without difficulty. It is not disposed of by the general proposition that a national bank may take, by way of security, property in which it is not authorized to invest, and may become owner of it by foreclosure or in satisfaction of a debt. It is not disposed of even by the decisions that it may acquire stock in a corporation
[300]*in this way (*First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679), and so subject itself to the liability of a stockholder for the corporate debts (*Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448; *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 366, 367, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831; *First Nat. Bank* v. *Converse*, 200 U. S. 425, 438, *ante*, 537, 542, 26 Sup. Ct. Rep. 306) ,—a proposition not shaken by *Scott* v. *Deweese*, 181 U. S. 202, 218, 45 L. ed. 822, 830, 21 Sup. Ct. Rep. 585. For it does not follow that because the interest in a partnership is represented by a paper certificate in form more or less resembling a certificate of stock in a corporation and transferable like it, a national bank can take the partnership certificate to the same extent that it could take the stock.

As the supreme court of Ohio assumes such partnerships and certificates to be valid, we assume them to be. *Wells* v. *Wilson*, 3 Ohio, 425; *Walburn* v. *Ingilby*, 1 Myl. & K. 61, 76; *Re Mexican & South American Co.* 27 Beav. 474, 481, 4 De G. & J. 320; *Phillips* v. *Blatchford*, 137 Mass. 510. We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But, from the point of view of the law, there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something, it is a proper security; and if it is worth nothing, no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

But to take a share by transfer on the books means to become *a member of the [301]
concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. *Germania Nat Bank* v. *Case*, 99 U. S. 628, 631, 25 L. ed. 448, 449; *Pullman* v. *Upton*, 96 U. S. 328, 24 L. ed. 818. This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership, it means that the transferee at once becomes a member of the firm and goes into its business with an unlimited personal liability,—in short, does precisely what a national bank has no authority to do. This the supreme court of Ohio rightly held beyond the powers of the bank. U. S. Rev. Stat. §§ 5136, 5137. It is true that it has been held that a pledgee may escape liability if it appears on the certificate and books that he is only a pledgee. *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; *Robinson* v. *Southern Nat. Bank*, 180 U. S. 295, 45 L. ed. 536, 21 Sup. Ct. Rep. 383; *Rankin* v. *Fidelity Ins. Trust & S. D. Co.* 189 U. S. 242, 249, 47 L. ed. 792, 795, 23 Sup. Ct. Rep. 503. No doubt the security might be realized without the pledgee ever becoming a member of the firm. It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the com-

mon double liability, in satisfaction of a debt. *First Nat. Bank* v. *Converse*, 200 U. S. 425, *ante*, 537, 26 Sup. Ct. Rep. 306. *A fortiori*, it cannot take shares in a partnership to the same end.

We are of opinion that with the liability as partner all liability falls. The transfer of the shares to the bank was not a direct transfer of a legal interest in the leasehold, which was in the hands of trustees. It was simply a transfer of a right to have the property accounted for and to receive a share of any balance left after paying debts, and the acquisition of this right was incident solely to membership in the firm. If the membership failed the incidental
[302] rights failed with it, and with the *rights the liabilities also disappeared. Becoming a member of the firm was the condition of both consequences. As the bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts. See *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 367, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831. It seems to us unnecessary to add more in order to show that the claim against the plaintiff in error must be dismissed.

Judgment reversed.

Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **McKenna** dissent.

UNITED STATES, *Petitioner*,
v.
EMIL DIECKERHOFF *et al.*

(See S. C. Reporter's ed. 302-313.)

1. Duties—redelivery bond—validity.— The authority of the collector, under U. S. Rev. Stat. § 2899, U. S. Comp. Stat. 1901, p. 1921, to require a bond from an importer for double the value of the merchandise imported, to be forfeited for the nonreturn unopened of any package of the invoice upon demand, includes the right to take a less stringent undertaking, such as a bond which provides for the return of any required package unopened or the payment of double its value as a condition of being discharged from the full penalty of the bond.

2. Damages—redelivery bond.— Double the value of the package of an invoice of imported merchandise ordered by the collector to be returned, and not merely the actual damages sustained by the United States by reason of its nonreturn, is the measure of recovery for the breach of the obligation incurred in a redelivery bond taken by the collector under the authority of U. S. Rev. Stat. § 2899, to return any required package unopened, or to pay double its value as a condition of being discharged from the full penalty of the bond.

3. Damages—penalty in redelivery bond—enforcement.— The enforcement of the penalty prescribed in a redelivery bond taken by a collector under the authority of U. S. Rev. Stat. § 2899, for the nonreturn unopened of any required package of an invoice of imported merchandise, is not precluded by the provision of § 961 (U. S. Comp. Stat. 1901, p. 699), that in suits to recover the forfeiture annexed to a bond or other specialty, where the forfeiture, breach, or nonperformance appears by default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff for so much as is due according to equity.

[No. 228.]

Argued April 17, 1906. Decided May 14, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the Circuit Court for the Southern District of New York, directing a verdict in favor of the government, in an action on a redelivery bond, in twice the estimated value of a package of imported merchandise not returned to the collector upon demand. The judgment of the Circuit Court of Appeals *reversed*, that of the Circuit Court *affirmed*, and the case remanded to the Circuit Court.

See same case below, 136 Fed. 545.

The facts are stated in the opinion.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for petitioner:

The measure of the recovery to be allowed is at least twice the value of the package demanded and not returned.

Clark v. *Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *The S. Oteri*, 14 C. C. A. 344, 30 U. S. App. 10, 67 Fed. 146; *Smythe* v. *United States*, 188 U. S. 156, 47 L. ed. 425, 23 Sup. Ct. Rep. 279; *Nilson* v. *Jonesboro*, 57 Ark. 168, 20 S. W. 1093; *State* v. *Hall*, 70 Miss. 678, 13 So. 39; *United States* v. *Montell*, Taney, 47, Fed. Cas. No. 15,798; *United States* v. *Hatch*, 1 Paine, 336, Fed. Cas. No. 15,325; *United States* v. *Pingree*, 1 Sprague, 339, Fed. Cas. No. 16,050; Andrews, Revenue Laws of U. S. 102.

If the bond as executed had strictly followed the language of U. S. Rev. Stat. §

NOTE.—*On the penalty as the limit of liability on statutory bond*—see note to Griffith v. Rundle, 55 L.R.A. 381.

As to when damages are liquidated—see notes to Hathaway v. Lynn, 6 L.R.A. 551; King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826; Condon v. Kemper, 13 L.R.A. 671; and Taylor v. Sandiford, 5 L. ed. U. S. 384.

2899, U. S. Comp. Stat. 1901, p. 1921, the government would have been entitled to demand a judgment for twice the estimated value of the goods in the invoice which contained the unreturned package.

Clark v. *Barnard, supra.*

Courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions when there cannot be any just compensation.

Story, Eq. Jur. §§ 1324, 1326; Pom. Eq. Jur. § 381.

The clause authorizing discharge of the bond upon payment of double the estimated value of any unreturned package is not specifically provided for by U. S. Rev. Stat. § 2899, U. S. Comp. Stat. 1901, p. 1921, but it is not prohibited, and, being less onerous than what might have been demanded, one who voluntarily assented thereto may not complain on that account.

Moses v. *United States,* 166 U. S. 571, 586, 41 L. ed. 1119, 1124, 17 Sup. Ct. Rep. 682.

The Secretary of the Treasury or his agent, the collector, has authority to take common-law bonds and to stipulate for liquidated damages therein.

United States v. *Tingey,* 5 Pet. 115, 8 L. ed. 66; *United States* v. *Bradley,* 10 Pet. 343, 9 L. ed. 448; *United States* v. *Hodson,* 10 Wall. 395, 19 L. ed. 937; *Jessup* v. *United States,* 106 U. S. 147, 27 L. ed. 85, 1 Sup. Ct. Rep. 74; *Constable* v. *National S. S. Co.* 154 U. S. 79, 38 L. ed. 916, 14 Sup. Ct. Rep. 1062; *The S. Oteri, supra; Stephenson* v. *Monmouth Min. & Mfg. Co.* 28 C. C. A. 292, 54 U. S. App. 499, 84 Fed. 115; *Grady* v. *United States,* 39 C. C. A. 42, 98 Fed. 240.

If the clause permitting payment of twice the value of an unreturned article is invalid the defect is cured by those provisions in the bond which follow the language of the statute. The conditions being severable, the authorized one is good.

United States v. *Mora,* 97 U. S. 413, 24 L. ed. 1013.

U. S. Rev. Stat. § 961 is substantially in the language of § 26 of the judiciary act of 1789 (1 Stat. at L. 87, chap. 20, U. S. Comp. Stat. 1901, p. 699). It is expressly confined to three cases—default, confession, or demurrer—and has no application where there is a trial upon pleadings and proof.

Farrar v. *United States,* 5 Pet. 373, 385, 8 L. ed. 159, 164; *Ives* v. *Merchants Bank,* 12 How. 159, 164, 13 L. ed. 936, 937.

Mr. **W. Wickham Smith** argued the the cause, and, with *Mr. John K. Maxwell,* filed a brief for respondents:

In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims it as such to show that it was so considered by the contracting party. Much stronger is the inference in favor of its being a penalty when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention.

Tayloe v. *Sandiford,* 7 Wheat. 13, 5 L. ed. 384.

The term "forfeiture" imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, *viz.*, that of a penalty.

Van Buren v. *Digges,* 11 How. 461, 13 L. ed. 771. See also *Watts* v. *Camors,* 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91; *Bignall* v. *Gould,* 119 U. S. 495, 30 L. ed. 491, 7 Sup. Ct. Rep. 294; *Chicago House-Wrecking Co.* v. *United States,* 53 L.R.A. 122, 45 C. C. A. 343, 106 Fed. 385; *Gay Mfg. Co.* v. *Camp,* 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794.

The penalty of the bond was fixed by the collector, and was intended to be only a maximum sum to limit the liability of the obligors, the actual sum to be recovered from them being only the amount of damage sustained by the government.

United States v. *Cutajar,* 59 Fed. 1000, 14 C. C. A. 515, 35 U. S. App. 133, 67 Fed. 530.

Mr. Justice **Day** delivered the opinion of the court:

An action was brought in the circuit court to recover upon a certain redelivery bond, purporting to be executed under cover of § 2899, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 1921. The respondents, principals on the bond, were partners, as Dieckerhoff, Raffloer, & Company. Achelis and Boker executed the bond as sureties. On January 13, 1897, Dieckerhoff, Raffloer, & Company imported by the steamship Bovic certain merchandise, which was entered in the New York custom house and consisted of seven packages. These were described in two invoices and are numbered 417 to 421,

983, 984. Package No. 418 was designated by the collector to be sent to the public stores for examination and appraisal; the others were turned over to the importer under § 2899, Rev. Stat. The estimated value of the entire importation—$1,522—was indorsed on the bond. Within ten days after the examination and appraisal of package No. 418, the collector ordered respondents to return package No. 420.
[306] This package *was not returned. Thereupon suit was instituted upon the bond. A demurrer to the complaint was overruled, and an answer was filed denying breach of the bond, and also that the United States had sustained any actual damages. At the trial a customs clerk testified as to the value of package No. 420, estimated from the invoice, that it was $184.56; that the indorsement on the bond was: "Vessel, Bovic; where from, Liverpool; amount, $1,522." It was conceded that the collector had called for the return of the package, that the same was not returned, and respondents offered no evidence. Counsel for the United States conceded that there was no proof in the case that the United States had suffered actual damage, and that they could make no such proof. Over the respondents' request for a verdict in their favor, the circuit court directed a verdict in favor of the government for $369.12, being twice the estimated value of the unreturned package. The circuit court of appeals reversed this judgment.

The sections of the Revised Statutes pertinent to be considered are:

"Sec. 2899, U. S. Comp. Stat. 1901, p. 1921. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If, in the meantime, any package shall be opened, without the consent of the collector or surveyor, given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited."

[307] *"Sec. 2901, U. S. Comp. Stat. 1901, p. 1921. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended."

"Sec. 2939, U. S. Comp. Stat. 1901, p. 1938. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package, at least, out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined."

The bond was in the sum of $50,000, and conditioned as follows:

"The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and *after the date of these [308] presents and delivered from the custody of the officers of the customs in pursuance of § 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined, have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors

shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

"And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof."

Upon the facts stated the question is, How much, if anything, can the government recover upon this bond? That there is difficulty in the solution of the question is found in the different suggestions put forward; that the actual damages sustained by the government may be recovered, which is the contention of the respondents, and was the view of a majority of the circuit court of appeals; second, the actual value of the unreturned package, which was the view sustained by one judge of the circuit court of appeals; third, twice the value of the package not returned, which was the view of the circuit court; fourth, double
[309] the value of the consignment, *which seems to be the present contention of the government.

It may be admitted that the bond does not follow in strict terms the provisions of § 2899, which seems to require, or at least to authorize, a bond in double the estimated value of the merchandise imported, with a condition that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The statute further provides that if, in the meantime, any package should be opened, without the consent of the collector or surveyor, given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, in either case it shall be forfeited. The bond given, while it was for a period of six months, in the sum of $50,000, provided that the collector of customs should indorse on the bond the estimated value of each importation and the date thereof, and that the penalty of the bond should be double the value of each importation as so made and indorsed, which, in this case, would make the penalty $3,044. This bond contains the condition that, if the obligors, in lieu of the return of the package, pay to the proper collecting officer double the value of the package or packages not so returned, then the obligation is to be void.

While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter to the statute, and is neither *malum prohibitum* nor *malum in se*, it is a valid bond, although not in terms directly required by the statute. *Moses* v. *United States*, 166 U. S. 571, 586, 41 L. ed. 1119, 1124, 17 Sup. Ct. Rep. 682. Indeed, the learned counsel for respondents concedes that such a bond can be taken, and in his brief says: "Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the collector to enforce it in its form as made. For the purposes of this argument we *concede that it was a volun-[310] tary bond, enforceable according to its terms, and that there has been a breach."

But we think this something more than a mere voluntary bond. The statute authorizes, it is true, a more stringent undertaking, for literally it authorizes a bond in double the value of the merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. And further provides that if, in the meantime, any package shall be opened, except in the presence of the collector in the manner provided, or if the package is not delivered to the order of the collector, according to the condition of the bond, it shall, in either case, be forfeited. With this ample authority to take a more enlarged undertaking, we think it was within the power of the collector to take the bond in suit, which, taken together, provides for the return of any required package in an unopened condition or the payment of double its value as a condition of being discharged from the full penalty of the bond. There is nothing in this bond which runs counter to the statute, and it is within the authority conferred to take a bond which should be forfeited if the package was not returned in the manner required. Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a package by paying double its value, when a bond in double the value of the merchandise, to be forfeited for the nonreturn

of a package unopened, might have been required.

The real question in the case, then, is, What, if anything, can be recovered under the circumstances shown, on the obligation incurred in this bond? It is the contention of the respondents that the United States can recover only for actual damages which it has shown that it sustained, and that it was not the purpose of the statute or the obligation of the bond given to enlarge the liability beyond such damages as the government shall be able to allege and prove. But we think the purpose of the statute and the purpose of the requirement in the [311] bond *provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer availed himself of the privilege of withdrawing merchandise from the custody of the governmental officials before it has been examined and appraised. It is the right of the government to examine merchandise imported from foreign countries and ascertain its value for the purpose of fixing the amount of duties collectible thereon. It has the right to hold this merchandise until this purpose can be effected. Obviously, in a country where the business of importing goods has become so vast, as is now the case in United States, it would be impracticable to store all goods and hold them until examination. The law has, therefore, provided for the detention usually of one package in ten of an importation, and given the privilege to the importer of removing the rest of the goods, but to be held intact, subject to the right of the government, if an examination of the packages ordered for inspection shall suggest such course, to require that other packages be returned intact for examination, and if this statutory duty is not performed, we think it was the intention of the law to provide specific damages to be recovered upon the nonperformance of the duty imposed, and to secure a prompt and faithful discharge of which the statute provides for the giving of a bond.

In carrying out this purpose we hold the law permitted the taking of such a bond as was given in this case, providing that, if the party did not return the package required, he should pay double the amount of the value thereof. We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, was intended to and does relieve the government from the necessity of showing any actual damage or loss. It is suggested that the government may prove the damages sustained possibly by the testimony of informers or of those who packed the merchandise before shipment, and in other ways. But in our opinion it was the purpose of this statute, and the bond executed in the case, to dispense with *the necessity [312] of resort to this method of showing damages, and to fix double the value of the package ordered to be returned, as a definite sum to be paid for the nonfulfilment of the statutory duty. In such cases the recovery is for the stipulated sum, and is not limited to the damages actually proven. *Clark* v. *Barnard*, 108 U. S. 436, 457, 27 L. ed. 780, 787, 2 Sup. Ct. Rep. 878.

It is strongly urged that this in many cases may work serious hardship, and that, in all the years in which this statute or its equivalent has been in force, no action is shown to have been brought upon this theory. But the contract is definite in its terms, and it was the privilege of the importer to leave the goods in the custody of the government or take them out upon giving the obligation which is the subject-matter of this suit. It may be that in some cases such a rule would permit the government to recover a large percentage of the value of the goods imported, and it is suggested the package not returned may represent the larger part of the value of the entire invoice; but we do not think these considerations should overcome the purposes of the statute and the terms of the obligation incurred in the giving of this bond.

The purpose of the statute was to enforce the collection of the revenues, and to require that goods shall be as represented, and, if removed from governmental control before the facts about them are ascertained, to require them to be returned unopened, except as provided by statute, or a specific penalty be paid for failure so to do.

It is further contended that § 961, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 699, protects against enforcement of a penalty of this kind. This section provides: "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." *But if we are [313] correct in holding that it was the intention of Congress to provide a specific penalty for failing to return the merchandise as re-

quired, it is not within the province of courts of equity to mitigate the harshness of penalties or forfeitures in such cases, for such relief would run directly counter to the statutory requirements. Story, Eq. Jur. § 1326. We think the circuit court was right in rendering judgment for double the value of the unreturned package.

The judgment of the Circuit Court of Appeals will be reversed and the judgment of the Circuit Court affirmed and the case remanded to the Circuit Court.

Mr. Justice **Brewer** took no part in the decision of this case.

ROBERT DEVINE, Jesse D. Hunter, Asa Hunter, *et al., Appts.*,
v.
CITY OF LOS ANGELES.

(See S. C. Reporter's ed. 313-339.)

1. **Courts—jurisdiction of circuit court—case arising under Federal laws—anticipating defense.**— Allegations in a bill to quiet title, framed under Cal. Code Civ. Proc. § 738, that defendant's adverse claims are based upon an erroneous construction of the treaty of Guadalupe Hidalgo and the act of March 3, 1851 (9 Stat. at L. 631, chap. 41), and upon certain enumerated acts of the California legislature, and ordinances and charters of the city of Los Angeles, adopted and approved in pursuance of such construction, do not present a case arising under the Federal Constitution, laws, or treaties, of which a Federal circuit court has jurisdiction without diversity of citizenship.

2. **Cloud on title—assertion of ownership.**— Verbal assertions of ownership do not constitute a cloud upon title, to remove which the aid of a court of equity can be invoked.

3. **Jurisdiction of circuit court—case arising under Federal laws—cloud on title.**—A case arising under the Federal Constitution and laws, of which a Federal circuit court has jurisdiction without diversity of citizenship, is not presented by a bill which asserts the invalidity, under the Federal Constitution, of certain statutes and ordinances alleged to constitute a cloud on title, which the bill seeks to remove.

4. **Courts—jurisdiction of circuit court—case arising under Federal Constitution.**— Averments that patentees from the United States, whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under the act of March 3, 1851, were deprived of their property without due process of law, and allegations that their contract obligations were impaired, by certain enumerated California statutes and charters of the city of Los Angeles, which conferred upon the city only such rights in respect to the waters of a river as may have been vested in the state, afford no proper basis for the jurisdiction of the Federal circuit court, as of a case arising under the Federal Constitution.

5. **Courts—jurisdiction of circuit court—Federal question—water rights.**— The nature and extent of the riparian rights and the rights in percolating waters of certain patentees from the United States whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under the act of March 3, 1851, are not Federal questions which will sustain the jurisdiction of a Federal circuit court, but are questions of state or general law.

[No. 207.]

Argued March 13, 1906. Decided May 14, 1906.

APPEAL from the Circuit Court of the United States for the Southern District of California to review a decree dismissing, for want of jurisdiction, a bill which seeks to quiet titles derived under Spanish and Mexican grants, and to remove a cloud therefrom. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

Complainants below, appellants here, are 244 in number, and own in severalty various tracts of land aggregating several thousand acres, located in the county of Los Angeles, California, in ranchos San Rafael, Los Felis, and Providencia. The rancho San Rafael was granted by the King of Spain, and the other two ranchos by the Republic of Mexico, to the predecessors of complainants. The titles were confirmed, pursuant to the treaty of Guadalupe Hidalgo [9 Stat. at L. 922], to the successors of the original grantees by the board of land commissioners created by and acting under an act of Congress approved March 3, 1851, entitled, "An Act to Ascertain and Settle Private Land Claims in the State of California." [9 Stat. at L. 631, chap. 41.] Patents were thereupon issued by the United States to the confirmees, and it was alleged that these grants conveyed the title to the waters within them.

It was further alleged that the city of Los Angeles claimed to be the successor in right and title to all the grants made by the Spanish and Mexican governments to the Pueblo de Los Angeles, and the city filed a

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

On the removal in equity of a cloud on title—see notes to West v. People's Bank, 8 L.R.A. 727, and Miller v. Cook, 10 L.R.A. 293.

claim before the land commissioners in virtue of the general laws of Spain to 16 square leagues of land, alleging that the said lands had been granted to the pueblo, which board confirmed the title of the city to four square leagues of land, but rejected its claim to the remaining 12 square leagues, and that a patent was issued to the city by the United States for the land so confirmed, which patent did not refer to the river or its tributary waters, and did not purport to convey any of the waters of said river. That the city claimed the paramount right to the waters of the Los Angeles river and the river itself in virtue of the grants, laws, usages, and customs of the Republic of Mexico and of the Kingdom of Spain, made and in vogue prior to the cession of the territory embraced within the state of California to the United States under the treaty of
[315] Guadalupe Hidalgo, and by virtue *of certain acts of the legislature of the state of California, referred to in the bill, and especially by virtue of an act of the legislature of California, passed April 4, 1850, incorporating the city of Los Angeles, and declaring that it "shall succeed to all the rights, claims, and powers of the Pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred, and obligations created, by the ayuntamiento of said pueblo.

It was further alleged that the city never procured the confirmation of any rights in the waters of the Los Angeles river other than those that passed under the grant of land conferred by the patent, and that the act of the legislature, passed April 4, 1850, and certain other acts of the legislature, and proceedings, acts, and charters of the city, set forth in the bill, are a cloud upon complainants' title to their lands. That the Los Angeles river runs through the three ranchos and thence through the city; that complainants' lands are riparian to the stream; that underlying complainants' lands are percolating waters which do not constitute a part of the river, but which, by reason of the patents referred to and mesne conveyances, belong to the several complainants as owners of said lands. The bill then went on to aver that the city claims that it is the owner of the river and its tributaries and their waters, passing through the ranchos named, and of the percolating waters in complainants' lands; that it claims the right to appropriate said waters for the use of the city and its inhabitants, and that complainants have no right to take any of the surface waters of the river or the percolating waters except in subordination to the city's paramount right to take and use the same, and the city threatens and intends to institute suit in the state courts of California to enjoin complainants from using any of the waters possessed by them from wells on their lands.

That the city rests its right and claim to the river and its waters upon a certain construction of the treaty of Guadalupe Hidalgo and of the act of Congress of March 3, 1851, and upon certain acts of the California legislature and certain charters *of the city of [316]
Los Angeles, adopted and approved in pursuance of an erroneous construction of the treaty and the act of Congress; the acts and charters being enumerated.

It was further alleged that, under said acts and said charters, the city had asserted and assumed the right to take physical control of the Los Angeles river and its tributaries, and has exercised the right of obstructing ditches and other conduits maintained by owners of land in the valley of the river above the city, and of preventing the use of the waters of the river for irrigation of the lands of complainants, and that said laws and charters and the exercise of said rights have resulted in the destruction of the values of the lands. And it was charged that the acts of the legislature and the charters of the city of Los Angeles were in violation of the 14th Amendment to the Constitution of the United States, in that they deprived, or attempted to deprive, complainants of their property without due process of law, and to grant the same to the city of Los Angeles; that the acts and charters impaired the obligation of the contracts expressed in the patents of the United States to complainants' lands; and that the assertion and exercise by the city of the right to control the river and its waters were in violation of § 1979, title 24, of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1262).

And the bill further averred that the construction of the act of Congress of March 3, 1851, upon which the defendant city rested its right and claim to said river and to said waters, is erroneous, and that, according to the proper construction thereof, the city was required to present to the board of land commissioners its claim to the waters of the river for confirmation.

It was also alleged that the claims and threats of the city to institute actions against complainants, and the control which it has exercised over the river and the waters thereof, and the several acts of the legislature of California, and the charter of the city, purporting to convey title to the river and its waters upon the city as the successor to the Mexican pueblo, cast a *cloud upon the titles of complainants to [317]
their lands, and had, in large measure, destroyed the market values thereof.

It was prayed:

1. That a decree be granted complainants removing the cloud cast by the city of Los Angeles upon their titles to the lands described in the bill, and that the acts of the legislature of the state of California and the charters of the city be declared invalid in respect to conferring upon the city any rights in the waters of the Los Angeles river, acquired from the pueblo of Los Angeles, other than such rights as were ascertained and confirmed under the act of March 3, 1851.

2. That a decree be granted to complainants and each of them quieting their several titles to their lands and to the waters therein, and to the riparian right of each of them to use the waters of said river, as against the paramount title claimed by said city to have been derived from Spain or Mexico, or claimed to have been derived from or to be supported by said acts of the legislature of the state of California, or by the charter of said city; and also that it be decreed that complainants and the city have each and severally such title only, derived from Spain and Mexico, as was confirmed and patented to them or their predecessors by the act of Congress of March 3, 1851.

3. That a decree be granted to complainants, forever enjoining the city of Los Angeles from setting up or asserting such paramount right and title to said waters; and further enjoining said city from asserting and exercising dominion or control over said river and said waters under or by virtue of said acts of the legislature or said charter of said city of Los Angeles.

It was alleged in the answer that, by the terms of each of the grants to the three ranchos named in the bill, and by the laws of the government making the same, all of the waters within any of the lands embraced in said ranchos, which formed a part of or found their way into the surface or subterranean stream of the Los Angeles river, were excepted and reserved in favor of the pueblo of Los Angeles, and that none [318] of said *waters were confirmed or granted by the United States to complainants' predecessors.

It was admitted that the city claimed to be, and it was alleged that the city was, in fact, the successor to all the rights and grants made by the Spanish and Mexican governments to the pueblo of Los Angeles.

The answer further alleged that the patent issued by the United States to the city of Los Angeles purported to grant to the mayor and council of the city of Los Angeles all appurtenances belonging to the land therein granted, which included all the waters of the river and the right to the use of the same.

It was admitted that the city claimed the paramount right to the waters of the Los Angeles river by virtue of grants, laws, usages, and customs of the Republic of Mexico and the Kingdom of Spain and the act of the legislature approved April 4, 1850, mentioned in the bill, but it was denied that these were the only sources of title through which the city claimed; and alleged that it also claimed said paramount right by virtue of long-continued use and possession of said river and the waters thereof for the period of more than one hundred and twenty years, and by various grants and conveyances from private individuals, and by virtue of various judgments and decrees of courts of competent jurisdiction, and of the patents to the mayor and common council of the city of Los Angeles, mentioned in the bill, and also by virtue of its ownership of various tracts of land, which are riparian to said river, amounting in area to more than 4,000 acres, embracing the land through which the river flows in passing through the lands included in said patent.

The answer disclaimed that the city acquired, under the act of the legislature passed April 4, 1850, any right to the Los Angeles river, or the waters thereof, or any other water or right which was, at the time of the passage of said act, vested in the predecessors of complainants, or any private individual or corporation.

The answer denied that the acts of the legislature, or the *proceedings, or acts, or [319] charters of the city, referred to in the bill, constituted any cloud upon complainants' titles, but, on the contrary, allege that none of complainants had, at the time of the commencement of the suit, or have now, any right or interest in or to the waters of the Los Angeles river, save in subordination to the paramount right of the city to take and use all of the waters of said river to the extent of the necessities of the city or its inhabitants.

The answer alleged that all of the waters underlying complainants' lands form and constitute a part of the Los Angeles river, and would, if not intercepted, reach the surface stream of the river at a point above the northern boundary of the city, and denied that any of said waters belonged to the several complainants, or that they, or any of them, have ever had any ownership of said waters, save in subordination to the paramount right of the city to take and use said waters, so far as it and its inhabitants might need the same.

It was denied that, in the petition of the mayor and common council of the city of Los Angeles to the board of land commissioners for confirmation of the pueblo lands, no claim was made to the waters of the Los Angeles river, and alleged that the board of

land commissioners, in its finding and judgment confirming the claim of the city to the pubelo lands, also confirmed its claim to the rights with respect to the waters of the river which were possessed by the pueblo; and it was admitted that the city of Los Angeles had, in the past, claimed, and still claimed, to be the owner of all the waters of said river, and of its tributaries, from its sources of supply to the southern boundary of the city, and also of all of the waters existing in complainants' lands, and of the waters under said lands; and it was alleged that all the waters in those lands did in fact constitute a stream or water course, and were part of the waters of the Los Angeles river. The city admitted that it claimed that complainants had no right to pump the waters in their lands, because such pumping might ultimately have the effect of reducing the supply in the surface and sub-
[320] terranean river, *and it was denied that they were percolating waters, and also denied that the city claimed the right to enter on the lands of any of complainants to take or use said waters, or any part thereof, without having first obtained the right so to do by grant from, or condemnation against, said complainants. It was admitted that the city claimed the right to prevent complainants from using the waters in their lands when the city had need of the same, but denied that it claimed the right to prevent complainants from using said waters by entering upon their lands or by using physical force, and alleged that the city claimed the right to prevent the use of said waters by complainants only in the manner prescribed by the laws of the state of California, and that the city intended to enforce its rights against complainants by means of the suit brought by it, as alleged in the bill, in the state court, against certain of the complainants, for the purpose of enjoining them from using the waters pumped by them from their lands, and by means of other legal process, and not by any unlawful acts or physical force.

It was admitted that the city rested its claim to the Los Angeles river and the waters thereof, including the waters in the lands of complainants, in part upon the treaty of Guadalupe Hidalgo, according to the manifest meaning thereof, *viz.*, that the rights of pueblos were intended to be protected by said treaty, as well as the rights of individuals; and it was admitted that the city rested its claim in part upon the act of Congress of March 3, 1851, according to the manifest meaning thereof, *viz.*, that the claims of pueblos, and of municipal corporations succeeding them, to lands granted by the Spanish and Mexican governments, were entitled to confirmation, and that the confirmation thereof had the effect of confirming all water rights which were appurtenant to said lands, and that said act did not require claims for property other than lands to be presented for confirmation.

It was denied that the city rested its claim to the Los Angeles river and its waters, including the waters in the lands of *complainants, upon the laws of the state of [321] California and the ordinances and charters of the city of Los Angeles, except to the extent that the same had the effect of vesting and continuing in the city and its predecessors such rights with respect to the waters of the Los Angeles river as were possessed by the pueblo at the time the pueblo was dissolved and the city was incorporated by the act of April 4, 1850, and such rights with respect to the waters of the river as might have been vested in the state of California upon its admission to the Union.

It was expressly disclaimed that there was granted by said acts of the legislature, or by the city charter, to the mayor and common council of the city of Los Angeles, any right to develop waters percolating under the bed of the Los Angeles river or elsewhere, which, at the time of the passage of said acts, or at the time of the adoption of said charter, was vested in the complainants, or any of them, or in their predecessors, or in any private individual or corporation.

It was alleged that the legislative acts, and the ordinances and charters mentioned in the bill, were adopted with the intention of asserting that the city of Los Angeles was the owner of all the rights possessed by the pueblo of Los Angeles to the waters of the Los Angeles river, and not with the intention of depriving complainants, or any of them, or any of their predecessors, or any other private individual or private corporation, of any right in respect to the waters of said river; and denied that by any of said acts of the legislature mentioned in the bill, or by the charter of the city or the amendments thereof, there was intended to be granted to the city any right with respect to the water flowing in said river or beneath the surface of the bed thereof, which was then vested in complainants, or any of them, or any of their predecessors, or any private individual or private corporation, or that by any of said acts it was intended to devest any private person or corporation of any vested private rights in said waters, or that any of said acts had ever been construed by any court in the state of California *to so [322] devest any such private vested rights, but, on the contrary, it was alleged that it had been determined by the supreme court of

California that said acts did not have such effect.

The answer denied that the city had ever interfered with the appellants in the use of the waters of the river or its tributaries, or the waters of said valley, except when such waters were located on or in the lands of the city, or on or in lands on which the city had acquired the right of entry to divert and use said waters, except when the city has interfered with such use by judgments of court, obtained by due process of law, and denied that the city has ever assumed or asserted the right to take physical control of any waters on or in complainants' lands. It was disclaimed that the acts or charters referred to in the bill granted to the city the right to take physical control of property belonging to complainants.

The answer denied that the acts of the legislature and the ordinances and charters of the city of Los Angeles, mentioned in the bill, or any of them, were in violation of the 14th Amendment, or impaired the obligation of contracts, or were in violation of § 1979, title 24, of the Revised Statutes of the United States.

The answer alleged that, according to the proper construction of the act of March 3, 1851, the confirmation and patent therein provided for only had the effect of confirming to the confirmee and patentee the lands therein described, but subject to all the easements and servitudes imposed thereon by the laws of Spain and Mexico in favor of third parties, including the rights to the waters of unnavigable streams which were attached to other lands, or belonged to pueblos or private individuals other than the grantees. And where such water rights were appurtenant to lands granted by the Spanish and Mexican governments, and confirmed and patented under said act of Congress, such water rights passed by such patents, and a claim for such water rights was not required by such act to be confirmed or patented.

[323] *It was admitted that the city claimed that complainants had no right to the waters of the Los Angeles river, including the waters in other lands, as against the city and its inhabitants, when the city shall determine that it needs said waters, and that the city claims that the use by the complainants of such waters is at the sufferance of the city, and may be prohibited by the city at any time, and that the city is threatening to institute suits against complainants for the purpose of enforcing such claims, but it is denied that any and all said claims, or any dominion or control which the city has exercised over the river and the waters thereof, has cast any cloud upon the several titles of complainants to their lands, or affected the market value or salability of such lands.

It was alleged in the answer that, in the year 1781, a pueblo was founded on the site of the present city of Los Angeles by the government of the Kingdom of Spain, and that, according to the laws and regulations of that country, said pueblo became entitled to the sole and exclusive right in perpetuity to the absolute ownership of all the waters of the Los Angeles river, whether flowing upon or beneath the surface of the ground; that said river then rose and now rises several miles above the site of the pueblo, and ran and still runs down through said site to the lands now embraced within the city of Los Angeles; that, during the whole of the occupation and control of said pueblo by the Spanish and Mexican governments, the municipal authorities at all times exercised control of, and claimed the exclusive right to use, all the waters of said river, and that right was, during all of said time, recognized and acknowledged by the owners of all of the lands bordering on said river, including the predecessors of complainants; that, ever since the occupation and control of said pueblo by the United States and by the state of California, the municipal authorities of the city have exercised the same rights over and to the waters of the river as were previously exercised and claimed by the authorities of the pueblo, and that such control and rights were exercised and claimed for the purpose of irrigation *and [324 for the domestic and other uses of said pueblo and said city and the inhabitants thereof.

It was further alleged that, within one year after the foundation of the pueblo, the municipal authorities thereof constructed a system of irrigation works and conveyed the waters of the river to and upon lands in the pueblo, and that thereafter, from time to time, other lands of the pueblo were brought under irrigation, so that all of said waters were diverted from said river and used for such irrigation during a period of many years prior to the conquest of California by the United States, and that, from and after such conquest, the same use was made of the waters of the river for the irrigation of lands within the pueblo and for domestic use of its inhabitants up to the time of the passage of the act of April 4, 1850, incorporating the city of Los Angeles; that from and after that time the municipal authorities of said city continued to construct additional works for the more economical diversion and distribution of such waters for use in irrigating lands within said city and for domestic use of the inhabitants thereof; that, within the past eighteen years, nearly all of said irrigable lands have been divided into building lots and covered with houses,

so that all of the waters previously used for the irrigation of said lands, excepting the portion thereof which has been diverted by complainants within the last five years, have been used by the city and its inhabitants for purposes other than for irrigation, and all of the waters of said river during the dry season of each year, extending from the first day of May to the first day of November, and a great portion of said waters during the rest of the year, have been needed for said uses. That the population of said city is not less than 180,000 people, and is increasing at the rate of more than 10,000 per year, and that the city has no other source of water supply except said river.

It was alleged that, with certain exceptions referred to therein, the pueblo of Los Angeles, from the time of its foundation in the year 1781, up to the incorporation of the [325] pueblo as a *city by the act of 1850, and the said city from that time until now, has continuously, exclusively, and adversely to the whole world, used all of the waters of the Los Angeles river under a claim of ownership of said waters, the exceptions referred to being claims made by certain persons at various times of rights to the use of the waters of the river and of affluents thereof, which have been litigated and decided by the state courts in favor of the city, and it was further alleged that, within the past twelve years, certain owners of lands in which flowed underground waters of the river have set up a claim that said waters were not a part of the river, and that they were entitled to take and appropriate said underground waters for their own use, and that, in pursuance of such claims, great numbers of said parties, including some of complainants, had constructed wells, and engaged in pumping large quantities of said water, thereby diminishing the surface flow of the river, and that it was for the purpose of preventing such diminution that the city was bringing and contemplated bringing the actions against complainants referred to in the bill; that, within the past five years, such abstraction of these underground waters did not interfere with the supply of water required by the city, but, within the past three years, the amount of diversion by means of said wells has increased so much, and the needs of the city and its inhabitants have also so greatly increased, that the waters of the river which reached the surface stream thereof and the underground diversion works of the city have not been sufficient to supply it and its inhabitants with the water needed by them.

It was also alleged that the city, in its corporate name or in the name of the board of water commissioners, is the owner of numerous tracts of land which are riparian to the river, and which are particularly described in the answer. And further, that in the year 1879 two actions were commenced by predecessors of some of complainants against the city of Los Angeles, claiming the right to divert and use waters of the river, and both of said actions were finally determined by the supreme *court of the [326] state of California against the plaintiffs, and in favor of the city, and it was alleged that complainants, who are successors in interest of the plaintiffs in the suits last mentioned, are, by said judgments, estopped to deny that the city is the owner of a paramount right to use so much of the waters of the Los Angeles river as it and its inhabitants may need.

Thereafter the city of Los Angeles, by its counsel, moved the court to dismiss this cause on the ground that it appeared that the court had no jurisdiction thereof, which motion was sustained and the bill dismissed; whereupon the cause was brought here on certificate.

Mr. **Cyrus F. McNutt** argued the cause, and, with *Messrs. Warren E. Lloyd, J. E. Hannon,* and *Stephens & Stephens,* filed a brief for appellants:

Cal. Code Civ. Proc. § 738, has not been regarded by the California courts as having abolished the right to maintain actions to remove clouds from title.

Angus v. *Craven,* 132 Cal. 691, 64 Pac. 1091; *Collins* v. *O'Laverty,* 136 Cal. 31, 68 Pac. 327; *Alcorn* v. *Buschke,* 133 Cal. 655, 66 Pac. 15; *Bolton* v. *Gilleran,* 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881.

The equity practice in the Federal courts is not affected by the legislation, or the practice prescribed by legislation, or by the courts, in the various states.

Pennsylvania v. *Wheeling & B. Bridge Co.* 18 How. 462, 15 L. ed. 450; *Payne* v. *Hook,* 7 Wall. 430, 19 L. ed. 260; *Russell* v. *Southard,* 12 How. 147, 13 L. ed. 930; *Blease* v. *Garlington,* 92 U. S. 8, 23 L. ed. 523; *Bucher* v. *Cheshire R. Co.* 125 U. S. 582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Thompson* v. *Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765.

When the claim of the defendant is no longer a supposed pretense or excuse, but a specific cloud on title, evidenced by written instruments and records and specific acts, the plaintiff is unable to state his cause of action at all without alleging Such allegations are no longer the charging part of the bill, but its very substance. They are the "state of things" already existi g "when the action is brought." If not alleged, evidence will not be received regarding them.

Foster, Fed. Pr. § 67; *Crocket* v. *Lee,* 7 Wheat. 522, 5 L. ed. 514.

One charged with a crime cannot disclaim it. He may deny it. One charged with trespassing against his neighbor's property or rights may deny the trespass, but he may not disclaim it. As said by Story, in discussing the question of disclaimer, "one cannot disclaim a liability."

Story, Eq. Pl. § 840.

The acts of the legislature of the state of California, complained of, are prima facie valid and a cloud on title, and complainants have a right, in equity, to have the same removed, and the claims of defendant thereunder quieted.

7 Cyc. Law & Proc. p. 255.

Courts of equity always show the highest solicitude regarding land titles, and will afford a remedy appropriate to the circumstances of each case.

Sharon v. *Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720.

Messrs. **W. B. Matthews** and **J. R. Scott** argued the cause, and, with *Mr. Henry T. Lee*, filed a brief for appellee:

The bill must disclose a Federal question by a statement of facts in legal and logical form, such as is required in good pleading.

Little York Gold-Washing & Water Co. v. *Keyes*, 96 U. S. 199, 201, 24 L. ed. 656, 658; *Lampasas* v. *Bell*, 180 U. S. 276, 282, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368.

While the appellants, in the prayer of the bill, ask for a decree quieting their title to the lands described in the bill, it is evident that they did not intend by their pleading to state a cause of action to quiet title under the old chancery practice.

Boston & M. Consol. Copper & S. Min. Co. v. *Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434.

Cal. Code Civ. Proc. § 738, has the effect of enlarging the ancient jurisdiction of courts of equity in respect to suits to quiet title.

Wehrman v. *Conklin*, 155 U. S. 314, 325, 39 L. ed. 167, 173, 15 Sup. Ct. Rep. 129.

These enlarged equitable rights are administered in Federal courts, so far as they do not conflict with any provision of the Constitution or with the statutes of the United States.

Broderick's Will (*Kieley* v. *McGlynn*) 21 Wall. 503, 22 L. ed. 599; *Holland* v. *Challen*, 110 U. S. 15, 26, 28 L. ed. 52, 56, 3 Sup. Ct. Rep. 495; *United States* v. *Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Frost* v. *Spitley*, 121 U. S. 557, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129.

In an action under this section it is not necessary to allege in the complaint the nature of the estate or interest claimed by the defendant.

People ex rel. Love v. *Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Castro* v. *Barry*, 79 Cal. 443, 21 Pac. 946; *Bulwer Consol. Min. Co.* v. *Standard Consol. Min. Co.* 83 Cal. 589, 23 Pac. 1102.

The jurisdiction of the court must be made to appear from the plaintiff's statement of his own claim, and not from his statement or anticipation of the nature of the defendant's claim.

Tennessee v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co. supra; Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 188, 46 L. ed. 144, 146, 22 Sup. Ct. Rep. 47; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

The bill discloses an entire misconception, on the part of the appellants, of the nature and purpose of suit to remove a cloud, in two particulars: First, such a suit is aimed at an instrument or record, and not at mere threats, claims, or pretensions; and, second, it is not available for the purpose of having a statute canceled, or adjudged to be void.

Castro v. *Barry*, 79 Cal. 443, 21 Pac. 946; *Parker* v. *Shannon*, 121 Ill. 452, 13 N. E. 155; *Pixley* v. *Huggins*, 15 Cal. 127; *Van Doren* v. *New York*, 9 Paige, 388; *Burr* v. *Hunt*, 18 Cal. 303; *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 548, 21 L. ed. 231, 232; *Ex parte Siebold*, 100 U. S. 376, 25 L. ed. 719.

The question of the repugnancy of the acts of the legislature and the charters of the city to the Federal Constitution is primarily for the state courts.

New Orleans v. *Benjamin*, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 193, 48 L. ed. 140, 144, 24 Sup. Ct. Rep. 63.

The city of Los Angeles never has claimed that any of such acts of the legislature or charters devested the appellants, or their predecessors, or any other riparian owners on the Los Angeles river, of any right which they may have had to the waters of that stream; and the supreme court of California has never decided that such acts or charters had that effect.

Vernon Irrig. Co. v. *Los Angeles*, 106 Cal. 253, 39 Pac. 762; *Hooker* v. *Los Angeles*, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 57 Pac. 585.

U. S. Rev. Stat. § 1979, U. S. Comp. Stat. 1901, p. 1262, had no application to suits of this nature.

Holt v. *Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

The controversy between the city and the appellants, presented by the bill, concerning the ownership of the waters of the Los

Angeles river and the waters in the lands of the appellants, does not involve any question of which Federal courts have jurisdiction.

Hooker v. *Los Angeles*, 188 U. S. 314, 317, 47 L. ed. 487, 490, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *San Francisco* v. *Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 653, 34 L. ed. 1116, 11 Sup. Ct. Rep. 435; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *DeLamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

The disclaimers contained in the answer effectually remove any possible ground of Federal jurisdiction.

Chrystal Springs Land & Water Co. v. *Los Angeles*, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co. supra.*

Mr. Chief Justice **Fuller** delivered the opinion of the court:

There being no diversity of citizenship, the jurisdiction of the circuit court could [333] only be maintained upon the ground *that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed.

Complainants prayed for a decree quieting their title to the lands described in the bill, but the averments did not bring the case within the classes of bills of peace or to quiet title, recognized by the usual chancery practice, as succinctly stated in *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434. It was apparently framed under § 738 of the California Code of Civil Procedure, providing that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This statute enlarged the ancient jurisdiction of courts of equity in respect of suits to quiet title, but, the equitable rights themselves remaining, the enlargement thereof may be administered by the circuit courts of the United States as well as by the courts of the state. *Broderick's Will* (*Kieley* v. *McGlynn*) 21 Wall. 503, 22 L. ed. 599; *Holland* v. *Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Gormley* v. *Clark*, 134 U. S. 348, 33 L. ed. 913, 10 Sup. Ct. Rep. 554.

It seems, and it has often been held by the supreme court of California, that, in an action under this section, it is not necessary that the complaint should allege the nature of the estate or interest claimed by the defendant. *Head* v. *Fordyce*, 17 Cal. 151; *Castro* v. *Barry*, 79 Cal. 443, 21 Pac. 946; *Bulwer Consol. Min. Co.* v. *Standard Consol. Min. Co.* 83 Cal. 589, 23 Pac. 1102.

We are dealing with the question of the jurisdiction of the circuit court, and the general rule as to that is thus stated by Mr. Justice Peckham, speaking for the court, in *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co. supra:*

*"It would be wholly unnecessary and im- [334] proper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading, so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is.

. . . . . .

"The cases hold that, to give the circuit court original jurisdiction, the Federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up or which they rely upon. *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451."

Tested by this rule, we are of opinion that, as a bill to quiet title, the jurisdiction of the circuit court cannot be sustained by reason of the allegations that defendant's adverse claims are based on an erroneous construction of the treaty of Guadalupe Hidalgo [9 Stat. at L. 922], the act of March 3, 1851 [9 Stat. at L. 631, chap. 41], and the acts of the legislature of California, and ordinances and charters of the city of Los Angeles, enumerated, as clearly shown hereafter.

But complainants, appellants here, deny that the present case was brought under § 738, and say that the bill was one to remove clouds from complainants' titles; that is to

say, clouds created by claims and threats, and by the several acts of California including defendant's charters, which complainants ask to be declared invalid.

We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title, or, invoking
[335] *equity interposition on the ground of the removal of clouds, that decrees may be sought adjudging statutes unconstitutional and void. If it were true that the statutes and charters referred to in the bill were unconstitutional, as alleged, they were void on their face, and could not constitute a cloud on complainants' titles.

The test as to when a cloud is or is not cast, as stated by Mr. Justice Field, then chief justice of California, in *Pixley* v. *Huggins*, 15 Cal. 127, and reasserted in *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. ed. 231, is undoubtedly applicable and demonstrates that the assertion of unconstitutionality cannot be resorted to to maintain Federal jurisdiction as constituting a cloud. The averment of unconstitutionality in such circumstances is a mere pretext to obtain that jurisdiction.

According to the bill complainants' titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners. The state of California was not in the line of such titles, so that the acts of the legislature and the charters of the city complained of manifestly did not have the effect of depriving complainants of their property or of impairing the obligation of any contract, but simply conferred on the city such rights in respect of the waters of the river as may have been vested in the state.

Hooker v. *Los Angeles*, 188 U. S. 314, 47 L. ed. 487, 63 L. R. A. 471, 23 Sup. Ct. Rep. 395, was a suit brought by the city to condemn a tract of land riparian to the Los Angeles river, and embraced in one of the ranchos described in the present bill. It originated in the superior court of the county of Los Angeles under the title of *Los Angeles* v. *Pomeroy*, was carried to the supreme court of the state and there affirmed. 124 Cal. 597, 637, 638, 57 Pac. 585. It involved the question of the respective rights of the city and of the defendants to the water of the Los Angeles river. The state supreme court said:

"No act of the legislature . . . can
[336] diminish or change *the rights of the defendants in these lands derived from their predecessors, the Mexican and Spanish grantees. . . . The defendants hold their lands as successors to several Spanish and Mexican grantees, under patents from the United States based upon the original grants. They claim that, even conceding the rights of the pueblo and the city's succession to those rights (a concession which they make only for the purposes of the argument on this point), they are still, by virtue of their ownership of the lands in question, entitled to the exercise of full riparian rights, except so far, and so far only, as those rights are impaired by the paramount rights of the pueblo as they existed before the change of flag and without any legislative addition thereto.

"This claim, we think, is clearly just. The legislature of California could grant nothing to the city of Los Angeles which belonged to others, and the rights of the city, as successor to the pueblo, in the lands of riparian proprietors holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself."

The case was brought here on writ of error, and we said:

"And so as to certain statutes of the state of California, which declared that the city of Los Angeles is vested with the paramount right to the surface and subterranean water of the Los Angeles river. Those statutes were admitted in evidence merely to show that the city was the successor of the ancient pueblo. The court held that the right of the city of Los Angeles to take from the Los Angeles river all of the waters of the river to the extent of its reasonable domestic and municipal needs was based on the Spanish and Mexican law, and not on the charters of the city of Los Angeles. The validity of the statutes, on account of repugnancy to the Federal Constitution, was not drawn in question in the trial court nor in the supreme court of the state, and both courts held that they neither granted to the city nor took away from plaintiffs in error any rights or property."

*This being so, the averments of depriva-[337] tion or impairment afforded no proper basis for jurisdiction, and as to § 1979 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1262), that was inapplicable. *Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

In truth, the questions as to the nature and extent of complainants' titles or rights, as put forward in the bill, are not Federal questions, but questions of state or general law.

In *Hooker* v. *Los Angeles, supra*, it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right,

privilege, or immunity claimed under the Constitution or some statute or treaty of the United States and so reviewable here. But this court held otherwise, and we said:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco* v. *Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350. And the question of the existence of percolating water was merely a question of fact.

"The patents were in the nature of a quitclaim, and, under the act of March 3, 1851, were 'conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.' The validity of that act was not drawn in question in the state court, and, as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to the waters of the river was not against any title or right claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under, the Constitution. If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not
[338] involve *the construction of the treaty, but the validity of the title of Mexican and Spanish grants prior to the treaty."

Chrystal Springs Land & Water Co. v. *Los Angeles*, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573, was a bill brought in the circuit court for the southern district of California and that court ruled (82 Fed. 114) that where both parties claimed under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy was only as to what were the rights thus granted and confirmed, the suit was not one arising under a treaty so as to confer jurisdiction on a Federal court, and that where the only ground of Federal jurisdiction was the allegation that defendant's claim of title was based in part on certain acts of the legislature of the state, which attempted to transfer to it, as alleged, the title held by complainant's grantors at the time of their passage, the court would not retain jurisdiction when an answer was filed by defendant denying the allegations, and disclaiming any title or claim of title not held by it before the passage of the acts. The bill was dismissed, and we affirmed the judgment.

We there cited, among other cases, *Phillips* v. *Mound City Land & Water Asso.* 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 657, and *Robinson* v. *Anderson*, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011. In the one case it was adjudged, as stated in the syllabus, that "an adjudication by the highest court of a state that certain proceedings before a Mexican tribunal prior to the treaty of Guadalupe Hidalgo were insufficient to effect a partition of a tract of land before that time granted by the Mexican government to three persons who were partners, which grant was confirmed by commissioners appointed under the provisions of the act of March 3, 1851 (9 Stat. at L. 631, chap. 41), 'to ascertain and settle the private land claims in the state of California,' presents no Federal question which is subject to review here."

In the other, that under the act of 1875 [18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508], even if the complaint, standing by itself, made out a case of jurisdiction, it was taken away as soon as, when the answer came in, it appeared that defendants either disclaimed all interest in the *land in question, or claimed title under, [339] and not adverse to, that of plaintiff. See also *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co.* 188 U. S. 632, 643, 47 L. ed. 626, 633, 23 Sup. Ct. Rep. 434. There are the same disclaimers here as in the *Chrystal Springs Case*, but, from what we have heretofore said, it will be seen that we are of opinion, in any aspect, that the bill was properly dismissed, and that the decrée to that effect must be *affirmed*.

ANTONIO ORTEGA, *Plff. in Err.*,
v.
ANGELA LARA.

(See S. C. Reporter's ed. 339–344.)

1. **Error to district court of Porto Rico —Federal question.**—The ruling of the district court of the United States for the district of Porto Rico that the recovery for the breach of a promise to marry was not limited to the expense incurred in reliance on the promised marriage, as provided by Porto Rico Civ. Code, art. 44, is not the equivalent, for the purpose of sustaining a writ of error from the Supreme Court of the United States, of a denial of a right claimed under a law of the United States, on the theory that this article became a law of the United States by reason of the act of April 12, 1900 (31 Stat. at L. 77, chap. 191) § 8, continuing local laws in force.

2. **Courts—jurisdiction—Porto Rico district court.**—The jurisdiction of the district court of the United States for the district of Porto Rico, which, under the act of March 2, 1901 (31 Stat. at L. 953, chap.

812), § 3, embraces controversies where the parties or either of them are citizens of the United States, or citizens or subjects of a foreign state, extends to a cause in which the parties on both sides are subjects of the King of Spain.

[No. 230.]

Argued April 17, 18, 1906. Decided May 21, 1906.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment entered on a verdict for plaintiff in an action to recover damages for a breach of a promise of marriage. *Dismissed* for want of jurisdiction.

The facts are stated in the opinion.

Mr. **George H. Lamar** argued the cause, and, with *Mr. N. B. K. Pettingill,* filed a brief for plaintiff in error:

Mr. **Frederic D. McKenney** argued the cause, and, with *Messrs. John Spalding Flannery* and *T. D. Mott, Jr.,* filed a brief for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Angela Lara brought her action against Antonio Ortega in the district court of the United States for the district of Porto Rico to recover damages alleged to have been suffered by her by reason of his breach of promise of marriage. The date of the promise was laid as June 1, 1900, and of the breach in 1904. Both parties were subjects of Spain and residents of Porto Rico.

Defendant demurred to the complaint, and, the demurrer having been overruled, pleaded the general issue. The cause was tried by a jury and resulted in a verdict for plaintiff in the sum of $5,000, interest and costs, on which judgment was entered. Defendant moved in arrest and for judgment *non obstante veredicto,* which motions were overruled, and this writ of error was thereupon allowed.

At the conclusion of the evidence, defendant requested the court to instruct the jury to find in his favor, on the grounds, among others, that the court had no jurisdiction of a suit where both plaintiff and defendant were subjects of the King of Spain, and because the cause of action arose in June, 1900, "at which time there was no provision in the laws in force in Porto Rico for a suit of the character set out in plaintiff's declaration, the only basis for the said suit being the provisions of article 44 of the Civil Code then in force." Similar reasons were assigned in support of the motions in arrest and *non obstante.*

*1. The judgment was for $5,000 and costs. [342] It carried interest, but it is the amount of the judgment that furnishes the test of our jurisdiction, and it is conceded that that is insufficient in this instance. But plaintiff in error contends that the refusal of the court below to limit the right of recovery by the terms of article 44 of the former Civil Code of Porto Rico amounted to the denial of a right claimed under a statute of the United States, and that jurisdiction may be maintained on that ground. Act March 3, 1885 (23 Stat. at L. 443, chap. 355, §§ 1, 2, U. S. Comp. Stat. 1901, p. 572); act April 12, 1900 (31 Stat. at L. 77, chap. 191, § 35).

The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899 [30 Stat. at L. 993, chap. 376], and the ratifications were exchanged and the treaty proclaimed April 11, 1899 [30 Stat. at L. 1754]. Then followed the act of April 12, 1900 (31 Stat. at L. 77, chap. 191). At that date, article 44 of the Civil Code of Porto Rico, relating to breaches of promise of marriage, was in force, and provided that, under certain conditions, "the person who refuses to marry without just cause shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage."

By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.

Nevertheless, and apparently largely out of abundant caution, the 8th section of the act of April 12, 1900, provided: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders *and decrees in force when [343] this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provid-

ed for Porto Rico or by act of Congress of the United States; . . . "

In 1902 the legislature of Porto Rico enacted a new Civil Code, which went into effect July 1 of that year, and this repealed article 44 of the prior Civil Code, and carried forward several articles bearing upon the same subject.

It will be remembered that the alleged promise was in 1900 and the alleged breach in 1904. And now the argument is, that by reason of § 8 of the act of April 12, 1900, commonly called the "Foraker act," article 44 became a law of the United States by adoption, and that, therefore, the ruling of the court below, that recovery was not limited to expenses, was equivalent to the denial of a right claimed under a law of the United States.

We do not agree with this view. Article 44 was a law of Porto Rico on April 12, 1900, and the operation of the Foraker act was to define how it might be amended or repealed.

It was repealed by the Porto Rican legislature before the alleged breach of promise. If the district court erred in declining on any ground to apply it as a limitation, the error cannot be corrected on this appeal, because the appeal does not lie.

The alleged Federal question had no existence in substance. The laws of Porto Rico remained the laws of Porto Rico except as indicated in § 8 of the Foraker act, which section did not make all the laws of Porto Rico acts of Congress.

We cannot perceive that "the Constitution of the United States, or a treaty thereof, or an act of Congress" was brought in question or a right claimed thereunder denied, within § 35 of the Foraker act, or that "the validity of a treaty or statute of, or an authority exercised under, the United States," was drawn in question within § 2 of the act of March 3, 1885.

2. By § 3 of the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), it was provided [344] "that the jurisdiction of the district *court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states."

The jurisdiction of the district court, when the parties on both sides were the subjects of the King of Spain, has several times been sustained by this court, and we do not feel required in this case to make any other ruling.

Writ of error dismissed.

JOSEPH RALPH BURTON, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 344–400.)

1. **Constitutional law—limitation on Federal power.**—The powers of the Federal government were not exceeded by the enactment of U. S. Rev. Stat. § 1782, U. S. Comp. Stat. 1901, p. 1212, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested.

2. **Constitutional law—separation of departments—authority of Senate over its members.**—The authority of the Senate of the United States over its members is not interfered with by U. S. Rev. Stat. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested, and declaring that anyone convicted under its provisions shall be incapable of holding any office of honor, trust, or profit under the government of the United States.

3. **Constitutional law—separation of departments—interference with senatorial duties.**—The discharge, by a Senator of the United States, of his legitimate duties, is not interfered with by U. S. Rev. Stat. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested.

4. **Officers — eligibility — disqualification for crime.**—Senators of the United States do not hold their places "under the government of the United States," within the meaning of the declaration in U. S. Rev. Stat. § 1782, that anyone convicted under its provisions shall be incapable of holding any office of honor, trust, or profit under that government.

5. **Criminal law—Senator's services before a department.**— A fraud order inquiry pending before the Postoffice Department is a proceeding in which the United States, although having no direct money or pecuniary interest in the result, is "directly

NOTE.—*On the separation of the departments of government*—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 361; Fleming v. Guthrie, 3 L.R.A. 53; King v. State, 3 L.R.A. 210; and State *ex rel.* Jameson v. Denny, 4 L.R.A. 79.

On former jeopardy—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; *Ex parte* Lange, 21 L. ed. U. S. 872; United States v. Perez, 6 L. ed. U. S. 165; and Silsby v. Foote, 14 L. ed. U. S. 394.

On acceptance of contract by letter or telegram—see note to Ellason v. Hensbaw, 4 L. ed. U. S. 556.

As to the proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

or indirectly interested" within the meaning of U. S. Rev. Stat. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is so interested.

6. **Indictment—sufficiency.**—The accused is not entitled to demand that all special or particular means employed in the commission of the offense should be more fully set out in the indictment, where the words of such indictment directly, and without ambiguity, disclose all the elements essential to the commission of the offense charged.

7. **Appeal—review of facts in criminal case.**—If there is sufficient evidence to go to the jury in a criminal case, the Supreme Court of the United States will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of evidence, but will limit its decision to questions of law.

8. **Criminal law—Senator's services before department.**—The agreement to receive, and the receipt of, the forbidden compensation, are made two separate and distinct offenses by U. S. Rev. Stat. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested.

9. **Criminal law—former jeopardy.**—An acquittal upon the charge of having received the compensation forbidden by U. S. Rev. Stat. § 1782, from a specified person, described in the indictment as an officer and employee of a corporation, will not sustain a plea in bar of a prosecution upon the charge of having received such compensation from the corporation, where the accused declined to plead further after his demurrer to the answer, alleging that the two offenses are not, in legal effect, identical, was overruled.

10. **Contracts—offer and acceptance—by mail or telegram.**—A contract is to be deemed concluded when the offer is accepted within a reasonable time, either by telegram, duly sent in the ordinary way, or by letter, duly posted to the proposer, provided either be done before the offer is withdrawn to the knowledge of, or upon notice to, the other party.

11. **Courts—venue of crime.**—The physical absence of the accused from the state of Missouri when the acceptance by a St. Louis corporation of his offer to render services in consideration of the compensation forbidden by U. S. Rev. Stat. § 1782, was despatched by mail or telegram, does not deprive the circuit court of the United States for the eastern district of Missouri of jurisdiction of the offense, on the theory that the crime was not committed in that district, within the meaning of U. S. Const. art. 3, § 2, and 6th Amend., requiring the trial of all crimes against the United States to be held in the state and district where such crimes shall have been committed.

[No. 539.]

Argued April 3, 4, 1906. Decided May 21, 1906.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a conviction of a violation of U. S. Rev. Stat. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John F. Dillon** and **F. W. Lehmann** argued the cause, and, with *Messrs. Harry Hubbard, W. H. Rossington,* and *W. Knox Haynes,* filed a brief for plaintiff in error:

The United States was not a party to, nor interested in, the proceedings set forth in the indictment.

Northampton v. *Smith,* 11 Met. 390; *McGrath* v. *People,* 100 Ill. 464; *Evans* v. *Eaton,* 7 Wheat. 356, 5 L. ed. 472; *State* v. *Sutton,* 74 Vt. 12, 52 Atl. 116; *Foreman* v. *Marianna,* 43 Ark. 324; *Taylor* v. *Highway Comrs.* 88 Ill. 526; *Chicago, B. & Q. R. Co.* v. *Kellogg,* 54 Neb. 138, 74 N. W. 403; *Sauls* v. *Freeman,* 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525; *Bowman's Case,* 67 Mo. 146; *United States* v. *Wiltberger,* 5 Wheat. 76, 5 L. ed. 37; *United States* v. *Sheldon,* 2 Wheat. 119, 4 L. ed. 199; *United States* v. *Morris,* 14 Pet. 464, 10 L. ed. 543; *United States* v. *Clayton,* 2 Dill. 219, Fed. Cas. No. 14,814.

The indictment states no facts showing the pendency of any proceeding in the Postal Department.

United States v. *Hess,* 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *Post* v. *United States,* 161 U. S. 583, 40 L. ed. 816, 16 Sup. Ct. Rep. 611; *Virginia* v. *Paul,* 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *American School of Magnetic Healing* v. *McAnnulty,* 102 Fed. 565; *Dauphin* v. *Key,* MacArth. & M. 203; *Enterprise Sav. Asso.* v. *Zumstein,* 64 Fed. 837, Affirmed in 15 C. C. A. 153, 37 U. S. App. 71, 67 Fed. 1000; *Bates & G. Co.* v. *Payne,* 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; *United States* v. *Ju Toy,* 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *United States* v. *Eaton,* 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Caha* v. *United States,* 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513.

The plea of former acquittal as to the offense charged in the third and seventh counts of the indictment showed a former indictment and trial for and acquittal of the offense, and this plea was not avoided by

the replication, and the demurrer to the replication should have been sustained. Placing the defendant on trial again for the offense alleged was in violation of the 6th article of Amendment to the Federal Constitution.

Baldwin v. *Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534; *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326, 5 L. ed. 100; *Ford* v. *Williams*, 21 How. 289, 16 L. ed. 38; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 381, 12 L. ed. 481; *Commercial Bank* v. *French*, 21 Pick. 486, 32 Am. Dec. 280; *Dugan* v. *United States*, 3 Wheat. 172, 4 L. ed. 362; *State* v. *Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *Hurst* v. *State*, 86 Ala. 604, 11 Am. St. Rep. 79, 6 So. 120; Cooley, Const. Lim. 7th ed. p. 470; *People* v. *M'Gowan*, 17 Wend. 386; *Monroe* v. *State*, 111 Ala. 15, 20 So. 634; *United States* v. *Lee*, 4 Cranch, C. C. 446, Fed. Cas. No. 15,586; *United States* v. *Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192; *United States* v. *Nickerson*, 17 How. 204, 15 L. ed. 219; *Mitchell* v. *State*, 42 Ohio St. 384; *Campbell* v. *State*, 9 Yerg. 333, 30 Am. Dec. 417; *State* v. *Martin*, 30 Wis. 216, 11 Am. Rep. 567; *Stuart* v. *Com.* 28 Gratt. 950; *Guenther* v. *People*, 24 N. Y. 100; *Morris* v. *State*, 8 Smedes & M. 762; *State* v. *Kattlemann*, 35 Mo. 105; *State* v. *Kittle*, 2 Tyler (Vt.) 471; *Dealy* v. *United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680.

There was no evidence to go to the jury that Burton made any agreement to receive compensation for services to prevent the issuance of a fraud order. Therefore the court erred in submitting to the jury the question whether Burton made such agreement.

Whatever the agreement was which Burton made to receive compensation from the Rialto Grain & Securities Company for services, such agreement was not made in the state of Missouri, and the defendant was deprived of his constitutional right to be tried in the state and district where the agreement was made, contrary to § 2, article 3, of the Constitution and of the 6th Amendment thereof.

Tayloe v. *Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Patrick* v. *Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. Rep. 811, 866; 12 Enc. Pl. & Pr. pp. 239, 240; *Re Burr*, 4 Cranch, 470, 2 L. ed. 684; *Re Palliser* (*Palliser* v. *United States*) 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; *Horner* v. *United States*, 143 U. S. 212, 36 L. ed. 129, 12 Sup. Ct. Rep. 407; *Landa* v. *State*, 26 Tex. App. 580, 10 S. W. 218; *United States* v. *Fowkes*, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; *United States* v. *Dietrich*, 126 Fed. 664; *Eliason* v. *Henshaw*, 4 Wheat. 225, 4 L. ed. 556; *First Nat. Bank* v. *Hall*, 101 U. S. 43, 25 L. ed. 822; *Minneapolis & St. L. R. Co.* v. *Columbus Rolling Mill*, 119 U. S. 151, 30 L. ed. 377, 7 Sup. Ct. Rep. 168; Chitty, Contr. 11th Am. ed. 15, note *f*; *Christian & C. Grocery Co.* v. *Bienville Water Supply Co.* 106 Ala. 124, 17 So. 352; *Tennessee Coal, Iron, & R. Co.* v. *Pierce*, 26 C. C. A. 632, 52 U. S. App. 355, 81 Fed. 814; *Seitz* v. *Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.

The agreement of the defendant with the Rialto company was for service by the month, and, no service in the department having been rendered during the period covered by the payment made March 26th, there was no offense in the receipt of that payment.

Davis v. *Preston*, 6 Ala. 83; *Matthews* v. *Jenkins*, 80 Va. 463; *La Coursier* v. *Russell*, 82 Wis. 265, 52 N. W. 176; *Benedict* v. *United States*, 176 U. S. 357, 44 L. ed. 503, 20 Sup. Ct. Rep. 458; *Re Nielsen*, 131 U. S. 188, 33 L. ed. 122, 9 Sup. Ct. Rep. 672.

The defendant was not subject to trial and punishment as for separate offenses in agreeing to receive and receiving compensation for the services charged in the indictment to have been rendered by him.

2 Bishop, New Crim. Proc. § 55; 1 Bishop, New Crim. Proc. § 436; *State* v. *Jones*, 106 Mo. 302, 17 S. W. 366.

The juror, William V. Jones, was disqualified because he had formed and still retained an opinion as to the guilt or innocence of the defendant, an opinion which was the result of reading the reports of the former trial, which reports he believed to be true; and the challenge to him should have been sustained.

Lewis v. *United States*, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; *Williams* v. *United States*, 35 C. C. A. 369, 93 Fed. 396.

The letters of Houts, Evans, Warner, and Fravel, and the accompanying circulars and booklets, all of which were read in full, to the jury, were incompetent and irrelevant as against the defendant, as he had no knowledge of them whatever, and their contents were not necessary to show the fact that some matter was pending in the department against the Rialto Grain & Securities Company.

Tappan v. *Beardsley*, 10 Wall. 427, 19 L. ed. 947.

Mr. **B. P. Waggener** also argued the cause, and, with *Messrs. John F. Dillon, Harry Hubbard, F. W. Lehmann, W. H. Rossington, W. Knox Haynes*, and *W. P. Hackney*, filed a brief for plaintiff in error:

The act of 1864, now Rev. Stat. § 1782,

U. S. Comp. Stat. 1901, p. 1212, is in conflict with the fundamental idea on which our whole Federal government is founded, *viz.:* That the Federal government is a government of limited powers, with duties defined and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people.

Cooley, Const. Lim. 7th ed. 11; *Martin* v. *Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Ableman* v. *Booth*, 21 How. 519, 16 L. ed. 174; *Ex parte Virginia*, 100 U. S. 361, 25 L. ed. 684; *Kilbourn* v. *Thompson*, 103 U. S. 182, 26 L. ed. 383.

By the Constitution, there has been delegated express power to each House to punish its own members in such manner as, in its wisdom, is just and proper, and, by "the concurrence of two thirds, to expel a member."

Kilbourn v. *Thompson, supra;* 1 Story, Const. 4th ed., 589.

When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases.

Lowe v. *Com.* 3 Met. (Ky.) 241; *Falloon* v. *Clark*, 61 Kan. 127, 58 Pac. 990; *Brown* v. *Grover*, 6 Bush, 3; *Thomas* v. *Owens*, 4 Md. 190; *Com.* v. *Williams*, 79 Ky. 42, 42 Am. Rep. 204; *Sheehan* v. *Scott*, 145 Cal. 684, 79 Pac. 350; *Rison* v. *Farr*, 24 Ark. 161, 87 Am. Dec. 52; *State ex rel. Allison* v. *Blake*, 57 N. J. L. 8, 25 L.R.A. 480, 29 Atl. 417; *State ex rel. Kimball* v. *Hendee*, 57 N. J. L. 307, 30 Atl. 894; Cooley, Const. Law, 5th ed. 753; Cooley, Const. Lim. 7th ed. p. 99.

A right conferred by the Constitution is beyond the reach of legislative interference. If it were not so, there would be nothing stable; there would be no security for any right. It is in the nature of a constitutional grant of power or privileges that it cannot be taken away by any authority known to government. It involves a prohibition of interference with it.

McCafferty v. *Guyer*, 59 Pa. 109.

No legislation is appropriate which would conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions.

Ex parte Virginia, supra.

The jurisdiction of each House to decide upon the election returns and qualifications of its own members is supreme and exclusive.

1 Story, Const. § 833, p. 584; 1 Kent, Com. 235; *People ex rel. Hatzel* v. *Hall*, 80 N. Y. 121; *State* v. *Gilmore*, 20 Kan. 551, 27 Am. Rep. 189; *State ex rel. Atty. Gen.* v. *Tomlinson*, 20 Kan. 703; *Robertson* v. *State*, 109 Ind. 92, 10 N. E. 582, 643; *State ex rel. Brooks* v. *Baxter*, 28 Ark. 129; *People ex rel. Drake* v. *Mahaney*, 13 Mich. 482; *Dalton* v. *State*, 43 Ohio St. 680, 3 N. E. 685.

Whenever a question arises concerning the constitutionality of a particular power, the first question is whether the power is expressed in the Constitution. If it is, the question is decided. If it is not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it is, then it may be exercised by Congress. If not, Congress cannot exercise it.

United States v. *Harris*, 106 U. S. 636, 27 L. ed. 292, 1 Sup. Ct. Rep. 601.

The sovereignty to be created was to be limited in its powers of legislation, and, if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land; nor were the state judges bound to carry it into effect.

Ableman v. *Booth*, 21 How. 519, 16 L. ed. 174.

A state has no voice whatever, under the Constitution, in prescribing the qualifications of a Senator.

Re Trumbull, Taft, Elec. Cas. 228; *Re Ames*, Taft, Elec. Cas. 375.

If a Senator is not an officer of the United States, in the sense of the Constitution, clearly he may not be coerced, or punished for his refusal to obey the requirements of an act of Congress relative to the discharge of his duties as United States Senator.

United States v. *Germaine*, 99 U. S. 510, 25 L. ed. 483; *United States* v. *Mouat*, 124 U. S. 307, 31 L. ed. 464, 8 Sup. Ct. Rep. 505; *United States* v. *Smith*, 124 U. S. 532, 31 L. ed. 536, 8 Sup. Ct. Rep. 595; *Re Green* (*Fitzgerald* v. *Green*) 134 U. S. 377, 33 L. ed. 951, 10 Sup. Ct. Rep. 586; *McPherson* v. *Blacker*, 146 U. S. 35, 36, 36 L. ed. 877, 878, 13 Sup. Ct. Rep. 3; *Kentucky* v. *Dennison*, 24 How. 107, 16 L. ed. 729.

"Each House" has the power to summon witnesses, and the same power as the courts to enforce its mandates, and may determine for itself the same question which Congress, by the act of 1864, has attempted to delegate to the judiciary to determine.

Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677.

The Senate necessarily possesses the inherent power of self-protection.

Id., 166 U. S. 668, 669, 41 L. ed. 1158, 1159, 17 Sup. Ct. Rep. 677.

Where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient.

Cooley, Const. Lim. 7th ed. 98.

Congress has no constitutional power, by legislation, to place any limitations or restrictions upon his official conduct as Senator, and make, by force of the statute, such conduct a crime which would not be a crime if he were not a Senator.

1 The Federalist, p. 357, No. 44; p. 273, No. 48.

The nature of the employed power exercised as a means must be legitimate; in other words, no power will be employed as a means to an end which is not legitimate,—that is, not within the powers granted by the Constitution. The ancillary legislation must be a necessary and proper means to accomplish an end which is clearly constitutional.

1 Tucker, Const. P. 368; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.

The express power conferred excludes the idea of any implied power not necessary and proper for carrying into execution the express power.

Anderson v. *Dunn*, 6 Wheat. 233, 5 L. ed. 249.

While the act does not in terms provide for forfeiture of office, or expulsion, it requires a judgment, upon conviction, that the person convicted shall be "rendered forever hereafter incapable of holding any office of honor, profit, or trust under the government of the United States." The effect of the judgment, if the act is valid, is to expel the Senator from the Senate.

Lowe v. *Com.* 3 Met. (Ky.) 241.

Assistant Attorney General **Robb** argued the cause and filed a brief for defendant in error:

The effect of granting a new trial is to nullify entirely the proceedings at the former trial.

Trono v. *United States*, 199 U. S. 521, *ante*, 292, 26 Sup. Ct. Rep. 121.

When acceptance of a proposal is made by letter or telegram, the contract is complete the moment the letter is mailed or the telegram despatched, the *lex loci contractus* being the place where the letter or telegram is mailed or despatched.

Tayloe v. *Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Patrick* v. *Bowman*, 149 U. S. 424, 37 L. ed. 794, 13 Sup. Ct. Rep. 811, 866; *Garrettson* v. *North Atchison Bank*, 47 Fed. 867; *Phenix Ins. Co.* v. *Schultz*, 25 C. C. A. 453, 42 U. S. App. 483, 80 Fed. 343; Hammond, Contr. § 42, note 22.

The charge of the court set the entire case, as presented by the evidence, fairly and substantially before the jury. This was sufficient.

Chicago & N. W. R. Co. v. *Whitton*, 13 Wall. 270, 290, 20 L. ed. 571, 578; *Tweed's Case* (*Flanders* v. *Tweed*) 16 Wall. 516, 21 L. ed. 392.

Those only are officers of the United States in a constitutional sense, and in the sense in which those words are employed in the statutes, who hold their places by virtue of an appointment by the President, or a court of law, or the head of a department.

United States v. *Germaine*, 99 U. S. 508, 25 L. ed. 482; *United States* v. *Mouat*, 124 U. S. 307, 31 L. ed. 464, 8 Sup. Ct. Rep. 505; *United States* v. *Smith*, 124 U. S. 532, 31 L. ed. 536, 8 Sup. Ct. Rep. 595; 17 Ops. Atty. Gen. 419.

The agreement to receive and the receipt of compensation for the alleged services constituted two offenses.

Clune v. *United States*, 159 U. S. 590, 595, 40 L. ed. 269, 271, 16 Sup. Ct. Rep. 125; *United States* v. *Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165.

The plenary authority of Congress to protect the Executive Department was asserted in *Public Clearing House* v. *Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789, where it was held that, in case of conflict, the rights of the individual must give way to the rights of the public.

The evident purpose of Congress in all this class of legislation has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the scope of legislative power.

Ex parte Curtis, 106 U. S. 371, 373, 27 L. ed. 232, 234, 1 Sup. Ct. Rep. 381.

In *United States* v. *Newton*, 9 Mackey, 226, the supreme court of the District of Columbia held that § 12 of the civil service act, which prohibits persons from soliciting or receiving political contributions in any room or building officially occupied by any United States officer or employee, etc., applied to private citizens as well as officials, and was not an unconstitutional abridgment of the citizen's right of speech and action; the government having a right to prescribe rules of conduct, not only for officers and employees, but for all persons visiting such places.

Unless Congress can define and punish offenses committed by Senators and Representatives in their official capacity, the government is absolutely at the mercy of corrupt members, for no other body can. That Congress can do so arises from the fact that all legislative power conferred upon the Federal government is vested in it. From the foundation of the government this has been held to include the power to enact penal legislation, such legislation being necessary

and proper to carry into execution the powers delegated.

United States v. *Coombs*, 12 Pet. 72, 9 L. ed. 1004; *United States* v. *Fox*, 95 U. S. 670, 24 L. ed. 538; *Frisbie* v. *United States*, 157 U. S. 166, 39 L. ed. 659, 15 Sup. Ct. Rep. 586.

Mr. Justice **Harlan** delivered the opinion of the court:

This criminal prosecution is founded upon the following sections of the Revised Statutes:

"Sec. 3929 (U. S. Comp. Stat. 1901, p. 2686). The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person or company, . . . whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any [359] kind, to return all such *registered letters to the postmaster at the office at which they were originally mailed with the word 'fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. . . . " By the act of March 2d, 1895, chap. 191, this section was extended and made applicable to all letters or other matter sent by mail." 28 Stat. at L. 963, 964, U. S. Comp. Stat. 1901, pp. 3178, 2688.

"Sec. 4041. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. . . . " 26 Stat. at L. 466, chap. 908, U. S. Comp. Stat. 1901, p. 2749.

"Sec. 1782 (U. S. Comp. Stat. 1901, p. 1212). No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a department, or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, *and shall be im- [360] prisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the government of the United States." 13 Stat. at L. 123, chap. 119.

The plaintiff in error was indicted in the district court of the United States for the eastern district of Missouri for a violation of § 1782, the offense being alleged to have been committed at St. Louis. The accused was found guilty, and, on writ of error, the judgment was reversed by this court, and a new trial ordered, upon the ground, among others, that, according to the facts disclosed in that case, the offense charged was not committed in the state of Missouri, where the accused was tried. 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243.

Subsequently, the defendant was tried under a new indictment (the present one) charging him with certain violations of § 1782. The indictment contained eight counts. Stating the case now only in a general way, the first, second, fourth, sixth, and eighth counts charged, in substance, that the defendant, a Senator of the United States, had *agreed* to receive compensation, namely, the sum of $2,500, for services to be rendered by him for the Rialto Grain & Securities Company, a corporation (to be hereafter called the Rialto Company), in relation to a proceeding, matter, and thing, in which the United States was interested, before the Postoffice Department, those counts differing only as to the nature of the interest which the United States had in such proceeding, matter, and thing; some of the counts alleging that the United States was directly, others that it was in-

directly, interested in such proceeding, matter, and thing. The third, fifth, and seventh counts charged that the defendant did *receive* compensation to the amount of $500 for the services alleged to have been so rendered by him, those three counts differing only as to the nature of the interest, whether direct or indirect, which the United States had in the alleged proceeding, matter, and thing before the Postoffice Department.

[361] *The defendant demurred to each count. The government, at that stage of the prosecution, dismissed the indictment as to the fourth and fifth counts and the court overruled the demurrer as to all the other counts. The accused filed a plea in bar to the third and seventh counts. To that plea the government filed an answer, to which we will advert hereafter. A demurrer to that answer was overruled, and, defendant declining to plead further, the plea in bar was denied. He was then arraigned, tried, and found guilty on the first, second, third, sixth, seventh, and eighth counts. No judgment or sentence was pronounced on the first, second, and eighth counts, because they covered the transaction and offense mentioned in the sixth count. And as the third count covered the transaction and offense embraced by the seventh count, no judgment or sentence was pronounced on it.

On the sixth count the defendant was sentenced to be imprisoned for six months in the county jail and to pay a fine of $2,000: on the seventh, to be imprisoned for six months in the county jail and fined $500. It was declared or recited in the judgment on each of those counts that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust, or profit under the government of the United States."

It will be well to bring out fully the allegations of the two counts upon which the sentences were based. They will show the nature of the proceeding, matter, or thing before the Postoffice Department, in respect of which the defendant was indicted.

The sixth count alleged that on the 18th day of November, 1902, the defendant was a Senator of the United States from the state of Kansas, having been theretofore elected for a term of six years, expiring on the 4th day of March, 1907, and the Rialto Company was a corporation engaged in the business of buying, selling, and dealing in grain and securities, having its principal offices at the city of St. Louis, Missouri; that before and on the above day there was

[362] pending before *the Postoffice Department of the United States, and before the then Postmaster General of the said United States, a certain proceeding in which the United States was then indirectly interested, for determining the question whether that corporation was engaged in conducting a scheme for obtaining money through the mails of the said United States, by means of false and fraudulent pretenses, representations, and promises, made by the said corporation, and whether the said Postmaster General should instruct the postmaster at the postoffice at St. Louis, the same then being a postoffice at which registered letters were then arriving, directed to the said corporation, to return all such letters to the postmasters at the several postoffices at which they were or should thereafter be originally mailed, with the word "fraudulent" plainly written or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof under the regulations of the said Postoffice Department, and in the same manner to dispose of all other letters and matter sent by mail to the said postoffice directed to the said corporation, "all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Postoffice Department and the said Postmaster General and, on that day, were still undetermined by the said Postmaster General. And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Ralph Burton, Senator, as in this count of this indictment aforesaid, on the said 18th day of November, in the year of our Lord nineteen hundred and two, after his said election as such Senator, and during his continuance in office as such Senator, at St. Louis, aforesaid, in the division and district aforesaid, then well knowing the proceedings in this count mentioned, in which the United States was then indirectly interested, to be, *as it then still was, pend- [363]
ing as last aforesaid, before the said Postoffice Department and the said Postmaster General, and undetermined by the said Postmaster General, and then well knowing the character of that proceeding, and that the said United States was then indirectly interested in the same proceeding as last aforesaid, and then well knowing all the premises in this count set forth, unlawfully did *agree* with the said Rialto Grain & Securities Company, corporation as aforesaid, by and through its officers, agents, and attorneys, to receive directly from that corporation, through its officers, agents, and attorneys, certain other compensation, to wit, the sum of $2,500, lawful money of the said

United States, for certain services to be rendered by him, the said Joseph Ralph Burton, to the said corporation, in relation to the last-mentioned proceeding, in which the said United States was then indirectly interested as aforesaid, before the said Postoffice Department and before the said Postmaster General, while the same proceeding was and should still be pending before the said Postoffice Department and the said Postmaster General, and still undetermined by the said Postmaster General, and after his, the said Joseph Ralph Burton's, said election as such Senator, and during his continuance in office as such Senator,—that is to say, services consisting of his, the said Joseph Ralph Burton's, appearing before the said Postoffice Department and before the said Postmaster General, the Chief Postoffice Inspector, and the Assistant Attorney General for said Postoffice Department, and other officers of said Postoffice Department, as an agent of, and attorney for, the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations, and persuasion, inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above
[364] mentioned, and to *put a stop to any further investigation of the questions in this count mentioned by the said Postoffice Department and by the said Postmaster General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said postoffice at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmasters at the postoffices at which they were or should thereafter be originally mailed as aforesaid, with the word 'fraudulent' plainly written or stamped upon the outside thereof, as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the postoffice at St. Louis aforesaid, of postal money orders drawn to its order, or in its favor. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Joseph Ralph Burton, at the time and place, and in manner and form in this count of this indictment aforesaid, unlawfully did offend against § 1782 of the Revised Statutes of the said United States, against the peace and dignity of the said United States."

The seventh count alleged "that on the said 26th day of March, in the year of our Lord nineteen hundred and three, the said Joseph Ralph Burton, then still being a Senator of the said United States for the said state of Kansas, as in the sixth count of this indictment set forth, and having, after his election as such Senator, and during his continuance in office, to wit, on divers days between the said 18th day of November, in the year of our Lord nineteen hundred and two, and the said 26th day of March, in the year of our Lord nineteen hundred and three, rendered the services in the said sixth count described, to the corporation in that count mentioned, before the Postmaster General of the said United States and before the said Postoffice Department, and the same having been, as he, the said Joseph Ralph Burton, when so rendering the same, well knew, services in relation to the *pro-[365] ceeding described in the said sixth count, in which the said United States was indirectly interested, pending, as he, the said Joseph Ralph Burton also well knew, before the said Postoffice Department and Postmaster General, unlawfully did, after his said election and during his continuance in office, at St. Louis aforesaid, in the said eastern division of the said eastern district of Missouri, *receive* directly from the said corporation, through its officers, agents, and attorneys, certain compensation for the same services, that is to say $500; he, the said Joseph Ralph Burton, when so receiving such compensation for the said services, well knowing the same to have been services in relation to a proceeding pending before a department and before an officer of the government of the said United States, and well knowing the said proceeding to have been a proceeding in which the said United States was indirectly interested, and one pending before the said Postoffice Department and Postmaster General, and undetermined by the said Postmaster General, as in the said sixth count is more fully set forth: against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Motions for new trial and in arrest of judgment having been denied the case was brought here upon writ of error.

1. The first question to be considered is whether § 1782 is repugnant to the Constitution of the United States. This question has been the subject of extended discussion by counsel. But we cannot doubt the authority of Congress by legislation to make it an offense against the United States for a senator, after his election and during his continuance in office, to agree to receive or to receive compensation for services to be rendered or rendered to any

person, before a department of the government, in relation to a proceeding, matter, or thing in which the United States is a party or directly or indirectly interested.

The principle that underlies § 1782 is not wholly new in our legislative history. [366] For instance, by the act of March 3d, *1863 (12 Stat. at L. 765, chap. 92, Rev. Stat. 1058, U. S. Comp. Stat. 1901, p. 731), it was declared that members of Congress shall not practise in the court of claims. Later, Congress by statute declared that no member of, or delegate to, Congress, shall, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States; and every person violating this section was to be deemed guilty of a misdemeanor, and fined $3,000. Rev. Stat. 3739, U. S. Comp. Stat. 1901, p. 2508.

Counsel for the accused insists that § 1782 is in conflict with the fundamental idea of the Federal system; namely, that the government is one "of limited powers, with duties and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people." The proposition here stated is certainly not to be disputed; for it is settled doctrine, as declared by Chief Justice Marshall, and often repeated by this court, that "the government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." *Martin* v. *Hunter*, 1 Wheat. 304, 343, 4 L. ed. 97, 107. We do not, however, perceive that there has been in the statute before us any departure from that salutary doctrine.

It is said that the statute interferes, or, by its necessary operation, will interfere, with the legitimate authority of the Senate over its members, in that a judgment of conviction under it may exclude a Senator from the Senate before his constitutional term expires; whereas, under the Constitution, a Senator is elected to serve a specified number of years, and the Senate is made by that instrument the sole judge of the qualifications of its members, and, with the concurrence of two thirds, may expel a Sen- [367] ator from that body. In our judgment *there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States," it is meant that Congress—keeping within the limits of its powers and observing the restrictions imposed by the Constitution—may, in its discretion, enact any statute appropriate to accomplish the objects for which the national government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. The proper discharge of those duties does not require a Senator to appear before an executive department in order to enforce his particular views, or the views of others, in respect of matters committed to that department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services. Congress, when passing this statute, knew, as, indeed, *every- [368] body may know, that executive officers are apt, and not unnaturally, to attach great, sometimes, perhaps, undue, weight to the wishes of Senators and Representatives. Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the government, whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the government may

not, by legislation, protect each department against such evils, indeed, against everything from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference. If that which is enacted in the form of a statute is within the general sphere of legitimate legislative, as distinguished from executive and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land,—supreme over all in public stations as well as over all the people. "No man in this country," this court has said, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 181, 1 Sup. Ct. Rep. 240. Nothing in the relations existing between a Senator, Representative, or Delegate in Congress and the public matters with which, under the Constitution, they are respectively connected from time to time, can exempt them from the rule of conduct prescribed by § 1782. The enforcement of that rule will not impair or disturb those relations or cripple the power of Senators, Representatives, or Delegates to meet all rightful
[369] *or appropriate demands made upon them as public servants.

Allusion has been made to that part of the judgment declaring that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust, or profit under the government of the United States." That judgment, it is argued, in inconsistent with the constitutional rights of a Senator to hold his place for the full term for which he was elected, and operates of its own force to exclude a convicted Senator from the Senate, although that body alone has the power to expel its members. We answer that the above words, in the concluding part of the judgment of conviction, do nothing more than declare or recite what, in the opinion of the trial court, is the legal effect attending or following a conviction under the statute. They might well have been omitted from the judgment. By its own force, without the aid of such words in the judgment, the statute makes one convicted under it incapable forever thereafter of holding any office of honor, trust, or profit under the government of the United States. But the final judgment of conviction did not operate, *ipso facto*, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers. This must be so for the further reason that the declaration in § 1782, that anyone convicted under its provisions shall be incapable of holding any office of honor, trust, or profit "under the government of the United States," refers only to offices created by, or existing under the direct authority of, the national government, as organized under the Constitution, and not to offices the appointments to which are made by the states, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the legislative department, *owes its exist-[370] ence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by state legislatures, and cannot properly be said to hold their places "under the government of the United States."

We are of opinion that § 1782 does not, by its necessary operation, impinge upon the authority or powers of the Senate of the United States, nor interfere with the legitimate functions, privileges, or rights of Senators.

2. It is next contended that the indictment does not present the case of a proceeding, matter, or thing in which, within the meaning of the statute, the United States was a party or interested, nor adequately state the facts constituting the offense. These objections are, we think, without merit. Our reading of the statute and the indictment leads to the opposite conclusion.

The statute makes it an offense for a Senator, after his election, and during his continuance in office, to receive or agree to receive compensation, in any form, from any person, in relation to a proceeding, matter, or thing before a department, in which the United States is a party, or directly or indirectly interested. The scope of the statute is, in our judgment, most manifest, and the nature of the offense denounced cannot well be made clearer than it has been made by the words used to express the legislative intent. The business in respect of which the accused is charged to have both agreed to receive, and to have received, compensation, was plainly a proceeding or matter in which the United States was interested. That such proceeding or matter involved the pecuniary interests of the de-

fendant's client is not denied. That it also involved the use of the property as well as postal facilities furnished by the United States for carrying and transporting mail matter must also be admitted. What the Postoffice Department aimed to do in the execution of the acts of Congress and the regulations established under those acts was to protect the mails of the United States from being used, in violation of law, to promote schemes for obtaining money and property by means of false and fraudulent pretenses, representations, and promises. That
[371] *statute has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution. *Ex parte Jackson*, 96 U. S. 727, 732, 24 L. ed. 877, 879; *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; *Public Clearing House* v. *Coyne*, 194 U. S. 498, 508, 47 L. ed. 1093, 1098, 24 Sup. Ct. Rep. 789. In the proceeding, matter, and thing before the department, with which the defendant was connected as an attorney for a corporation immediately concerned in the result, the Postmaster General represented the United States, and, in the discharge of his official duties, sought to enforce a law of the United States. The United States was the real party in interest on one side, while the Rialto Company was the real party in interest on the other side. If the Postmaster General did not represent the United States, whom did he represent? The word "interested" has different meanings, as can be readily ascertained by examining books and the adjudged cases. 4 Words & Phrases Judicially Defined, 3692; Stroud's Judicial Dictionary, 399. But its meaning here is to be ascertained by considering the subject-matter of the statute in which the word appears. And it is, we think, a mistake to say that the United States was not interested, directly or indirectly, in protecting its property, that is, its mails and postal facilities, against improper and illegal use, and in the enforcement, through the agency of one of its departments, of a statute regulating such use. It would give too narrow an interpretation to the statute to hold that the United States was not interested, directly or indirectly, in a proceeding in the department having such objects in view. It is true the business before the Postoffice Department in which the Rialto Company was concerned did not assume the form of a suit in which there were parties according to the technical rules of pleading. But it was, nevertheless, in a substantial sense, a proceeding, matter, or thing before an executive department, in which both the United States and the Rialto Company were interested.

*It is said that, within the meaning of [372]
the statute, the United States is not interested in any proceeding or matter pending before an executive department, unless it has a direct moneyed or pecuniary interest in the result. Under this view, Senators, Representatives, and Delegates in Congress who are members of the bar may regularly practise their profession *for compensation* before the executive departments in proceedings which, if not directly involving the pecuniary interests of the United States, yet involve substantial pecuniary interests for their clients as well as the enforcement of the laws of the United States, enacted for the protection of the rights of the public. Such a view rests upon an interpretation of the statute which is wholly inadmissible. In our opinion, § 1782 excludes the possibility of such a condition of things, and makes it illegal for Senators, Representatives, or Delegates to receive, or agree to receive, compensation for such services. We may add that the judgment in *Burton* v. *United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243, proceeded upon the ground that the case then made—and the present case, as to the facts, is much stronger against the defendant—was embraced by the statute.

It is equally true that the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him,—the two counts hereinbefore given at large, and upon which sentences were pronounced, being as full as any of the others. The averments of the indictment were sufficient to enable the defendant to prepare his defense, and, in the event of acquittal or conviction, the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly, and without ambiguity, disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the Constitution, and according to the rules of pleading, the defendant was informed of the nature and cause of the *accusation against him. *Unit-* [373]
ed States v. *Simmons*, 96 U. S. 361, 362, 24 L. ed. 820; *United States* v. *Carll*, 105 U. S. 611, 26 L. ed. 1135; *Blitz* v. *United States*, 153 U. S. 308, 315, 38 L. ed. 725, 727, 14 Sup. Ct. Rep. 924.

3. It is insisted, however, that the court below erred in not directing the jury to acquit the defendant; in other words, that the evidence in support of the indictment was so meager that the jury could not properly have found him guilty of any offense. We cannot assent to this view. There was, beyond question, evidence tending to establish on one side the defendant's guilt of the charges preferred against him; on the other side, his innocence of those charges. It will serve no useful purpose to set out all the testimony. It is sufficient to say that the whole evidence has been subjected to the most careful scrutiny, and our conclusion is that the trial court was not authorized to take the case from the jury and direct a verdict of not guilty. That course could not have been pursued consistently with the principles that underlie the system of trial by jury. The case was pre-eminently one for the determination of a jury. It was for the jury to pass upon the facts; and, as there was sufficient evidence to go to the jury, this court will not weigh the facts, and determine the guilt or innocence of the accused by the mere preponderance of evidence, but will limit its decision to questions of law. In its charge to the jury the circuit court held the scales of justice in even balance, saying all that was necessary to guard the rights of the accused. Nothing seems to have been omitted that ought to have been said nor anything said that was not entirely appropriate. Upon the general question of guilt or innocence, and as to the rules by which the jury should be guided in their consideration of the case, the circuit court, in substance, said that the indictment was not evidence in any sense, but only an accusation which it was incumbent upon the government to sustain by proof establishing guilt beyond a reasonable doubt; that the presumption of law was that he was innocent of the accusation as a whole and as to every material element of it, and that such presumption abided with him from the be-
[374] ginning to the end of *the trial, and required, at the hands of the jury, an acquittal, unless a careful, intelligent, fair consideration of the whole evidence, attended by the presumption of innocence, produced in the mind, beyond a reasonable doubt, the conviction that the defendant was guilty; and that they, the jury, were the sole judges of the credibility of the witnesses and of the weight to be attached to their testimony.

The circuit court was equally direct and impartial in what it said in relation to the particular issues of fact raised by the indictment and evidence. After explaining the nature of the proceeding before the Postoffice Department, in respect of which, the indictment alleged, the defendant acted as counsel for the Rialto Company, for compensation received and to be received, and after referring, with some fullness, to the specific charges in the several counts, the court called attention to the questions that were common to all the counts. It said to the jury: "Was the defendant a Senator of the United States for the state of Kansas during the times covered by the transactions under investigation? It is admitted that he was, and therefore you will have no difficulty in determining that. Was the Rialto Grain & Securities Company an existing corporation carrying on business of the character described during the times covered by the transactions under investigation? There was proof that it was, and no proof to the contrary, so you will have no difficulty with that. Was a proceeding pending before the Postoffice Department from November 18th, 1902, to March 26th, 1903, to determine whether or not a fraud order should be issued against that company? If the evidence shows that the officers of the Postoffice Department, at the instance of private individuals or otherwise, had, before that time, set on foot an inquiry to determine whether or not satisfactory evidence existed that the Rialto Grain & Securities Company was engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, as charged in the indictment; and if the evidence further shows that that inquiry had *not been concluded, [375]
and was, during the period named, in the charge of any of the officers of the Postoffice Department then charged with the performance of any duty in respect of such inquiry,—then I charge you that there was such a pending proceeding before the Postoffice Department, as described in the indictment, and is referred to in the statutes before mentioned; and also that it was a proceeding in which the United States was both directly and indirectly interested."

It then called the attention of the jury to the particular counts charging the defendant with having *agreed* with the Rialto Company to receive a stated compensation for services to be rendered in the proceeding before named. Touching those counts, the court said: "Did he make such an agreement? That he made an agreement of some character to act as counsel for that company for a stated compensation is conceded. The real question is whether that agreement included, among other matters in relation to which he was to serve the company, the proceeding in the Postoffice Department before named. Upon that ques-

tion the evidence is conflicting, and it is your duty to weigh the evidence and determine the truth. If, among other things, it was intended by the defendant and the Rialto Grain & Securities Company in making the agreement that he would, in part consideration for the compensation he was to receive, appear as agent or attorney of such company before the Postoffice Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, whether by way of stopping the investigation or ultimately preventing the issuance of a fraud order,—then I charge you that the agreement of the defendant was violative of the statute; otherwise it was not. The offense prescribed in the statute consists in the agreement to receive compensation for the rendition of such services. The mere agreement to render the services is not an offense. It is the agreement to receive compensation
[376] for the rendering of them *which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The offense is complete and the defendant's guilt is established if the evidence shows that he made an agreement to render such services for compensation."

Coming then to the questions referring exclusively to the counts charging defendant with having *received* from the Rialto Company compensation for services rendered by him to it, the court said to the jury: "Did he render any service for the Rialto Grain & Securities Company before the Postoffice Department in the proceeding named? On that question I charge you that if he appeared as agent or attorney of such company before the Postoffice Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then, by any statement or representation respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Postoffice Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute. And I further charge you that if he appeared as agent or attorney of such company before the Postoffice Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing them in respect of their action in said proceeding, and did then arrange with the Department, or any of its officers, that a hearing should be had in respect of such matter, and then also assured the Department, or any of its officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said company in said proceeding without his being first notified thereof, that would constitute services within the meaning of the statute. Did he, at St. Louis, *Missouri, on the 26th [377] day of March, 1903, receive from the Rialto Grain & Securities Company any payment of money as compensation for such services?" Here the court gave instructions, seven in number, asked by the defendant. They were not objected to by the government and need not be set out.

4. Another point made by defendant is that he could not legally be indicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation. This is an erroneous interpretation of the statute, and does violence to its words. It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation, separate, distinct offenses. The statute, in apt words, expresses that thought by saying: "No Senator . . . shall receive *or* agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered," etc. There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. In this case, the subject-matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the legislature, not

[378]*the court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *H. Hackfield & Co.* v. *United States*, 197 U. S. 442, 450, 49 L. ed. 826, 829, 25 Sup. Ct. Rep. 456.

5. The defendant invokes the protection of that clause of the Constitution of the United States which declares that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The question arose in this way:

The first and second counts of the indictment in the former case charged that the defendant, in violation of the statute, and on March 26th, 1903, unlawfully, knowingly, wilfully, and corruptly took, accepted, and received $500 "from the Rialto Grain & Securities Company," for services rendered in its behalf in a matter before the Postoffice Department in which the United States was interested. Those two counts differed only as to the interest, whether direct or indirect, of the United States in that matter. The third count in the former indictment charged that on March 26th, 1903, the defendant unlawfully, knowingly, wilfully, and corruptly took, accepted, and received $500 "from one W. D. Mahaney" (described as an officer and employee of the Rialto Company), as compensation for services rendered by defendant to that company in a matter before the Postoffice Department in which the United States was directly interested. The jury in the former case convicted the defendant on the first and second counts and acquitted him on the third count; in other words, they found, in effect, that he received money from the company, but not from Mahaney. Upon writ of error sued out by defendant this court reversed the judgment and sent the case back with directions for a new trial. Whether that reversal, upon defendant's own writ of error, had the effect, within the principle of *Trono* v. *United States* (recently decided) 199 U. S. 521, *ante*, 292, 26 Sup. Ct. Rep. 121, to take from him the benefit of his acquittal on the third count in the former case, we need not decide. It may be assumed, for the purposes of this discussion, that it did not.

The defendant pleaded the judgment of acquittal on the third count in the former [379]indictment in bar of this prosecution *as based on the third and seventh counts in the present indictment. In its answer to that plea the government alleged that, while the third and seventh counts of the present indictment are identical in legal effect with counts one and two of the former indictment, "the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indictment." The defendant, as we have seen, demurred to the answer. The demurrer having been overruled, and the defendant declining to plead further, the plea in bar was overruled and denied.

As no issue was taken upon the answer, by replication, the question presented is whether, upon the face of the record, *as matter of law* simply, the offense charged in the third and seventh counts of the present indictment is the same as that charged in the third count of the former indictment. This question must be answered in the negative, unless the charge, in the present indictment, that the money in question was received by the defendant "from the Rialto Grain & Securities Company," is the same, in law, as the charge, in the former indictment, that he received it "from one W. D. Mahaney," mentioned as an officer and employee of the Rialto Grain & Securities Company. We could not so hold, for the reason that the two charges do not necessarily import, in law, the same thing. The only support for the contrary view is found in the words, added after Mahaney's name, describing him to be an officer and employee of the Rialto Company. But those words are to be taken only as descriptive of the person, or as identifying the person from whom, it was charged, the defendant, in fact, received the money. It was not alleged in the former indictment that Mahaney paid the money to the defendant in behalf of, or by direction of, the company. This distinction was manifestly in the mind of the jury in the former case; for, while they found the defendant guilty of having received forbidden compensation from the company, they found him not guilty of having received such compensation from Mahaney. *The defendant may have received [380]such compensation from Mahaney, but it may not have been paid by direction of the company. So, in a legal sense, it may have been received from the company, although paid by the hands of Mahaney. It cannot be held otherwise, as matter of law, upon the face of the two indictments, apart from any evidence. And there was no evidence in support of the plea or in refutation of the answer. The defendant simply demurred to the answer, thereby admitting its averments of fact; and, without a replication, and without any evidence, rested his defense of former jeopardy upon the face of the two indictments. As the effect of the reversal of the judgment in the former case was to set aside the judgment of conviction on the first and second counts of the original indictment, the way was opened for another trial on those counts. But the government elected not to proceed under

that indictment, but to have a new one embodying the same charge as to the $500 that was made in the former case. Its right to adopt that course cannot be questioned. In our judgment, the defendant cannot plead his acquittal upon the charge of having received forbidden compensation *from Mahaney* in bar of a prosecution upon the charge of having received such compensation *from the company*. A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. Com. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact*. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*." *Com.* v. *Roby*, 12 Pick. 502. Looking, as we must, only at the face of the original and the present indictments, the two charges must be regarded as separate and distinct. The plea of former jeopardy in this case presents a technical defense, and cannot be allowed for the reason that the offense of which the defendant was heretofore acquitted does not plainly appear, as matter of law, upon the face of the record, to be identical with the one of which
[381] he has been convicted in this case. *If, at the trial below, under the present indictment, proof had been made that the $500 was paid by Mahaney, and that he was an officer and employee of the Rialto Company,—if the proof had gone no farther,—the jury would not have been authorized to find that the money was received *from the company;* whereas, the same proof would have sustained the charge in the third count of the original indictment. This shows that the two charges were not identical, in law, and that the same evidence would not have sustained each. It is well settled that "the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both." 1 Bishop, Crim. Law, § 1051; *Wilson* v. *State*, 24 Conn. 57, 63, 64. For these reasons we hold that the court below properly sustained the answer to the plea, and, the defendant not pleading further, the plea in bar was properly overruled and denied.

6. An important point remains to be considered. It relates to the jurisdiction of the court below to try the defendant for the crime alleged.

The Constitution requires that the trial of all crimes against the United States shall be held in the state and the district where *such crimes* shall have been committed. Const. art. 3, § 2, 6th Amendment. The contention of the accused is that, in no view of the evidence, can he be said to have committed any offense in the state of Missouri; consequently, the Federal court, holden at St. Louis, was without jurisdiction, under the Constitution, to try him. The contention of the government is that the alleged offense was committed at St. Louis, and that it was proper to try the defendant in the district embracing that city.

The circuit court thus instructed the jury: "If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court? In other words, was it made in St. Louis, Missouri? Upon this question I charge you that if such an agreement was
*negotiated or tentatively effected at some[382] other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain & Securities Company at St. Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain & Securities Company at St. Louis, Missouri, and was there accepted and ratified by that company without any change in its terms, then the agreement was made at St. Louis, Missouri, and within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had and the tentative agreement was made were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium."

The jury found that the alleged agreement was consummated, that is, completed, at St. Louis. This finding was clearly justified by the evidence. There was proof that on the 17th day of November, 1902, the general counsel of the Rialto Company—while he and the accused were in Illinois, traveling together from St. Louis to Chicago—explained to the latter the affairs and condition of the company, and invited the defendant to become counsel with him for the company; that, as the result of that conference and invitation, the defendant, being in Illinois at the time, proposed or offered to become such counsel on the basis of an employment for not less than five months at a monthly salary of $500; that he was then informed that only the company could conclude an arrangement as to compensation; that he contemplated, at the

time, that his offer as to employment and compensation would be submitted for him to the company at St. Louis; that, upon the return of the company's counsel to St. Louis, on the morning of November 18th, [383] 1902, he at once communicated to the *Rialto Company at that city, the above offer or proposal of the defendant; that the company promptly accepted the offer, of which fact the defendant was immediately informed by telegram of November 18th, 1902, sent from St. Louis, and addressed to him at Washington, by the representative of the company; that such acceptance was confirmed by a letter written and duly mailed at St. Louis on the same day, in which letter counsel, speaking for the company, said: "I hope you received my message to the effect that this company accepts your terms to act as counsel at a salary of $500 per month, and service to begin immediately, that is, of this date, November 18, 1902;" that under date of November 20th, 1902, by letter addressed to the Rialto counsel at St. Louis, the defendant acknowledged receipt by due course of mail of the above letter of November 18th, and stated that he had called that morning at the Department, on behalf of the company, and had found that two complaints had been filed there against it, which had been sent out on November 7th for investigation; that the letter last referred to thus concluded: "I have arranged with the Department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department. No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had. In return, if agreeable, you may make remittance for my first month's pay."

The evidence further tended to show that during the five months following the acceptance of his offer at St. Louis, the defendant acted as counsel for the Rialto Company before the Postoffice Department when requested or when it was necessary, and received from the company a salary of $500 per month for his services to it,—the salary for each of the first four months being paid [384] by the company's check, drawn at *St. Louis upon a St. Louis bank, and made payable to the defendant's order, which check was sent from St. Louis to the defendant at Washington. The last month's salary of $500 was paid in cash to defendant at St. Louis, in the company's office, on March 26th, 1903, on which date, with his own consent he was discharged as the company's attorney, his services being no longer required. The evidence also tended to show that during the whole period of the defendant's employment and service as the company's attorney he relied or counted upon the acceptance of his offer on the 18th day of November, 1902, as evidencing an agreement then concluded between him and the company in respect of compensation. He received the letter of November 18th by due course of mail, and does not deny having received the telegram previously sent to him, the same day, on the same subject. Nothing was said or done by him during the whole period of his service as the company's counsel that was inconsistent with the agreement established by the evidence. All that he did, said, or wrote was consistent with the idea that he regarded the acceptance at St. Louis, of his offer, as completing the agreement between him and the company. From the time of such acceptance he was entitled, so far as the agreement was concerned, to demand, and he in fact received, the stipulated salary.

In view of the evidence and of all the circumstances, was the jury warranted in finding that the alleged agreement was concluded at St. Louis? Manifestly so, we think. Although this is a criminal prosecution, that question must be determined by the principles recognized in the general law of contracts as to the time when an agreement between parties takes effect and becomes binding upon them. It is to be taken as settled law, both in this country and in England, in cases of contracts between parties distant from each other, but communicating in modes recognized in commercial business, that, when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by telegram, *duly sent in [385] the ordinary way, or by letter, duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of, or upon notice to, the other party. A leading authority on the general subject is *Tayloe* v. *Merchants' F. Ins. Co.* 9 How. 390, 399, 400, 13 L. ed. 187, 190, 191. It appeared in that case that a fire insurance company made an offer by mail to insure property upon certain terms. The offer was accepted in a letter promptly mailed to the proper address of the company. The inquiry arose as to the time when the contract of insurance was to be deemed completed. This court held that, according to the settled principles of law governing contracts entered into by correspondence between parties distant from each other, the

contract became complete when the letter accepting the offered terms was mailed, the offer not having been then withdrawn. The court said: "We are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted."

In *Patrick* v. *Bowman*, 149 U. S. 411, 424, 37 L. ed. 790, 794, 13 Sup. Ct. Rep. 811, 866, the court, referring to the *Tayloe Case*, again held that when an offer is made and accepted by the posting of a letter of acceptance, the contract is complete according to the terms of the offer.

Kent says: "In creating the contract, the negotiation may be conducted by letter, as is very common in mercantile transactions; and the contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail or otherwise, provided it be done with due diligence, after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. Putting the answer by letter in the mail containing the acceptance, and thus placing it beyond the control of the party,
[386] is *valid as a constructive notice of acceptance. An offer by letter, or by special agent, is an authority revocable in itself, but not to be revoked without notice to the party receiving it, and never after it has been executed by an acceptance. There would be no certainty in making contracts through the medium of the mail, if the rule were otherwise." 2 Kent, Com. 477.

The authorities to the same effect are too numerous to be cited, but we refer particularly to *Vassar* v. *Camp*, 11 N. Y. 441, 445; *Mactier* v. *Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Adams* v. *Lindsell*, 1 Barn. & Ald. 681; *Re Imperial Land Co.* L. R. 7 Ch. 587; *Household Fire & Carriage Acci. Ins. Co.* v. *Grant*, L. R. 4 Exch. Div. 218; *Perry* v. *Mt. Hope Iron Co.* 15 R. I. 380, 381, 2 Am. St. Rep. 902, 5 Atl. 632; *Wheat* v. *Cross*, 31 Md. 103, 1 Am. Rep. 28; *Averill* v. *Hedge*, 12 Conn. 424; *Chiles* v. *Nelson*, 7 Dana, 281; *Washburn* v. *Fletcher*, 42 Wis. 152; *Minnesota Linseed Oil Co.* v. *Collier White Lead Co.* 4 Dill. 434, Fed. Cas. No. 9,635; *Maclay* v. *Harvey*, 32 Am. Rep. 40 note and authorities cited (90 Ill. 525); *Levy* v. *Cohen*, 4 Ga. 1, 13; *Falls* v. *Gaither*, 9 Port. (Ala.) 605, 612; 2 Redf. Railways, 338, 339; Pom. Contr. 95; 1 Parsons, Contr. 9th ed. 483; 2 Parsons, Contr. 257, note; Metcalf, Contr. 17; Thompson, Electricity, §§ 425–478; Scott & J. Telegraphs, §§ 295 *et seq.*; Addison, Contr. 16, 17. Whether the acceptance by the Rialto Company of the defendant's offer is to be regarded as effectively made by the telegram duly sent to him, or only when the letter addressed to him by the Rialto counsel was duly mailed at St. Louis, or in both ways, in any event, the acceptance promptly and adequately occurred on the 18th of November, 1902, at St. Louis, on which day and at which place it is to be deemed that the minds of the parties met, the agreement becoming complete the moment of the acceptance of defendant's offer, without the necessity of formal notice to the company that Burton had received information of its acceptance of his offer.

But this, the defendant insists, is not enough to show that *the alleged offense was [387] committed at St. Louis. Counsel would seem to contend that the physical absence of the accused from St. Louis, when the offer was received by the company and when the agreement was concluded, rendered it impossible that he could have committed the alleged offense *at that city*. In substance, the contention is that an individual could not, in law or within the meaning of the Constitution, commit a crime within a state in which he is not physically present at the time the crime is committed.

The constitutional requirement is that the *crime* shall be tried in the state and district where committed; not necessarily in the state or district where the party committing it happened to be at the time. This distinction was brought out and recognized in *Re Palliser* (*Palliser* v. *United States*) 136 U. S. 257, 265, 34 L. ed. 514, 517, 10 Sup. Ct. Rep. 1034. Palliser was indicted in the district court of the United States for the district of Connecticut for violating certain statutes relating to the disposal of postage stamps, and forbidding postmasters not only to dispose of postage stamps in the payment of debts or in the purchase of commodities, or to pledge them, but also to sell or dispose of them except for cash. By letter written and mailed at New York and addressed to a postmaster in Connecticut, Palliser made to that officer an offer of contract which could not have been accepted by the latter without violating the above statutes. This court held that the offer in Palliser's letter was a tender of a contract with the intent to induce the postmaster to sell postage stamps for credit, in violation of his duty, and that the case, therefore, came within § 5451 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3680), providing that "every person who promises,

offers, or gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value to any officer of the United States, . . . with intent to influence him to commit or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud [388] on the United States, *or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished" by fine and imprisonment.

The question arose whether Palliser, who did not go into Connecticut, could be punished in that state for the offense alleged against him. This court, speaking by Mr. Justice Gray, said: "The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the state and district wherein the crime shall have been committed. Art. 3, § 2; Amendments, art. 6. But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district 'wherein the crime shall have been committed.' . . . When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate; and Congress has accordingly provided, that 'when any offense against the United States is begun in one judicial district and completed in any other it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner and as if it had been actually and wholly committed therein.' Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585." In that case the court said it was universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction, the offender may be tried where the shot takes effect.

If the sending by the defendant to the Rialto Company from Chicago to St. Louis of the offer above referred to was the beginning of negotiations for an agreement in violation of § 1782, the agreement between the parties was completed at the time of the acceptance of the defendant's offer at St. Louis on November 18th, 1902. Then the offense was committed, and it was committed at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed.

*The principle announced in Palliser's case [389] was reaffirmed in *Horner* v. *United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407, in which it was held that the district court of the United States in Illinois had jurisdiction to try one charged with having violated the statute relating to the sending of lottery matter in the mails, in that he had unlawfully caused to be delivered to a certain person in that district lottery circulars conveyed by mail in a sealed letter that he had deposited in the mail at New York, addressed to and to be delivered to such person in Illinois. The fact that the accused was in New York when the lottery circulars were mailed, and not personally present in Illinois when the offense was completed by the delivery there of the lottery circulars to the person to whom they were sent, was held to be immaterial, and not to defeat the jurisdiction of the Federal court in Illinois to try the accused.

It cannot be maintained, according to the adjudged cases, that the personal absence of the defendant Burton from St. Louis, at the time his offer was accepted, and when the agreement between him and the company was completed and became binding, as between the parties, deprived the Federal court there of jurisdiction. He sent his offer to St. Louis with the intent that it should be there accepted and consummated. Having been completed at that city in conformity with the intention of both parties, an offense was, in the eye of the law, committed there; and when the court below assumed jurisdiction of this case it did not offend the constitutional requirement that a crime against the United States shall be tried in the state and district where it was committed.

Other questions were discussed by counsel, but we have alluded to all involving the substantial rights of the accused that are mentioned in their briefs of points and authorities, and which we deem it necessary to notice.

Mr. Justice **McKenna** concurs in the judgment based on the count charging the receipt of forbidden compensation, but does not concur in the judgment on the count charging simply an agreement to receive compensation. He is of opinion that *the [390] agreement to receive and the receipt of compensation constitute, under the circumstances of this case, but one offense.

Judgment affirmed.

Mr. Justice **Brewer**, dissenting:

A conviction of plaintiff in error on an indictment charging substantially the same offenses as are charged in the present case

was reversed by this court. 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243. In the opinion then filed it was stated that four Justices of this court (the writer of this being among the number) were of the opinion that the matters charged against the defendant were not made offenses by the statute under which the indictment was found. Nothing was said in that opinion in respect to this matter beyond the simple statement of the conclusions of the several Justices. As one of the four, I think the importance of the case justifies me in stating the reasons which led to that conclusion, and which induces belief that the present conviction is wrongful.

The statute (Rev. Stat. § 1782, U. S. Comp. Stat. 1901, p. 1212) forbids a Senator or other official of the government to "receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever." It was charged in the indictment that there was pending in the Postoffice Department a proceeding to inquire whether the Rialto Grain & Securities Company was conducting a scheme for obtaining money by false pretenses through the mails of the United States, and whether a fraud order, as it is called, should be issued against said company, and that the defendant, as a Senator of [391] the United States, unlawfully agreed to *receive from the said corporation compensation for services rendered by him in relation to such proceeding before that Department. It was not charged that the United States was a party to the proceeding, nor that it would either make or lose any money or property, whatever might be the result, but only that it was directly and indirectly interested. The question is therefore distinctly presented whether a proceeding in one of the departments of the government, in which it does not appear that the United States is pecuniarly interested in the result, will neither make nor lose by the issue of the proceeding, whatever it may be, is one in which it is "directly or indirectly interested." Unless the statute, by clear intendment, includes the transaction, any extension beyond its meaning so as to include the transaction would be, under the elementary rule governing the interpretation of criminal statutes, simply judicial legislation, as it would be, by judicial construction, making that a crime which Congress has not so made, and thereupon imposing punishment. *United States* v. *Wiltberger*, 5 Wheat. 77, 5 L. ed. 37; *Sarlls* v. *United States*, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; *United States* v. *Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609. There is a certain broad sense in which the word "interest" is sometimes used, which describes the relation which the government has to the acts of all its officials, to all proceedings in courts or in departments, and, indeed, to the conduct of all its citizens. It is interested in seeing justice and righteousness obtain everywhere. It is interested in seeing that no wrongful conduct shall prevail. But so is every official and every citizen interested. It is not an interest which separates and distinguishes the government from the citizens, but it is that interest which all have, whether government or citizens, in the orderly and just management of affairs, in honorable and right living. It is that interest which a father or head of a family has in the good conduct of all the members of his family. But the word "interest" as found in the law books refers to pecuniary profit and loss, and that Congress used the word "interested" in its common legal acceptation is as clear and certain as anything can be.

*It is well to inquire in the first place [392] whether the word "interest" or "interested" has a settled legal meaning. A leading case is that of *Northampton* v. *Smith*, 11 Met. 390, in which was involved the construction of a statute of Massachusetts which provided that, when a judge of probate was interested in any case within his jurisdiction, the case should be transferred to the most ancient adjoining county. The probate judge transferred the case on the ground that he was one of the inhabitants of the town of Amherst, and that there were in the will which was offered for probate many bequests to charitable purposes for the benefit of persons described as dwelling in the eight towns enumerated, of which Amherst was one. Mr. Chief Justice Shaw, delivering the opinion of the court, said (p. 394):

"If the term 'interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthropy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found fit to be intrusted with the administration of justice; for no man can be exempt from such interests."

And again (p. 395):

"2. It must be a pecuniary or proprietary

interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy or bias, which would disqualify a juror. *Smith* v. *Bradstreet*, 16 Pick. 264.

"3. It must be certain, and not merely possible or contingent. *Hawes* v. *Humphrey*, 9 Pick. 350, 20 Am. Dec. 481; *Wilbraham* v. *Hampden County*, 11 Pick. 322; *Danvers* v. *Essex County*, 2 Met. 185. It must be direct and personal, though such a personal interest may result from a relation which the judge holds as the member of a town, parish, or other corporation, [393] where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject-matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration, and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action."

In *McGrath* v. *People*, 100 Ill. 464, it was held that:

"The state is not 'interested, as a party or otherwise,' in a proceeding in the nature of a quo warranto to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give to the supreme court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under § 88 of the practice act. The interest which the state must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the supreme court from the trial court, is a substantial interest,—as, a monetary interest."

In *Evans* v. *Eaton*, 7 Wheat. 356, 5 L. ed. 472, a patent case, the question was whether a certain witness was competent, the alleged objection being that he was interested, because he might use the alleged invention if the patent was adjudged void, and Mr. Justice Story, speaking for the court, said (p. 425, L. ed. p. 489):

"The special notice in this case asserts matter which, if true, and found specially by the jury, might authorize the court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But, in this respect, Frederick stands in the same situation as every other person in the community. If the patent is declared void, the invention *may be used by the whole com- [394] munity, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and, so far as such an interest goes, we think it is to the credit, and not to the competency, of the witness."

In *State* v. *Sutton*, 74 Vt. 12, 52 Atl. 116, the case and the ruling is disclosed by the following quotation from the opinion:

"This is an indictment under § 5072 of the Vermont statutes, for defaming this court and a judgment thereof, and the judges of the court as to said judgment. It is objected that Judge Watson, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge Watson is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. *State* v. *Batchelder*, 6 Vt. 479. It is said that a judge defamed would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenance of a civil action for damages. But such an interest does not disqualify."

In *Forcman* v. *Marianna*, 43 Ark. 324, it was held that a judge who was a taxpayer in a town was not disqualified from sitting in a case relating to the annexation of certain territory to the town, the court saying (p. 329):

"A general interest in a public proceeding, which a judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the state at times for a judge. The 'interest' which disqualifies a judge under the Constitution is not the kind of interest which one feels in public proceedings or public measures. It must be a pecuniary or property interest, or one affecting his individual rights, and the liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, *in the future, from the general op- [395] eration of laws and government upon the status fixed by the decision."

In *Taylor* v. *Highway Comrs.* 88 Ill. 526, the question was who had the right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, and the court said:

"The word 'interested' must receive a reasonable construction, such as will, on

the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the state has an interest in the highways in the different counties of the state. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the state. But we apprehend it was not the intention of the legislature that the word 'interested' should receive such a liberal construction. It was, doubtless, intended to give the right of appeal to those persons who had a direct and pecuniary interest, not shared by the public at large,—such as owned land adjoining the new road laid out or the old one vacated."

In *Chicago, B. & Q. R. Co.* v. *Kellogg,* 54 Neb. 138, 74 N. W. 403, in deciding whether a trial judge was disqualified, this was the ruling:

"'A judge . . . is disqualified from acting as such . . . in any case wherein he is . . . interested.' But the word 'interested,' found in this section of the statute, probably means pecuniarily interested, or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge Beall will gain or lose anything from the result [396]of *this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered the law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him interested and disqualified, within the meaning of said section of the statute."

See also *Com.* v. *O'Neil,* 6 Gray, 343; *Sauls* v. *Freeman,* 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525; *Bowman's Case,* 67 Mo. 146.

In Bouvier's Law Dictionary, vol. 1, p. 651, "interest" is defined:

"The benefit which a person has in the matter about to be decided and which is in issue between the parties. By the term 'benefit' is here understood some pecuniary or other advantage, which, if obtained, would increase the witness's estate, or some loss which would decrease it."

In Black's Law Dictionary the definition is (p. 636):

"A relation to the matter in controversy, or to the issue of the suit, in the nature of a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind, inclining the person to favor one side or the other."

If the word "interested" was not used in this section in this ordinary legal sense, the words "in which the United States is a party or directly or indirectly interested" are surplusage, because, in respect to every proceeding before a department or other tribunal, the United States as *parens patriæ* has an interest, in what Chief Justice Shaw calls the "loose" sense of the term. Indeed, what significance is there in inserting the words from "contract" to "interested," inclusive, unless some distinct limitation was intended? If the language was "in relation to any proceeding before any department, court-martial," etc., it would express the intent to exclude *Sen- [397]ators from appearance for compensation in any and all matters before the departments. Inserting the clause above referred to obviously means a limitation, and no other limitation is suggested except that which limits it to matters in which the government is pecuniarly interested. Neither do the words "or any other matter or thing" enlarge the scope of the prohibition so as to take in matters of a different nature. The rule of construction regarding the effect of such words when following an enumeration of subjects is that they are to be held as meaning any other matter or thing of a like or similar nature to those already named, so that all subjects of that kind may be included, and none escape by reason of not being specially named. They do not open the statute to all kinds of matters or things not of the same nature as those already named. Otherwise there would be no sense in the prior enumeration. *Hermance* v. *Ulster County,* 71 N. Y. 481; *People* v. *New York & M. B. R. Co.* 84 N. Y. 565; *Thames & M. Marine Ins. Co.* v. *Hamilton,* L. R. 12 App. Cas. 484.

Doubtless the government is charged with the supervision of the action of all its officials, but that supervision does not, of itself, create a pecuniary interest. This court has a supervising control of the lower Federal judicial tribunals. We are interested in seeing that full justice is done in all cases therein. But that duty of supervision and review creates no pecuniary interest,

and does not disqualify a single one of us from participating in the consideration of this case.

If it be said that the government is pecuniarily interested in the postage the amount of which might be affected by the issue of a fraud order, it is enough to say that there is no proof of any such interest. Further, postage is received in payment for services rendered in transportation. If no services are rendered no postage is received. The issue of a fraud order does not put a stop to the carrying of letters. It simply stops the delivery. It may be that when knowledge of the issue of a fraud order becomes widespread, the number of letters [398]may be *diminished, but, as heretofore said, diminishing the amount of mail matter diminishes likewise the cost thereof. The government is no more interested in an increase or diminution of the amounts received by railroad and other carriers for transporting the mails, or those received by stamp contractors for the manufacture of stamps, than it is in the fees received by marshals, clerks, and other officers for services rendered to individuals. In any event, opposing a fraud order would not, in the language of the chairman of the House Committee on the Judiciary, hereinafter quoted, be a suit against the government.

Again, the history of the passage of the bill which culminated in this statute emphasizes the views already expressed. The bill was introduced into the Senate December 23, 1863, by Senator Wade. As prepared, it forbade the appearance of a Senator or member of the House of Representatives in any court as well as department, etc. On February 10, 1864, the Committee on the Judiciary reported in favor of striking out the following words (p. 555):

"No member of the Senate or of the House of Representatives of the United States shall, during his continuance in office, hereafter appear or act as counsel, attorney, or agent in any cause or proceeding, civil or criminal, in any court—civil, criminal, military, or naval—or before any commission, in which the United States is a party or directly or indirectly interested, or receive any compensation of any kind, directly or indirectly, for services of any description rendered by himself or another in relation to any such cause or proceeding;"

—and they were stricken out.

On page 561 is this statement by Senator Trumbull, the chairman of the committee:

"This is not a bill to prevent attorneys from practising in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the government, who are paid for their services, from receiving a compensation for advocating claims in the departments and before the bureaus *of the government, and before [399]courts-martial. That is the particular question that is pending."

On p. 2773 in the proceedings of the House it appears:

"Mr. Wilson, from the Committee on the Judiciary, reported back Senate bill No. 28, relating to members of Congress. heads of departments, and other officers of the government. The bill was read. It prescribes penalties for members of Congress, heads of departments, or other officers engaging as attorneys or counselors in suits against the government. The bill was ordered to a third reading; and was accordingly read the third time and passed."

While much weight must not be given to the declarations of individual Senators, those which are embodied in the reports of the chairmen of the judiciary committees are certainly entitled to consideration, and they show clearly that the intent of Congress in this enactment was to prevent Senators and other officials of the government from receiving compensation for assisting in the prosecution of claims against the government. It would be the height of absurdity to suppose anyone believed that a Senator should be debarred from the right of appearing in any court in cases in which the government is without a pecuniary interest, and yet, that was the scope of the bill as originally presented, if the present construction of the statute is sustained.

Further, while it may be true that executive officers are apt to give undue weight to the wishes of Senators, yet, there is nothing in this statute to prevent a Senator from exerting all his influence over them. He may prosecute any claims in behalf of his constituents or others, even though the government is directly and largely pecuniarily interested. He may appear in any matter or proceeding pending before one of the departments, and there is nothing in the statute to prohibit it. The only restriction is that he must himself have no pecuniary interest in the matter. The denunciation is against his receiving, or agreeing to receive, compensation for his services. Is it not reasonable to believe that, if pecuniary interest on his *part is the only bar [400]to his action, a like pecuniary interest on the part of the government is that interest on the other side intended by the statute?

It is said the language of the section is "directly or indirectly interested," but that does not change the fact that the Government must be interested; and interested, as I have shown, refers to some pecuniary interest. It is directly interested when, as the result of the proceeding, it

may make or lose some of its property, as, where a claim is prosecuted in the department for a tract of land, or for the allowance of a contract to a higher rather than to a lower bidder. It is indirectly interested when the effect of the ruling may result in pecuniary loss to the government in some other case to be thereafter presented to the department. It may be that, in a pending case, the government is guaranteed against loss, and yet, if a certain ruling is established as the ruling of the department, it may affect future cases in which there is no such indemnity to the government, and in those cases it would be indirectly interested. But whatever the line of demarcation between "direct" and "indirect" results, the statute is clear that the government must be "interested."

Other matters of moment have been discussed by counsel, but as this is fundamental, and upon it rests the whole prosecution, I have preferred to express my views on this matter alone. It seems clear to my mind that the construction now given writes into the statute an offense which Congress never placed there. It is a criminal case, and, in such a case above all, judicial legislation is to be deprecated.

I am authorized to say that Mr. Justice **White** and Mr. Justice **Peckham** concur in these views.

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[401]*HARRIET T. JAMES, Administratrix of Charles P. James, Deceased, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 401–408.)

1. **Judges—of District of Columbia supreme court—compensation.**— The salary of justices of the supreme court of the district of Columbia payable by law during the fiscal year ending June 30, 1893, was $5,000, which was the amount to which such salaries were increased by the express provision of the appropriation act for the fiscal year ending June 30, 1892, although the appropriation for the next fiscal year was a lump sum, inadequate to pay more than the former salary, since these provisions must be read in connection with the appropriation made by the act of March 2, 1895 (28 Stat. at L. 851, chap. 187), to pay, as a deficiency for the fiscal year ending June 30, 1893, to the justices of that court, a sum representing the difference between the rate of compensation theretofore received by them and $5,000 per year.

2. **Judges—of supreme court of District of Columbia—compensation after resignation.**—The supreme court of the District of Columbia is "a court of the United States" within the meaning of U. S. Rev. Stat. § 714, U. S. Comp. Stat. 1901, p. 578, providing that, when any judge of any court of the United States resigns his office after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

[No. 215.]

Argued April 6, 9, 1906. Decided May 21, 1906.

APPEAL from the Court of Claims to review a judgment rejecting the claim of the administratrix of a deceased justice of the supreme court of the District of Columbia, to recover a balance alleged to be due on account of the salary authorized to be paid him after his resignation. *Reversed* and remanded, with directions to enter judgment for the petitioner.

See same case below, 38 Ct. Cl. 615.

The facts are stated in the opinion.

Mr. **Morgan H. Beach** argued the cause, and, with *Mr. A. A. Hoehling, Jr.*, filed a brief for appellant.

Assistant Attorney General **Van Orsdel** argued the cause, and, with *Mr. Felix Brannigan*, filed a brief for appellee.

*Mr. Justice **White** delivered the opinion [402] of the court:

Charles P. James was an associate justice of the supreme court of the District of Columbia. On December 1, 1892, being over seventy years of age and having served for more than ten years, he resigned his office. He died on August 8, 1899. This suit was brought by the administratrix of the estate of Justice James, on June 30, 1900, to recover $6,688.90, on the ground that the salary of Justice James at the time of his resignation was $5,000 per annum, and that, after his resignation and up to the time of his death, he was paid, under the provisions of Rev. Stat. § 714, U. S. Comp. Stat. 1901, p. 578, only at the rate of $4,000 per annum, upon the erroneous theory that that sum was the rate of salary fixed by law at the time of the resignation. From a judgment rejecting the claim (38 Ct. Cl. 615) this appeal was prosecuted.

To comprehend the contentions pressed at bar it is necessary briefly to refer to the statutes fixing the salary of the justices of the supreme court of the District of Columbia in force at the time of, and after the date of, the resignation of Justice James.

By the 2d section of the act of June 1, 1866 (14 Stat. at L. 55, chap. 104), the annual salary of the chief justice of the supreme court of the District of Columbia was fixed at $4,500, and of each associate justice

at $4,000. This provision continued in force up to and including the fiscal year ending June 30, 1891. The act (26 Stat. at L. 947, chap. 541) making appropriations for judicial salaries, etc., for the fiscal year commencing July 1, 1891, and ending June 30, 1892, contained the following provision:

"For salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, at the rate of five thousand dollars per annum each; thirty thousand dollars."

The law containing this provision had the enacting clause usually found in appropriation acts, declaring that the appropriations [403]*were made in full compensation of the services of the fiscal year to which the acts related, and the last section of the act repealed all acts or parts of acts inconsistent or in conflict with its provisions. Under this act Justice James was paid for the fiscal year referred to a salary at the rate of $5,000 per annum.

The appropriation act for the following fiscal year, commencing July 1, 1892, and ending June 30, 1893, contained an appropriation of a lump sum of $24,500 to pay the salaries of the chief justice and associate justices of the supreme court of the District of Columbia. [27 Stat. at L. 223, chap. 196.] The sum thus appropriated was only adequate to pay the salaries of the associate justices at the rate of $4,000 per annum each, and this act also contained the general enacting and concluding clauses above referred to.

For the five months of the year covered by this last act, up to his resignation, *viz.*, from July 1, 1892, to December 1, 1892, Justice James was paid at the rate of $4,000 per annum. Shortly after his resignation, before the expiration of the fiscal year covered by the lump appropriation for the year commencing July 1, 1892, and ending June 30, 1893, Congress, by the act of February 9, 1893 (27 Stat. at L. 436, chap. 74), created the court of appeals of the District of Columbia. By the terms of the act its provisions were not to take effect until April 3, 1893. It was provided in the 14th section of the act that "justices of the supreme court of the District of Columbia shall hereafter receive an annual salary of five thousand dollars each, payable quarterly at the Treasury of the United States." As the lump appropriation made in the act above referred to for the fiscal year ending June 30, 1893, was adequate only to pay the salaries at the rate of $4,000 per annum, it followed that the existing appropriation was not adequate to pay the salaries of the justices of the supreme court of the District of Columbia at the rate of $5,000 per annum from the date fixed for the going into effect of the court of appeals act, that is, from April 3, 1893, to the end of the *fiscal year. [404] To remedy this, in the deficiency appropriation act of March 3, 1893 (27 Stat. at L. 653, chap. 210, U. S. Comp. Stat. 1901, p. 3349), there was appropriated a sum which added to the previous lump appropriation, was adequate to pay to the justices of the supreme court of the District a salary at the rate of $5,000 per annum from April 3, 1893, to the end of the fiscal year. For the following fiscal years, it is conceded, regular appropriations were made for the salaries of the justices of the supreme court of the District of Columbia at the rate of $5,000 per annum. The deficiency appropriation act of March 2, 1895, contained an appropriation (28 Stat. at L. 851, chap. 187) "to pay the chief justice and five associate justices of the supreme court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety three." In virtue of this appropriation Justice James was paid for the portion of the fiscal year (from July 1, 1892, to June 30, 1893) covered by the lump appropriation, that is, up to the time of his resignation, on December 1, 1892, a sum which, added to the $4,000 appropriated in the lump appropriation act for that fiscal year, made his salary at the rate of $5,000 per annum.

On behalf of the administratrix the contention is that the appropriation at the rate of $5,000 per annum made for the fiscal year from July 1, 1891, to June 30, 1892, operated as an increase of the salary to that amount, and that this increase was not repealed by the subsequent legislation, or, if intended to be repealed, the repealing act was void, because the supreme court of the District of Columbia was an inferior court of the United States within the meaning of § 1, article 3, of the Constitution, and therefore, as Congress had increased the salary to $5,000 it was without power to reduce it.

The opposing contention is that the only effect of the appropriation for the fiscal year ending June 30, 1892, was to temporarily raise the salary for that year, and that, as in the subsequent *year only a lump sum [405] adequate to pay at the rate of $4,000 per annum was appropriated, the general law of 1866 governed, and that amount became the salary which, by law, was payable to Justice James at the time of his resignation. And it is insisted that Congress was vested with power to increase and diminish at pleasure the compensation paid to a justice of the supreme court of the District of Columbia because that court was not one of the courts referred to in § 1 of article 3 of the Constitution. Indeed, irrespective of the

question of what was the rate of salary payable to Justice James at the time of his resignation, the government contends that the judgment below should be affirmed, because, in any event, the supreme court of the District of Columbia was not a court of the United States within the intendment of Rev. Stat. § 714, and, in consequence, the judges of that court were not entitled, on resignation, to the benefits intended to be conferred thereby.

From the view we take of the case it is unnecessary to consider the constitutional questions which are raised by the opposing parties. We say this because, if the result of an analysis of the legislation of Congress be to establish that the salary by law payable to Justice James at the time of his resignation was $5,000 per annum, it will be superfluous, on that branch of the case, to intimate any opinion as to whether the supreme court of the District of Columbia is a court of the United States within the meaning of § 1 of article 3 of the Constitution. Likewise, on the second branch of the case, if it be concluded that the justices of the supreme court of the District of Columbia are embraced within the provisions of § 714 of the Revised Statutes, irrespective of whether that court is or is not an inferior court within the meaning of the constitutional provision above referred to, it will be likewise superfluous to consider the question of constitutional power.

It is not disputed that, by the express terms of the appropriation act for the fiscal [406] year ending June 30, 1892, the salaries *of the justices of the supreme court of the District of Columbia were increased to $5,000 per annum, at least for that year. As, however, the appropriation for the next fiscal year—the one in which Justice James resigned—was only of a lump sum adequate to pay $4,000 per annum, it is insisted that that amount was the salary payable to Justice James at the date of his resignation. Whether, if the act appropriating the lump sum stood alone, it would sustain the contention based upon it we are not called upon to decide, since we may not merely consider the lump appropriation but must also take into view the act of March 2, 1895 (28 Stat. at L. 851, chap. 187) relating to the identical subject, *viz.*, the salary for the fiscal year ending June 30, 1893, payable by law to the justices of the supreme court of the District.

The act of March 2, 1895, appropriated to pay as a deficiency to the chief justice and the five associate justices of the supreme court of the District of Columbia a sum representing the difference between the rate of compensation theretofore received by them and $5,000 per annum for the fiscal year 1893, the year in which Justice James resigned. Now that act is susceptible of only one of two constructions; *viz.*, either that it was a legislative declaration to the effect that the increase of salary operated by the specific provision contained in the appropriation act for the fiscal year ending June 30, 1892, was a permanent provision, and had not been repealed by the lump appropriation made in the act of the following year, or that it was intended retroactively to fix the salaries of the justices of the supreme court of the District of Columbia for the fiscal year 1893 at the sum of $5,000,—a power which Congress undoubtedly possessed. *Stockdale* v. *Atlantic Ins. Co.* 20 Wall. 323, 331, 332, 22 L. ed. 348, 351. Whichever view is adopted, the legal proposition inevitably arises that the salary of the justices of the supreme court of the District of Columbia payable by law for the fiscal year of 1893 was the sum of $5,000. Indeed, as a matter of fact, under the operation of the deficiency appropriation, the salary *actually paid to [407] Justice James for the portion of the fiscal year up to the time of his resignation was at the rate of $5,000 per annum. It is no answer to this deduction to say that as the effects just indicated arose from the act of 1895, therefore they could not have existed in the fiscal year of 1893, when Justice James resigned; for this would be but to deny efficacy to the act of 1895, either as a congressional interpretation of the prior legislation or as a retroactive statute, fixing the salaries for the year 1893.

As Congress had the power, wholly irrespective of the prior legislation, retroactively to fix the salary payable to a justice of the supreme court of the District of Columbia for an antecedent year, and as the effect of the act of 1895 was necessarily a determination by Congress that the salary payable to Justice James for the year during which he resigned was $5,000, we are not at liberty to disregard the retroactive effect of the act of Congress by holding that the salary payable to him by law for the year during which he retired was a less sum than the amount which Congress, in the exercise of its plenary authority in the premises, has declared was the lawful salary.

The salary of Justice James for the period just referred to being, then, at the rate of $5,000 per annum, it is obvious that he was within the terms of Rev. Stat. § 714, if the provisions of that section applied to justices of the supreme court of the District of Columbia. That section is as follows:

"Sec. 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of

seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

On behalf of the government it is, as we have said, contended that Justice James was not entitled to the benefit of this statute, because that statute only embraced judges of such courts of the United States
[408] as were within the purview of § 1 *of article 3 of the Constitution, and it is insisted the supreme court of the District of Columbia was not so embraced. We think the premise upon which this contention rests is wholly devoid of merit. The words of the statute, "when any judge of any court of the United States resigns his office," are broad enough to embrace all courts created by the United States, without taking into view the particular constitutional authority which was exercised in such creation. It is true that the statute excludes the conception that it was intended to apply to judges of courts created by Congress when the term of office was of a limited duration. Conversely, however, in our opinion, the text of the statute leaves no room for question that its provisions were intended to apply to a judge of any court of the United States holding his office by a life tenure, such as during good behavior. Indeed, as it is conceded at bar that, from the period of the enactment of the statute down to the present time, it has, without interruption or deviation, been construed by the legislative and executive departments of the government as applicable to justices of the supreme court of the District of Columbia, we do not deem it necessary to determine whether the supreme court of the District of Columbia is an inferior court within the meaning of § 1 of article 3 of the Constitution, since, even if it be not a court of that character, it is nevertheless a court of the United States within the meaning of Rev. Stat. § 714.

The judgment is reversed and the case remanded, with directions to enter a judgment for the petitioner.

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[409] *AYER & LORD TIE COMPANY, *Plff. in Err.*,

v.

COMMONWEALTH OF KENTUCKY, by Frank A. Lucas, Revenue Agent of Said Commonwealth.

(See S. C. Reporter's ed. 409–428.)

Taxes—on enrolled vessels—situs.— The settled rule that the domicil of the owner or the actual situs of the vessel, and not the place of enrolment of a vessel plying between ports of different states, engaged in the coastwise trade, and the consequent marking of the stern of the vessel with the name of the place of enrolment, as provided for in U. S. Rev. Stat. §§ 4178, 4334 (U. S. Comp. Stat. 1901, pp. 2830, 2968), was the criterion by which to determine the situs of the vessel for taxation, was not changed by the declaration of the act of June 26, 1884 (23 Stat. at L. 58, chap. 121, U. S. Comp. Stat. 1901, p. 2831), § 21, that the word "port," as used in those sections, shall be construed to mean either the port where the vessel is enrolled, or the place where it was built, or where one of the owners resides, which simply enables the owner to select a place other than the port of enrolment to be marked upon the vessel.

[No. 268.]

Argued April 27, 1906. Decided May 21, 1906.

IN ERROR to the Court of Appeals for the State of Kentucky to review a judgment which affirmed, on a second appeal, a judgment of the Circuit Court of McCracken County, in that state, sustaining a demurrer to the answer in an action to recover taxes on vessels engaged in interstate commerce, and enforcing the tax. *Reversed* and remanded for further proceedings.

See same case below, on first appeal, 25 Ky. L. Rep. 1068, 2061, 77 S. W. 686, 79 S. W. 290; on second appeal, 26 Ky. L. Rep. 585, 85 S. W. 1096.

Statement by Mr. Justice **White:**

The commonwealth of Kentucky, by Frank A. Lucas, revenue agent, commenced an action in the county court of McCracken county to recover from the Ayer & Lord Tie Company alleged omitted state, county, and municipal taxes for the years 1899, 1900, and 1901, claimed to be assessable upon two steamboats and certain barges, and, for the year 1901, upon one other steamboat, all the property of the company.

In the statement of the plaintiff the right to recover in respect of the steamboats was based solely upon the assertion that, on the dates when it was alleged the boats became subject to the taxes in question, they were "enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and state of Kentucky; that, as required by the said laws of the United
*States governing navigation, the words of [410]
'Paducah, Kentucky' were painted on the stern of said steamboats; that said boats, when not in use, are kept at Paducah, Kentucky, and that the said port of Paducah is, and was, on each of said days, the home port of said steamboats."

NOTE.—*As to where ships are taxable*—see note to Johnson v. De Bary-Baya Merchants' Line, 37 L.R.A. 520.

The right to recover in respect of the barges was based upon the allegation that "each and all of said boats are now, and were, on each of the above days mentioned, used by the defendant for the purpose of towing ties, loaded on barges; that the defendant was, on each of the days aforesaid, the owner, seised of, and in possession of, certain barges, used in connection with said steamboats, for the purpose of transporting railroad ties."

The tie company answered as follows: That it was an Illinois corporation, chartered in 1893, and empowered "to transact business with steamboats engaged in interstate commerce;" that "ever since its incorporation it has been engaged in business as owner of towboats, plying on the Mississippi, Ohio, Tennessee, and Cumberland rivers, and their tributaries; that the business in which towboats had been engaged is that of interstate commerce and of transporting railroad ties in its own barges from different points of said rivers to the port of Brookport, in the state of Illinois; that their said towboats, in pursuit of their business, occasionally touch at the point of Paducah, Kentucky, but never to discharge their cargo, but simply for the purpose of buying stores, employing seamen, and for other like purposes; that they and said barges are in the state of Kentucky but temporarily, and most of their business is transportations from ports and places in Alabama, Mississippi, Kentucky, Missouri, Arkansas, Illinois, and Tennessee to said port of Brookport, in the state of Illinois; St. Louis, in the state of Missouri; Duval's Bluff, in the state of Arkansas,—at which ports said towboats discharge and deliver their respective cargo of ties; and said boats and barges, owned and controlled by Ayer & Lord Tie Company, were engaged in the business aforesaid during and prior to years [411] *1899, 1900, and 1901, and, since owned by the said defendant company, have never been engaged in any other business but as aforesaid, nor has said company, since its incorporation, been engaged in any other business than as aforesaid; that their said vessels were and are regularly licensed and enrolled by the United States under and in pursuance to the acts of Congress."

It is further averred that, although the tie company had offices in various cities of Illinois situated on the Ohio river, as also offices in the cities of Paducah and Fulton, in the state of Kentucky, and Duval's Bluff, in the state of Arkansas, it had such offices in Kentucky for convenience, and its principal office was averred to be in the state of Illinois, of which state it was a citizen.

It was denied that the home port of its vessels was in the port of Paducah, Kentucky, and it was averred that such vessels were enrolled in Kentucky for convenience, and that, when they were so enrolled, the general manager of its transportation department and of the steamboats of the tie company was a resident of the state of Kentucky.

It was further specifically averred that, during the year for which the state of Kentucky was seeking to assess the property in question for taxation, "all of said property was assessed (listed?) by the defendant in the state of Illinois for taxation, and has been taxed, and defendant has paid taxes under the state of Illinois, to said state and city of Chicago on all of said property, and denies the right of the state of Kentucky to subject same property to taxation."

Claiming the right, under the commerce clause of the Constitution of the United States, to trade at the ports of the different states without molestation by the state of Kentucky, the company averred that the imposition and the collection of taxes in question would operate an unlawful interference with the right of the company to trade or engage in interstate commerce as it had heretofore been accustomed to do.

A demurrer was filed to the answer on the ground that it *did not state facts suf- [412] ficient to constitute a defense. The county court overruled the demurrer, and, plaintiff declining to plead further, the court dismissed "the plaintiff's statement and action." The case was then taken by appeal to the circuit court of McCracken county. As part of the record from the county court, the defendant filed in the circuit court a petition and bond for removal of the cause to a Federal court, upon the ground of diversity of citizenship. On the trial of the case, before action taken on a demurrer which had been refiled to the answer, the court overruled and dismissed the petition for removal, and the defendant excepted. The demurrer to the answer was overruled, and, the plaintiff declining to plead further, a judgment of dismissal was entered. The cause was then appealed to the court of appeals of Kentucky. That court held that the demurrer should have been sustained, and the judgment in favor of the company was reversed. 25 Ky. L. Rep. 1068, 77 S. W. 686. A petition for rehearing was denied for reasons stated in an opinion. 25 Ky. L. Rep. 2061, 79 S. W. 290.

After the mandate of the court of appeals was filed in the circuit court, that court, upon the pleadings, and the mandate and opinion of the court of appeals, entered a judgment sustaining the demurrer, and, the defendant declining to plead further, the allegations of plaintiff's statement were taken for confessed, and it was adjudged that the property therein described was liable for taxation at the values stated

in the judgment, and the defendant was adjudged to pay the taxes due upon such assessable values for the years in controversy, with the statutory penalty. In compliance with the request of the defendant the court separately stated its findings of fact and conclusions of law, which are as follows:

"Separation of Findings of Facts from Conclusions of Law.

"That the defendant was, at the time specified in the pleadings, the sole owner of the following-described property, named in the petition, to wit: Steamers Russel
[413] Lord, Pavonia, Inverness, *and barges; that the same were of the value as follows, as set out in the statement: Russel Lord, $13,000; Pavonia, $10,000; Inverness, $2,500; barges, $10,000; that the defendant had enrolled said steamboats at Paducah, Kentucky, with the name "Paducah" painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the state of Illinois.

"As a matter of law the court adjudges that the port of Paducah, Kentucky, was, at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant and named in the statement, and that all of said vessels were liable to assessment and valuation, at the times stated in the statement, in McCracken county, Kentucky, for purposes of state, county, and city taxes for the years, respectively, Russel Lord and Pavonia, 1899, 1900, and 1901; Inverness, 1901; barges, 1899, 1900, and 1901. The defendant excepts to each of the above findings of facts, and also to all of the conclusions of law."

A motion to set aside the judgment and for a new trial having been made and overruled, the cause was again appealed to the courts of appeals of Kentucky. That court affirmed the judgment of the circuit court upon the authority of its previous opinion, and the case was then brought to this court.

Mr. **Charles E. Kremer** argued the cause, and, with *Mr. James Campbell*, filed a brief for plaintiff in error:

The case of the barges here comes clearly within *Com.* v. *American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

The steamboats were not taxable in Kentucky.

Morgan v. *Parham*, 16 Wall. 471, 21 L. ed. 303; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686; *Mobile* v. *Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *Yost* v. *Lake Erie Transp. Co.* 50 C. C. A. 511, 112 Fed. 746.

It cannot be said that the home port of these vessels was Paducah.

The J. E. Rumbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; *The Lotus No. 2*, 26 Fed. 637; *The Jennie B. Gilkey*, 19 Fed. 127; *The Charlotte Vanderbilt*, 19 Fed. 219; *The Plymouth Rock*, 13 Blatchf. 505, Fed. Cas. No. 11,237; *The Mary Chilton*, 4 Fed. 847; *The E. A. Barnard*, 2 Fed. 712; *Hill* v. *The Golden Gate*, Newberry Adm. 308, Fed. Cas. No. 6,492; *Blanchard* v. *The Martha Washington*, 1 Cliff. 463, Fed. Cas. No. 1,513; *The Thomas Fletcher*, 24 Fed. 375; *The Chelmsford*, 34 Fed. 399; *The Marion S. Harriss*, 81 Fed. 964; *The Richard S. Garrett*, 44 Fed. 379; *The Havana*, 64 Fed. 496.

The state must show a situs of the property in question.

Walker v. *Walker* (*Walker* v. *Beal*) 9 Wall. 755, 19 L. ed. 819; *Marine Bank* v. *Fiske*, 71 N. Y. 353; *Myers* v. *Cronk*, 113 N. Y. 608, 21 N. E. 984; *Monson* v. *Tripp*, 81 Me. 24, 10 Am. St. Rep. 235, 16 Atl. 327.

Mr. **N. B. Hays** argued the cause, and, with *Mr. Charles H. Morris*, filed a brief for defendant in error:

This action is not such as may be originally brought in the United States circuit court, and does not come within the provisions of the act of Congress providing for the removal of actions from the state to the Federal courts. The commonwealth of Kentucky is the real party plaintiff, and is not a citizen within the meaning of said act of Congress providing for removal on the allegation of diverse citizenship.

Postal Teleg. Cable Co. v. *United States* (*Postal Teleg. Cable Co.* v. *Alabama*) 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Fitts* v. *McGhee*, 172 U. S. 518, 43 L. ed. 537, 19 Sup. Ct. Rep. 269; *Stone* v. *South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ferguson* v. *Ross*, 3 L.R.A. 322, 38 Fed. 161; *Chicago, St. L. & N. O. R. Co.* v. *Com.* 115 Ky. 278, 72 S. W. 1119.

The situs of the boats for the purposes of taxation is Paducah, Kentucky; and they are subject to taxation there, and not elsewhere.

Hays v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Wheeling, P. & C. Transp. Co.* v. *Wheeling*, 99 U. S. 273, 25 L. ed. 412; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 432, 20 L. ed. 195; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 36, 35 L. ed. 621, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Moran* v. *New Orleans*, 112 U. S. 75, 28 L. ed. 655, 5 Sup. Ct.

Rep. 38; *Morgan* v. *Parham*, 16 Wall. 471, 21 L. ed. 303.

Inasmuch as the plaintiff in error is a corporation created and existing under the laws of Illinois, it is a citizen of said state, and, its principal office being in the city of Chicago, these boats and vessels cannot, therefore, have a home port in Chicago, nor an actual situs in said city and state. It follows that their home port and actual situs, although different from the domicil of the owner thereof, must determine their legal situs; and, their home port being in McCracken county, Kentucky, and the city of Paducah, and being constantly employed and used in the streams of Kentucky and those adjacent thereto, and when not in use kept at Paducah, they are property within the jurisdiction of said city, county, and state for the purpose of taxation, and the right of the state to tax them should not be denied.

Pullman's Palace Car Co. v. *Pennsylvania*, *supra*; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 302, 49 L. ed. 1060, 25 Sup. Ct. Rep. 686; *North Western Lumber Co.* v. *Chchalis County*, 25 Wash. 95, 54 L.R.A. 212, 87 Am. St. Rep. 747, 64 Pac. 909; *National Dredging Co.* v. *State*, 99 Ala. 462, 12 So. 720; *Norfolk & W. R. Co.* v. *Public Works*, 97 Va. 23, 32 S. E. 779; *Minturn* v. *Hays*, 2 Cal. 590, 56 Am. Dec. 366; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, *ante*, 150, 26 Sup. Ct. Rep. 36.

Mr. J. H. Ralston, with *Messrs. Taylor & Lucas*, also filed a brief for defendant in error:

While, for purposes of taxation, the general rule is *mobilia sequuntur personam*, such is by no means the invariable rule; and in many cases tangible personal property acquires a situs for taxation foreign to the residence of its owner.

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, *ante*, 150, 26 Sup. Ct. Rep. 36; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631.

Every vessel, above a certain tonnage, is required to have a home port. This "home port" has long been held to be the situs of vessels for purposes of taxation.

Judson, Taxn. § 186; *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Morgan* v. *Parham*, 16 Wall. 471, 21 L. ed. 303; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Battle* v. *Mobile*, 9 Ala. 234, 44 Am. Dec. 438; *Irvin* v. *New Orleans, St. L. & C. R. Co.* 94 Ill. 105, 34 Am. Rep. 208; *Johnson* v. *De Bary-Baya Merchants' Line*, 37 Fla. 499, 37 L.R.A. 518, 19 So. 640; *People ex rel. Pacific Mail S. S. Co.* v. *Tax & A. Comrs.* 58 N. Y. 242; *Yost* v. *Lake Erie Transp. Co.* 50 C. C. A. 511, 112 Fed. 746; *Newport* v. *Berry*, 14 Ky L. Rep. 29, 19 S. W. 238.

The taxation of these vessels by the Kentucky authorities does not constitute an unwarranted interference with interstate commerce.

Moran v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Louisville & J. Ferry Co.* v. *Com.* 22 Ky. L. Rep. 446, 57 S. W. 624; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Henderson Bridge Co.* v. *Com.* 99 Ky. 623, 29 L.R.A. 73, 31 S. W. 486, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Morgan* v. *Parham*, *supra*.

*Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court: [418]

As, in the argument, counsel for plaintiff in error has not discussed the alleged error in overruling the motion to remove, we treat that question as waived and pass to the merits.

Notwithstanding, by the demurrer to the answer, it was conceded that the tie company was the owner of the alleged taxable property, that it was an Illinois corporation, and that its main office was in Chicago, that it had paid taxes in Illinois upon such property, that the property was employed in interstate commerce between ports of different states, including the state of Illinois, that its steamboats were enrolled at Paducah, Kentucky, for convenience, Kentucky being the place of residence of one of its managing officers, and that its boats touched Paducah only temporarily, never receiving or discharging cargo at that port, the court of appeals of Kentucky held that the property in question was subject to the taxing power of the state of Kentucky. The existence of power in the state to tax the property in question was rested solely upon the proposition that, as the steamboats were enrolled at Paducah, and the name "Paducah" was painted upon their sterns, it was to be conclusively presumed that the home port of the vessels was at Paducah, and that such home port was the situs of the property for taxation. The barges were brought within the principle announced, because they were treated as mere accessories of the steamboats. While, in the opinion, the steamboats were regarded as operated under a registry, the fact is

they were engaged in the coastwise trade under an enrolment and license. But this is immaterial, since vessels, in order to be enrolled, must possess the qualifications and fulfil the requirements necessary for registration.

To comprehend the question a chronological statement of the legislation of Congress as to the registration or enrolment of vessels, etc., is necessary.

[419] *By § 3 of an act approved December 31, 1792 (1 Stat. at L. 288, chap. 1, U. S. Comp. Stat. 1901, pp. 2808, 2830), it was provided as follows:

"Sec. 3. *And be it further enacted*, That every ship or vessel, hereafter to be registered (except as is hereinafter provided), shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong, at the time of her registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length. And if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in manner aforesaid, the owner or owners shall forfeit fifty dollars; one half to the person giving the information thereof; the other half to the use of the United States."

On June 23, 1874 (18 Stat. at L. 252, chap. 467), the foregoing provision was amended so as to allow the name of the vessel to be painted upon her stern in yellow or gold letters. In the Revised Statutes the requirement in question was separated into two sections (§§ 4141, 4178, U. S. Comp. Stat. 1901, pp. 2808, 2830), reading as follows:

"Sec. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

"Sec. 4178. The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length. If any vessel [420] of the United States shall be *found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars, recoverable one half to the person giving the information thereof, the other half to the use of the United States."

By § 2 of the act of February 18, 1793 (1 Stat. at L. 305, chap. 8), "for enrolling and licensing ships or vessels to be employed in the coasting trade," etc., the same requirements were made essential for enrolment as for registering; and, by § 11, licensed vessels were specifically obliged to have the name and port painted on the stern. As incorporated into the Revised Statutes the latter provision reads as follows:

"Sec. 4334 (U. S. Comp. Stat. 1901, p. 2968). Every licensed vessel shall have her name and the port to which she belongs painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of twenty dollars."

By § 21 of an act approved June 26, 1884 (23 Stat. at L. 58, chap. 121, U. S. Comp. Stat. 1901, p. 2831), it was provided as follows:

"Sec. 21. That the word 'port,' as used in sections forty-one hundred and seventy-eight and forty-three hundred and thirty-four of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside."

Again, by acts approved February 21, 1891, chap. 250, § 1 (26 Stat. at L. 765), and January 20, 1897, chap. 67, § 1 (29 Stat. at L. 491, U. S. Comp. Stat. 1901, p. 2830), § 4178, Rev. Stat., was amended so that it now reads as follows:

"Sec. 4178. The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilded, or consist of cut or carved or cast roman letters in light color on a dark ground, *or in a dark color on a light ground, [421] secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner or owners shall be liable to a penalty of ten dollars for each name omitted: *Provided, however*, That the names on each bow may be marked within the year eighteen hundred and ninety-seven."

Was the ruling below justified by these statutes? We think not.

The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrolment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a state other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority.

In *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254, vessels were registered in New York, where the owner resided. The vessels were employed in commerce on the Pacific ocean between San Francisco and Panama, and the question was whether the vessels were subject to taxation in California. It was decided that they were not, as they had not become incorporated into the property of California so as to have an actual situs in that state, and it was declared that the vessels were properly taxable at the domicil of their owner.

In *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192, the boats of the company, an Illinois corporation, were enrolled at St. Louis and plied between that city and the city of East St. Louis, in the state of Illinois. The company had an office in St. Louis, where its president and other principal officers lived, and where the ordinary business meetings of the directors were held and the corporate seal was kept. A tax was paid upon the boats in Illinois, the residence of the owner. The city of St. [422] Louis *taxed the ferry boats as personal property "within the city." It was, however, held that the boats did not so abide within the city as to become incorporated with and form part of its personal property, citing *Hays* v. *Pacific Mail S. S. Co. supra.* In the course of the opinion the court said (italics mine):

"The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, § 2 (1 Stat. at L. 55, chap. 11), and the act of 1792, § 3 (1 Stat. at L. 288, chap. 1), require every vessel to be registered in the district to which she belongs, and the 4th section of the former act, and the 3d section of the latter, declares that her home port shall be that at or near which her owner resides. *The solution of the question where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrolment.* 3 Kent, Com. 133, 170; *Hill* v. *The Golden Gate,* Newberry, Adm. 308, Fed. Cas. No. 6,492; *Dudly* v. *The Superior,* Newberry, Adm. 181, Fed. Cas. No. 4,115; *Jordan* v. *Young,* 37 Me. 276.

In *Morgan* v. *Parham,* 16 Wall. 471, 21 L. ed. 303, a vessel originally registered in New York had been engaged for years in the coastwise trade between Mobile and New Orleans and was enrolled at Mobile. It was decided that the boat could not be taxed in Alabama.

In *Wheeling, P. & C. Transp. Co.* v. *Wheeling,* 99 U. S. 273, 25 L. ed. 412, vessels engaged in commerce between ports of different states were held taxable at the domicil of the owner.

Quite recently, in *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, the foregoing authorities were approvingly cited, and were in effect reaffirmed. In that case the vessels were enrolled in New York, the domicil of the owner, but, although engaged in interstate commerce, the vessels were navigated wholly within the limits of the state of Virginia, it was held that they came within the exception to the general rule which we have previously stated, and were properly taxable in Virginia.

*As, in the case at bar, the owner of the [423] vessels was domiciled in Illinois and the vessels were not employed exclusively in commerce between points in the state of Kentucky, but were engaged in traffic between that state and the ports of other states, including Illinois, it seems obvious that, as a question of fact, they had no permanent situs in the state of Kentucky within the rule announced in the *Old Dominion Steamship Case.* The right, then, of the state of Kentucky to tax the vessels, must solely depend upon the fact that they were enrolled at the port of Paducah, in that state. But, if enrolment at that place was within the statutes, it is wholly immaterial, since the previous decisions to which we have referred decisively establish that enrolment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent situs of the property within the taxing jurisdiction. The court below, however, did not apparently decline to apply the previous decisions of this court, but treated them as inapposite, under the assumption that they were rendered before the act of 1884, and that the necessary effect of that statute was to change the general law so as to cause vessels to be subject to taxation within a state where they were enrolled, although that state was neither the residence of the owner nor the place of the actual situs of the property. As the ruling below was made before the decision of this court in the *Old*

Dominion Steamship Company Case, rendered since the act of 1884, we might well leave the demonstration of the error into which the court fell to result from the decision of that case, since the ruling below is wholly inconsistent with that decision. This clearly follows, since, in the *Old Dominion Steamship Case*, the right of the state of Virginia to tax was based upon the permanent situs of the vessels in Virginia, although they were enrolled in another state. But, in view of the general importance of the subject, we shall briefly point out the mistaken construction given by the court below to the act of 1884.

After referring to the act of 1884, and [424] quoting the provisions *of the Rev. Stat. § 4178, as now existing, the court below said:

"Appellee had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided, and it fully complied with the law regulating the subject by painting the words 'of Paducah, Kentucky,' on the stern thereof; and, by the amendment of 1884, Paducah became the home port of the vessels so registered and marked.

. . . . . .

"The steamboats involved in this litigation are separated from the residence of their owner by a long distance . . . ; in fact, they can never visit the port at which their owner resides; they are, so far as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property such as that under consideration ought, logically, to be taxed at its own home port; there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the latter for both its existence [of the property] and its value. At its home port it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys." [25 Ky. L. Rep. 1071, 77 S. W. 688.]

It is at once apparent that this line of reasoning, whilst it *asserts the principle of [425] actual situs, and expounds the act of 1884 as making that the exclusive rule to test the power to tax, at once causes the act to destroy the very principle which it was assumed the act upheld. This is the inevitable consequence of the conclusion reached by the court below, that the act of 1884 endowed the owner of a vessel with the power, simply by the painting a name of a place upon his vessel, to make such place the situs for taxation, although it might be neither the actual situs of the property nor the residence of the owner.

The act in question was an elaborate one, containing thirty sections, relating to the American merchant marine, and was entitled "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for Other Purposes." 23 Stat. at L. 53, chap. 121, U. S. Comp. Stat. 1901, p. 2804. The only provision contained in that act which had any reference to the subject under consideration, and which was relied upon in the court below, was § 21, which we have previously quoted, and which we again copy:

"Sec 21. That the word 'port,' as used in sections forty-one hundred and seventy-eight and forty-three hundred and thirty-four of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled or the place in the same district where the vessel was built or where one or more of the owners reside."

Clearly this section does not essentially change the prior general law respecting enrolment, as it simply enlarges the power of an owner in regard to painting on the stern of his vessel the name of the place from which he may desire to hail her. The prior provisions as to enrolment clearly exacted that the owner, as an incident to enrolment, should mark upon his vessel the name of the place of enrolment; in other words, compelled the owner to hail his vessel from the place of enrolment, although he might be domiciled elsewhere. Now, *as the settled [426] rule at the time of the passage of this act was that enrolment, and consequent marking of the stern of the vessel with the name of the place of enrolment, was not the criterion by which to determine the power of taxation, it is impossible to conceive that Congress intended, by merely conferring a privilege to select the name of a place other than the port of enrolment to be marked

upon a vessel, to overthrow the settled rules in regard to taxation of such property which existed at the time of the passage of the act of 1884. To give to the statute the construction adopted by the court below would be simply to hold that its purpose was to endow the owner with the faculty of arbitrarily selecting a place for the taxation of his vessel in defiance of the law of domicil, and in disregard of the principle of actual situs, since, by the statute, the owner was given the right to paint either the name of the place where the vessel was built, where enrolled, or where one of the owners resided. And this demonstrates the misconception of the construction given to the act of 1884 by the court below, since the court declared that the whole effect of the act was to endow the owner of vessels with the power to select, by marking on the stern, a place "in the field of operations," which should be the place of taxation. But no such limitation as the field of operations can be implied from the language of the statute, and, therefore, if the construction adopted were upheld, the unlimited right of the owner to arbitrarily frustrate the taxing laws of the state where he was rightfully subject to taxation would result.

Undoubtedly, as we have said, the general statutes as to enrolment in force prior to 1884 required that the name of the port to be painted upon the vessel should be the port of enrolment, although such place might not be the domicil of the owner. In practice, however, that rule was not always observed, because the owners of vessels desired to hail them from the place of the residence of the owner. *The Albany*, 4 Dill. 439, Fed. Cas. No. 131. And the history of the adoption of the provision now known as [427] § 21 of the act of 1884 referred to leaves *no room for doubt that Congress simply intended to legalize such practice. The provision had its origin in an amendment unanimously reported by the committee on commerce of the Senate on May 1, 1884, to a bill then pending in the Senate. The chairman of the committee, in reporting the proposed amendment, said (15 Cong. Rec. p. 3650):

Mr. Frye. The next amendment I am authorized to offer is a section in reference to the painting of the name of the ship on the stern. Not very important that must appear to Senators. Many of our shipowners in the state of Maine think more of that than they do of the rest of this bill. The man who owns a ship looks upon her as his wife or his children; he loves his ship; and, under the law as it stands to-day, he is required to paint on the stern the name, it may be that of his wife or of his daughter, and the port to which she belongs. For seventy-five years the port to which she belonged was construed to be the place where she was owned, and if a man built a ship in Surry, and she was owned there, he painted on the stern the "May Ann, from Surry, Maine." In 1875 a sharp Treasury official discovered that it was a violation of the law. He reported to the Secretary of the Treasury, and the Secretary issued an order that all those ships must bear the name of the port of entry, regardless of where they were built or owned. They are building vessels, home vessels, owned at home, owned in families, in many instances by the blacksmith, the carpenter, the captain, and the mate. Their vessels they wish to name after one of the family and the home, the place where she is owned and built; and yet, under the construction of the Treasury Department, she may be the "Julia Ann," from Machias, her port of entry, but actually built and owned a hundred miles from there. Take Bath and Richmond, on the Kennebec river,—Bath, the greatest ship-building city in the United States to-day of wooden ships; her rival, Richmond, is 15 miles above. The men who build their ships in Richmond regard it as about as serious a wrong as can be imposed upon them by law to compel them *to put a [428] ship built there and owned there under the name of Bath, her port of entry, and Bath would fully reciprocate under like circumcumstances. I take it that no Senator will object to that provision.

Mr. Hale. Just there let me ask my colleague, was not the reason for the ruling of the Secretary of the Treasury that the technical view was taken of the word "port," and it was concluded there could be nothing but the port of entry, thereby taking away this privilege from the men who built the ship?

Mr. Frye. I so understand it.

And, without debate, the amendment was adopted, and subsequently, with other amendments, was incorporated as part of the bill which came from the House of Representatives, relating to the same general subject as the bill which was under consideration in the Senate. Ib. pp. 3869, 3973, 5440.

The suggestion that, because the vessels were enrolled at Paducah, the owner was estopped from disputing that they had a situs for taxation there, is but to contend that the place of enrolment was *per se* controlling, in disregard of the repeated rulings of this court to the contrary.

The judgment of the Court of Appeals of Kentucky must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

[429] *JOSIAH MILLARD, *Appt.*,

v.

ELLIS H. ROBERTS, Treasurer of the United States; Henry B. F. Macfarland, Henry L. West, and John Biddle, Commissioners of the District of Columbia, *et al.*

(See S. C. Reporter's ed. 429–438.)

1. **Statutes — validity — revenue bill.** — Bills for other than tax purposes, but which may incidentally create revenue, such as the acts of February 12, 1901 (31 Stat. at L. 767, 774, chaps. 353, 354), and February 28, 1903 (32 Stat. at L. 909, chap. 856), for the elimination of grade crossings and for a union railway station in the District of Columbia, which provide for the payment of a sum of money to the railway companies, to be raised by a tax on property in the District, are not revenue bills which, under U. S. Const. art. 1, § 7, cl. 1, must originate in the House of Representatives.

2. **Public moneys—appropriation for private use.**—Public funds are not unconstitutionally appropriated for private use by the acts of February 12, 1901, and February 28, 1903, for the elimination of grade crossings, and for a union railway station in the District of Columbia, which provide for the payment to the railway companies of a sum of money to be raised by a levy on the taxable property of the District in consideration of the removal of railroads from their present location, and of large expenditures of money by the railway companies, and the surrender by them of substantial rights.

[No. 234.]

Argued and submitted April 18, 1906. Decided May 21, 1906.

APPEAL from the Court of Appeals of the District of Columbia, to review a decree which affirmed a decree of the Supreme Court of that District, sustaining demurrers to, and dismissing, a bill to enjoin the Treasurer of the United States from devoting public funds to the purposes authorized by congressional legislation for the elimination of grade crossings and for a union railway station in the District of Columbia. *Affirmed.*

See same case below, 25 App. D. C. 221.

The facts are stated in the opinion.

Mr. **Josiah Millard** *in propria persona* argued the cause and filed a brief for appellant:

Taxes on land or the profits issuing from lands are taxes in the strict sense of the word. They are direct taxes within the meaning of the constitutional provision respecting the apportionment of representatives and direct taxes, and, therefore, also neecssarily within the meaning of the provision that all bills for raising revenue shall originate in the House of Representatives.

Pollock v. *Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Story, Const. § 880, and note; *Twin City Nat. Bank* v. *Nebeker*, 3 App. D. C. 190, 167 U. S. 196, 203, 42 L. ed. 134, 136, 17 Sup. Ct. Rep. 766; Cooley, Taxn. 3d ed. 95, 96, and note; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Binns* v. *United States*, 194 U. S. 489, 496, 48 L. ed. 1088, 1091, 24 Sup. Ct. Rep. 816; *Downes* v. *Bidwell*, 182 U. S. 292, 45 L. ed. 1108, 21 Sup. Ct. Rep. 770; *People ex rel. Metropolitan Street R. Co.* v. *New York State Tax Comrs.* 199 U. S. 1, *ante*, 65, 25 Sup. Ct. Rep. 705.

The chief characteristic of an act which lays a tax for any purpose whatever is that it is intended to raise revenue by taxation, and no other purpose, pretended or real, can deprive it of the nature of a bill for raising revenue. Bills which lay taxes on lands or incomes for any purpose whatever are bills for raising revenue within the purview of the Constitution.

Story, Const. § 880, and note; *Income Tax Cases* (*Pollock* v. *Farmers' Loan & T. Co.*) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

It does not matter that this legislation relates to the District of Columbia, even if it related exclusively to it; for, notwithstanding any rule of either House, the power of Congress in this District is restricted and qualified by all the general limitations, express or implied, which are imposed on its authority by the Constitution.

Curry v. *District of Columbia*, 14 App. D. C. 429; *Callan* v. *Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Thompson* v. *Utah*, 170 U. S. 343, 346, 42 L. ed. 1061, 1065, 18 Sup. Ct. Rep. 620; *United States* v. *More*, 3 Cranch, 160, note, 2 L. ed. 398, note; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 22 L. ed. 455; *Loughborough* v. *Blake*, 5 Wheat. 317, 325, 5 L. ed. 98, 100; *Wilkes County* v. *Coler*, 180 U. S. 506, 513–525, 45 L. ed. 642, 648–652, 21 Sup. Ct. Rep. 458; *Cohen* v. *Virginia*, 6 Wheat. 264, 446, 5 L. ed. 257, 301.

If a tax is imposed upon one of the political subdivisions of a country, as in the present case, the purpose must not only be a public purpose as regards the people of that subdivision, but it must also be local.

People ex rel. Detroit & H. R. Co. v. *Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Cohen* v. *Virginia* and *Loughborough* v. *Blake*, *supra*.

The people of the District of Columbia

NOTE.—*As to the public purposes for which money may be appropriated or raised by taxation*—see note to Daggett v. Colgan, 14 L.R.A. 474.

cannot be taxed to pay "the debts of the United States," in whole or in part, whether equitable or legal, unless the taxes on them for that purpose are, if indirect, uniform throughout the United States, and are, if direct, apportioned among the states and territories in proportion to population; and, hence, the case of *United States* v. *Realty Co.* 163 U. S. 440, 444, 41 L. ed. 219, 221, 16 Sup. Ct. Rep. 1120, the Sugar Bounty Case, is no precedent here, even if these taxes were designed to pay a debt, and not to provide *uno flatu* a bounty for a private corporation and a stately edifice for the adornment of the capital of the nation, as such.

The right of taxation can only be used in aid of a public object,—an object which is within the purpose for which governments are established; and cannot, therefore, be exercised in aid of enterprises strictly private, even though, in a remote or collateral way, the local public may be benefited thereby.

Citizens' Sav. & L. Asso. v. *Topeka*, 20 Wall. 655, 664, 22 L. ed. 455, 461; *Cole* v. *LaGrange*, 112 U. S. 1, 6, 28 L. ed. 896, 897, 5 Sup. Ct. Rep. 416; *United States ex rel. Miles Planting & Mfg. Co.* v. *Carlisle*, 5 App. D. C. 138; *Hanson* v. *Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Whiting* v. *Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30; *Sweet* v. *Hulbert*, 51 Barb: 312; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Central Branch Union P. R. Co.* v. *Smith*, 23 Kan. 745.

The act of Congress of May 21, 1872, "designating a depot site for the Baltimore & Potomac Railroad" on the Mall, also created a trust fund for the use of the public schools of the District of Columbia (S. Doc. 220, p. 85), by a contract to which the Baltimore & Potomac Railroad Company and the board of aldermen and common council of this District were parties, and to which the United States became a party by said act, which charitable use could not be defeated by the acts of Congress herein complained of, but is still a subsisting estate with regard to which this court should establish a constructive trust by making the Philadelphia, Baltimore & Washington Railroad Company a trustee, to the use of said schools, of the moneys it may receive from the United States in consideration of any rights which it pretends to have acquired in the property on the Mall in derogation of the rights of said schools.

Hill, Trustees, 116; Story, Eq. Jur. § 1167; *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 2, 36, 59, 34 L. ed. 478, 490, 496, 10 Sup. Ct. Rep. 792; *Pawlet* v. *Clark*, 9 Cranch, 292, 3 L. ed. 735.

A literal compliance with the mandatory provisions of the Constitution, whether affirmative or negative, is a condition precedent to the validity of any law laying taxes on the property of the people, and attempts to evade those provisions constitute violations of them.

Wilkes County v. *Coler*, 180 U. S. 506, 521, 522, 45 L. ed. 642, 651, 21 Sup. Ct. Rep. 458; *Baltimore* v. *Gill*, 31 Md. 375; *Rodman* v. *Munson*, 13 Barb. 63; *Newell* v. *People*, 7 N. Y. 9.

All remedial laws, such as the constitutional provisions respecting taxation and due process of law, must be so construed as to repel the mischief and advance the remedy, by searching out and nullifying evasions as well as violations of them.

Atty. Gen. v. *Meyrick*, 2 Ves. Sr. 44; *Atty. Gen.* v. *Day*, 1 Ves. Sr. 218; *Atty. Gen.* v. *Davies*, 9 Ves. Jr. 535; *Marbury* v. *Madison*, 1 Cranch, 137, 2 L. ed. 60; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Cummings* v. *Missouri*, 4 Wall. 277, 18 L. ed. 356; *Baltimore* v. *Gill*, 31 Md. 375; *Cook County* v. *Chicago Industrial School*, 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183; *Farmer* v. *St. Paul*, 65 Minn. 176, 33 L.R.A. 199, 67 N. W. 990; *Washingtonian Home* v. *Chicago*, 157 Ill. 414, 29 L.R.A. 798, 41 N. E. 893; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 40, 35 L. ed. 55, 61, 11 Sup. Ct. Rep. 478; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 22 L. ed. 455; *Ward* v. *Joslin*, 186 U. S. 142, 152, 46 L. ed. 1093, 1099, 22 Sup. Ct. Rep. 807; *Taxing District* v. *Loague*, 129 U. S. 493, 32 L. ed. 780, 9 Sup. Ct. Rep. 327; *San Francisco Nat. Bank* v. *Dodge*, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. Rep. 384.

No conclusive presumption can arise to defeat the operation of the mandatory and remedial provisions of the Constitution respecting taxation and due process of law, which are self-executing.

Wilkes County v. *Coler, supra; Post* v. *Kendall County*, 105 U. S. 667, 26 L. ed. 1204; *South Ottawa* v. *Perkins*, 94 U. S. 260, 263, 24 L. ed. 154, 156.

Solicitor General **Hoyt, Edward H. Thomas, Wayne Mac Veagh, Frederic D. McKenney, John Spalding Flannery, George E. Hamilton,** and **M. J. Colbert** submitted the cause for appellees:

Congress, in the acts themselves, having declared that the appropriations were made upon a valuable consideration and for a public purpose, the matter is not open to review in the courts.

Cooley, Principles of Const. Law, 57, 58; Cooley, Taxn. 2d. ed. p. 111.

Although railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public.

New York & N. E. R. Co. v. *Bristol*, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437.

The power of states, counties, and municipalities to aid in the construction of railroads, upon the ground that railroads are quasi public institutions created and existing for the benefit of the public at large, is so well established by abundant authority that a mere reference to some of the many decisions on this point would seem to be sufficient.

Olcott v. *Fond du Lac County*, 16 Wall. 696, 21 L. ed. 389; *Curtis* v. *Butler County*, 24 How. 447, 16 L. ed. 748; *Rogers* v. *Burlington*, 3 Wall. 665, 18 L. ed. 83; *St. Joseph Twp.* v. *Rogers*, 16 Wall. 663, 21 L. ed. 338; *Gilman* v. *Sheboygan*, 2 Black, 515, 17 L. ed. 308; *Larned* v. *Burlington*, 4 Wall. 276, 18 L. ed. 353; *Chicago, B. & Q. R. Co.* v. *Otoe County*, 16 Wall. 673, 21 L. ed. 380; *Pine Grove Twp.* v. *Talcott*, 19 Wall. 676, 22 L. ed. 233; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 330, 21 L. ed. 600; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 661, 22 L. ed. 460; *Otoe County* v. *Baldwin*, 111 U. S. 15, 28 L. ed. 336, 4 Sup. Ct. Rep. 265.

The United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia. When Congress, acting as the municipal legislature of said District, in the exercise of the police power, enacts legislation for the benefit of the health and safety of the community, and makes an appropriation and levies an assessment to carry said legislation into effect, the propriety of its action is not open to review by the courts.

Wight v. *Davidson*, 181 U. S. 371, 381, 45 L. ed. 900, 905, 21 Sup. Ct. Rep. 616.

In *Wilson* v. *Lambert*, 168 U. S. 611, 42 L. ed. 599, 18 Sup. Ct. Rep. 217, the act of September 27, 1890 (26 Stat. at L. 492, chap. 1001, U. S. Comp. Stat. 1901, p. 1249), providing for the establishment of the Rock Creek park, and authorizing the levying of an assessment upon the taxpayers of the District of Columbia to defray the cost thereof, was held to be a valid exercise of the powers of Congress in legislating for the District of Columbia.

In *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437, in which was involved an act of the legislature of the state of Connecticut abolishing grade crossings as a menace to public safety, this court held that this was a proper exercise of the police power of the state. Grade crossings being in the nature of nuisances, the legislature might cause them to be abated, and require either party to pay the whole or any portion of the expense.

Wabash R. Co. v. *Defiance*, 167 U. S. 88, 98, 42 L. ed. 87, 92, 17 Sup. Ct. Rep. 748; *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 74, 42 L. ed. 948, 954, 18 Sup. Ct. Rep. 513.

Even if the appropriations made by the acts of 1901 and 1903 could be regarded as donations, they would still be legal, and the acts providing therefor constitutional and valid.

Allen v. *Smith*, 173 U. S. 402, 43 L. ed. 745, 19 Sup. Ct. Rep. 446; *United States* v. *Realty Co.* 163 U. S. 440, 41 L. ed. 219, 16 Sup. Ct. Rep. 1120.

The provision of § 7, art. 1, of the Constitution, which requires that "all bills for raising revenue shall originate in the House of Representatives," cannot apply to any of the acts involved in this case.

Story, Const. §§ 874, 880; 2 Elliot's Debates, 283; *Twin City Nat. Bank* v. *Nebeker*, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. Rep. 766; *United States ex rel. Michels* v. *James*, 13 Blatchf. 207, Fed. Cas. No. 15,464.

The act of February 28, 1903, from the recitals in its enacting clause and the fact that it has received the approval of the President and has been regularly enrolled among the statutes of the United States, must be presumed to have been passed by Congress in strict accord with the letter and spirit of the Constitution; and resort cannot be had to the journals of the two Houses to overthrow this presumption.

Field & Co. v. *Clark*, 143 U. S. 649, 680, 36 L. ed. 294, 306, 12 Sup. Ct. Rep. 495; *Harwood* v. *Wentworth*, 162 U. S. 547, 562, 40 L. ed. 1069, 1073, 16 Sup. Ct. Rep. 890; *Twin City Nat. Bank* v. *Nebeker*, *supra*.

Where the consequences that would result from the destruction of statutes solemnly enacted are so grave, we think the court would be entirely justified in refusing to declare the acts unconstitutional although defects in the laws or irregularities in their enactment were clearly pointed out.

Nicol v. *Ames*, 173 U. S. 514, 43 L. ed. 791, 19 Sup. Ct. Rep. 522.

Mr. Justice **McKenna** delivered the opinion of the court:

This is a bill in equity to enjoin Ellis H. Roberts, as Treasurer of the United States, from paying to any person any moneys of the District of Columbia, under certain acts of Congress† * (31 Stat. at L. 767, 774, chaps. [435]

† An act entitled "An Act to Provide for Eliminating Certain Grade Crossings of Railroads in the District of Columbia, to Require

353, 354; 32 Stat. at L. 909, chap. 856), and to enjoin the other defendants from carrying into effect said acts of Congress, and that said acts "be declared null and void for want of constitutional authority." Defendants interposed demurrers to the bill, which were sustained by the supreme court, and a decree entered dismissing the bill. The court of appeals affirmed the decree.

The principal allegations of the bill are that the railroad defendants are private corporations and all interested in the railway and terminal facilities of the District of Columbia; that the District of Columbia owns no stock in any of the companies nor is otherwise interested in any of them save as useful private enterprises, and yet it is required by said acts, "without any lawful consideration therefor," to pay the Baltimore & Potomac Railroad Company the sum of $750,000, and a like sum to the Baltimore & Ohio Railroad Company, "to be levied and assessed upon the taxable property and privileges in the said District other than the property of the United States and the District of Columbia," and for the exclusive use of said corporations respectively, "which is a private use, and not a governmental use;" that the public moneys of the District of Columbia are raised chiefly by taxation on the lands therein, and that the complainant is obliged to pay and does pay direct taxes on land owned by him therein. And the bill also alleges that the acts of Congress are "acts which provide for raising revenue, and are repugnant to article 1, § 7, clause 1, of the Constitution of the United States, and are, therefore, null and void *ab initio*, and to their entire extent, because they, and each and every one of them, originated in the Senate, and not in the House of Representatives." Certain volumes of the Congressional Record are referred to and made part of the bill.

[436] *In other allegations of the bill are expressed the limitations upon the power of the United States and the District of Columbia as to taxation; that the acts of Congress complained of are repugnant to the Constitution of the United States; that public funds are appropriated for private use, and that exorbitant taxes will be required to meet the legitimate expenses of the District of Columbia, and appellant will thereby be oppressed and deprived of his property without due process of law.

The first contention of appellant is that the acts of Congress are revenue measures, and therefore should have originated in the House of Representatives, and not in the Senate, and, to sustain the contention, appellant submits an elaborate argument. In answer to the contention the case of *Twin City Nat. Bank* v. *Nebeker*, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. Rep. 766, need only be cited. It was observed there that it was a part of wisdom not to attempt to cover by a general statement what bills shall be said to be "bills for raising revenue" within the meaning of those words in the Constitution, but it was said, quoting Mr. Justice Story, "that the practical construction of the Constitution, and the history of the origin of the constitutional provision in question, proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes, which may incidentally create revenue." 1 Story, Const. § 880. And the act of Congress which was there passed on illustrates the meaning of the language used. The act involved was one providing a national currency, and imposed a tax upon the average amount of the notes of a national banking association in circulation. The provision was assailed for unconstitutionality because it originated in the Senate. The provision was sustained, this court saying:

"The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. There was no purpose, by the act or by any of its provisions, to raise revenue to be applied *in meeting the expenses or ob- [437]
ligations of the government."

This language is applicable to the acts of Congress in the case at bar. Whatever taxes are imposed are but means to the purposes provided by the act.

The legality of those purposes is attacked in the other contentions of appellant. All of the contentions rest upon the correctness of the allegation that the moneys provided to be paid to the railroad companies are for the exclusive use of the companies, "which is a private use, and not a governmental use."

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and Authorize the Construction of New Terminals and Tracks for the Baltimore & Ohio Railroad Company in the City of Washington, and for Other Purposes," approved February 12, 1901; an act entitled "An Act to Provide for Eliminating Certain Grade Crossings on the Line of the Baltimore & Potomac Railroad Company in the City of Washington, District of Columbia, and Requiring Said Company to Depress and Elevate its Tracks, and to Enable it to Relocate Parts of Its Railroad Therein, and for Other Purposes," approved February 12, 1901; an act entitled "An Act to Provide for a Union Railroad Station in the District of Columbia and for Other Purposes," approved February 28, 1903.

The titles of the acts are the best brief summary of their purposes, and those purposes are obviously of public benefit. We do not think that it is necessary to enter into a discussion of the cases which establish this. The scheme of improvement provided by the acts required a removal of the railroads from their situations, large expenditures of money by the companies, and the surrender of substantial rights. These rights are recognized, and their surrender expressed to be part of the consideration of the sums of money paid to the companies. Indeed, there is an element of contract, not only in the changes made, but in the manner and upon the scale which they are required to be made. As remarked by Mr. Justice Morris, speaking for the court of appeals:

"The case is practically that of a contract between the United States and the District of Columbia on the one side and the railroad companies on the other, whereby the railroad companies agree to surrender certain rights, rights of property as well as other rights, and to construct a work of great magnitude, greater, perhaps, than their own needs require, but which Congress deems to be demanded for the best interest of the national capital and by the public at large; and for this surrender of right and this work of magnitude commensurate with the public demand, Congress agrees to pay a certain sum, partly out of the funds of the United States and partly out of the funds of the District of Columbia. It is a simple case of bargain and sale, like any other purchase." [25 App. D. C. 221.]

438] *We have assumed that appellant, as a taxpayer of the District of Columbia, can raise the questions we have considered, but we do not wish to be understood as so deciding.

Decree affirmed.

Mr. Justice **Harlan** concurs in the result only.

SANTA FE PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

LAURETE HOLMES.

(See S. C. Reporter's ed. 438–445.)

1. Master and servant—liability to servant—duty as to places and appliances—negligence of train despatcher.—The promulgation by a train despatcher of special orders, sufficient, if obeyed, to insure the safe operation of two passenger trains approaching each other on the same track, is not a complete discharge of the railway company's duty to furnish safe places and appliances for its employees if the despatcher afterwards becomes aware of the danger of a collision, growing out of a disobedience of such orders, which he may guard against by issuing new orders.

2. Master and servant—liability to servant—duty as to places and appliances—negligence of train despatcher.—A railway employee, injured by a head-on collision which would not have occurred if the train having the right of way had not passed a station six minutes ahead of schedule time, as fixed by special orders from the train despatcher, may hold the railway company accountable, where the despatcher failed to issue orders to intercept the train at that point after being informed that it was two minutes ahead of time in passing a point but a few miles away.

[No. 235.]

Argued April 18, 19, 1906. Decided May 21, 1906.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed the judgment of the Circuit Court for the Southern District of California in favor of a railway employee in an action for damages for injuries received by him in a collision. *Affirmed.*

See same case below, 68 C. C. A. 634, 136 Fed. 66.

Statement by Mr. Justice **McKenna:**

Action brought in the circuit court of the United States for the ninth circuit, southern district of California, by defendant in error, for damages for injuries received by him in a head-on collision of two trains, on one of which he was an engineer. The answer alleged negligence upon the part of defendant in error, by disobeying the orders, rules, and regulations of the company, and also alleged that the collision was *caused by the negligence of a fellow [439] servant. The action was tried without a jury, and the circuit court found for defendant in error in the amount of $9,000, and entered judgment against the company for that sum. The judgment was affirmed by the circuit court of appeals. 68 C. C. A. 634, 136 Fed. 66. The company, being a Federal corporation, then sued out this writ of error.

The colliding trains were regular passenger trains, and are denominated in the testimony as train No. 3 and train No. 4, the former being westbound and the latter east-

NOTE.—*On the duties of master and servant with regard to rules promulgated for the safe conduct of the business*—see note to Nolan v. New York, N. H. & H. R. Co. 43 L.R.A. 305.

bound. Defendant in error was the engineer on No. 4, or rather one of the engineers, the train being hauled by two engines. He was the engineer of the second engine. Both trains were run on regular schedule or time cards when on time or slightly delayed, No. 4 having the right of track. On the morning of the collision, November 20, 1901, train No. 3 was unusually delayed, and special orders became necessary for the operation of the trains on the Arizona division. The first order was issued before train No. 4 had left Needles. The order was as follows: "No. 3 eng. 482 has right of track over No. 4 eng. 444 and 452 to Needles, but will run 1 hour 50 minutes late Kingman to Needles." The copy of the order was delivered to train No. 4 before 4:22 A. M., before its departure from Needles, and to No. 3 upon its arrival at Kingman at 4:21 or 4:22 A. M. Train No. 4 ran east to Mellen, a distance of 11.9 miles, where it stopped upon signal. In the meantime the second order (No. 23) was issued by the train despatcher, train No. 3 having been more delayed in arriving at Kingman than had been expected. This order was delivered to train No. 4 at Mellen. It read as follows: "No. 3 eng. 482 will run two (2) hours late Kingman to Needles." A copy of the order was delivered to No. 3 at Kingman. The effect of these orders and the general rules of the company was that No. 3 was to run according to the time card, except that it was to run two hours late and was to have the right of track over No. 4, the latter to look [440] out for No. 3, and run with reference *to its movement as provided for by the special orders in connection with the time-table. The orders and the time-table would have made Franconia the proper place of passing of the trains, No. 3 being due to arrive there at 5:17, No. 4 at 5:06, or eleven minutes ahead of No. 3. Train No. 3 should have left Kingman at 4:25. It left at 4:31, six minutes late. It passed Yucca, however, at 4:55 (this is disputed, but upon what evidence we shall presently consider); it should not have passed until 4:57; and it passed Franconia six minutes ahead of time. The operator at Yucca (the only night telegraph office between Kingman and Franconia) at 4:58 or 59 reported to the train despatcher that No. 3 had passed at 4:55.

No. 4 left Mellen, which was the only night office between Needles and Franconia, between 4:45 and 4:47, and ran 6.8 miles to Powell, arriving there at 5 o'clock. A stop was made of three or four minutes for the purpose of adjusting the flow of oil in the leading locomotive, and then proceeded towards Franconia. In the meantime No. 3 had arrived at Franconia six minutes ahead of the schedule time under the special order for leaving that station. On approaching the station the engineer signaled an inquiry for orders and received by semaphore signal from the operator the reply: "No orders from the train despatcher." He did not stop at Franconia, and, while the train was going at a speed of from 60 to 70 miles an hour, about 1¼ miles from Franconia, it collided with No. 4, which was running from 40 to 50 miles an hour. Both trains were wrecked, the engineer of the leading locomotive of No. 4 and several others were killed, and the defendant in error sustained serious injuries. The operator at Franconia had no orders that morning for either No. 3 or No. 4. But for the collision, No. 4 would have reached and have been placed on the siding at Franconia, notwithstanding the delay at Powell, two or three minutes before No. 3 was due at Franconia. Plaintiff in error's rule No. 385 only requires the train not having the right of *track to take a siding [441] and be clear of the main track before the leaving time of the opposing train. Other facts are stated in the opinion.

Mr. **Gardiner Lathrop** argued the cause for plaintiff in error.

Messrs. T. J. Norton, E. W. Camp, and *Robert Dunlap* filed a brief for plaintiff in error:

The orders were sufficient.

4 Thomp. Neg. § 4152.

The train sheet was not competent evidence of the time of the passage of the train.

Chicago Lumbering Co. v. *Hewitt,* 12 C. C. A. 129, 22 U. S. App. 646, 64 Fed. 314.

The duty of complying with the rules, regulations, and orders that have been given to them, and of carefully operating the trains, is a duty incumbent upon those employees to whom their operation has been intrusted. All employees so engaged are fellow servants, and no recovery can be had against the railway company for an injury sustained by one of such employees, due to the negligence of another, notwithstanding such negligence may have consisted solely in the disobedience of an order issued by the company for the operation of its trains.

2 Bailey Personal Injuries Relating to Master & Servant, § 3290; *Rose* v. *Boston & A. R. Co.* 58 N. Y. 217; *Slater* v. *Jewett,* 85 N. Y. 62, 39 Am. Rep. 627; *Kennelty* v. *Baltimore & O. R. Co.* 166 Pa. 60, 30 Atl. 1014; *Healey* v. *New York, N. H. & H. R. Co.* 20 R. I. 136, 37 Atl. 676; *Lewis* v. *Seifert,* 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; *Maher* v. *Union P. D. & G. R. Co.*

45 C. C. A. 301, 106 Fed. 311; *Chicago, St. L. & N. O. R. Co.* v. *Doyle*, 60 Miss. 977.

A master is not bound to supervise the merely executive details of the work to be done by his servants.

Howard v. *Denver & R. G. R. Co.* 26 Fed. 837; *Baird* v. *Reilly*, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884; *Michigan C. R. Co.* v. *Dolan*, 32 Mich. 510; *Hermann* v. *Port Blakely Mill Co.* 71 Fed. 853.

The dangerous situation caused by the engineer and conductor of No. 3, by their violation of special order 23 and rule 392, was without fault on the part of the plaintiff in error, and consequently it was under no legal obligation, either to them or to any of their servants, to take measures to rescue them from the impending danger.

Allen v. *Hixson*, 111 Ga. 460, 36 S. E. 810.

The duty to provide a safe place for the work does not carry with it the obligation to protect that place from dangers arising from acts of fellow servants, even in cases where the fellow servant fills a dual capacity,—that is, being a vice president in so far as providing a safe place is concerned.

Donnelly v. *San Francisco Bridge Co.* 117 Cal. 417, 49 Pac. 559; *Donovan* v. *Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519; *Martin* v. *Atchison, T. & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *O'Niel* v. *Great Northern R. Co.* 80 Minn. 27, 51 L.R.A. 532, 82 N. W. 1086.

The master is under no obligation to preclude or warn against such dangers as arise from the conduct of the business in which his employees are engaged, and which are transitory risks incident to the work, and produced by the action of the employees themselves.

Northern P. R. Co. v. *Dixon*, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683; *Whittaker* v. *Bent*, 167 Mass. 588, 46 N. E. 121; *Meehan* v. *Speirs Mfg. Co.* 172 Mass. 375, 52 N. E. 518; *Durst* v. *Carnegie Steel Co.* 173 Pa. 162, 33 Atl. 1102; *Healey* v. *New York, N. H. & H. R. Co., supra.*

If the train despatcher was negligent, his negligence was not that of the company, but of a coservant.

Reiser v. *Pennsylvania Co.* 152 Pa. 38, 34 Am. St. Rep. 620, 25 Atl. 175; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 914; *Olson* v. *Oregon Coal & Nav. Co.* 96 Fed. 109; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Union P. R. Co.* v. *Daniels* (*Union P. R. Co.* v. *Snyder*) 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Nixon* v. *Selby Smelting & Lead Co.* 102 Cal. 458, 36 Pac. 803; *Donnelly* v. *San Francisco Bridge Co.* 117 Cal. 417, 49 Pac. 559; *Crispin* v. *Babbitt*, 81 N. Y. 521, 37 Am. Rep. 521.

Conceding for the purpose of argument, the despatcher's negligence, and that it was that of a vice principal, it was not the proximate cause of the injury.

Milwaukee & St. P. R. Co. v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Missouri P. R. Co.* v. *Moseley*, 6 C. C. A. 641, 12 U. S. App. 601, 57 Fed. 921; *Louisiana Mut. Ins. Co.* v. *Tweed*, 7 Wall. 44, 19 L. ed. 65; *Mahogany* v. *Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860; Wharton, Neg. §§ 134, 136–140; *Texas & P. R. Co.* v. *Doherty* (Tex. App.) 15 S. W. 44; *Richmond & D. R. Co.* v. *Tribble*, 97 Va. 495, 24 S. E. 278; *State* v. *Ruth*, 9 S. D. 84, 68 N. W. 189; Cooley, Torts, p. 70; Broom, Legal Maxims, 8th ed. p. 216; *Ionides* v. *Universal Marine Ins. Co.* 14 C. B. N. S. 259; *New York, C. & St. L. R. Co.* v. *Perriguey*, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; *Morrison* v. *Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny* v. *New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Sharp* v. *Powell*, L. R. 7 C. P. 253; *South Side Pass. R. Co.* v. *Trich*, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; *Berry* v. *Sugar Notch*, 191 Pa. 345, 43 Atl. 240; *Bosworth* v. *Brand*, 1 Dana, 377; *Carter* v. *Towne*, 103 Mass. 507; *Seale* v. *Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Union P. R. Co.* v. *Callaghan*, 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988; *Hoag* v. *Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653.

Mr. **W. H. Stilwell** argued the cause, and, with *Messrs. Byron Waters* and *Wm. Wylie*, filed a brief for defendant in error:

The plaintiff in error was accountable for the negligence of its train despatcher.

Northern P. R. Co. v. *Dixon*, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683; *Oregon Short Line & U. N. R. Co.* v. *Frost*, 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965.

The duty of the master must be commensurate with the character of the service required and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case.

Hanley v. *California Bridge & Constr. Co.* 127 Cal. 240, 47 L.R.A. 597, 59 Pac. 577.

The diligence required will be the greater as the danger and hazards increase.

Darrigan v. *New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 596.

The greater the danger to be apprehended, the greater should be the care exercised.

Northern P. R. Co. v. *Mix*, 57 C. C. A. 592, 121 Fed. 481; *Mercantile Trust Co.* v. *Pittsburgh & W. R. Co.* 53 C. C. A. 207, 115 Fed. 481.

The master must make such provisions for the employees as will reasonably protect them against the dangers incident to their employment.

Davis v. *Southern P. Co.* 98 Cal. 24, 35 Am. St. Rep. 133, 32 Pac. 708; *Elledge* v. *National City & O. R. Co.* 100 Cal. 290, 38 Am. St. Rep. 290, 34 Pac. 720; *Nixon* v. *Selby Smelting & Lead Co.* 102 Cal. 464, 36 Pac. 803; *Union P. R. Co.* v. *Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 67; *Hanley* v. *California Bridge & Constr. Co.* 127 Cal. 240, 47 L.R.A. 597, 59 Pac. 577.

If the negligence of the company contributed to the injury, the company was liable, even though the negligence of a fellow servant was contributory also.

Grand Trunk R. Co. v. *Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *New Jersey & N. Y. R. Co.* v. *Young*, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 725; *Northern P. R. Co.* v. *Poirier*, 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 885; *Crew* v. *St. Louis, K. & N. W. R. Co.* 20 Fed. 92.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

The case here is in narrow compass both as to the facts and the law. It is apparent that none of the operators of train No. 4 was guilty of negligence. The second special order indicated Franconia as the meeting point of the trains and that train No. 4 should reach there before 5:17, the leaving time of train No. 3. This it could have accomplished notwithstanding the delay at Powell. It is equally apparent that train No. 3 was ahead of time and we may consider that its engineer was culpable. The question is yet presented whether the company is not charged with liability. In this question there are involved two elements,—one of law and one of fact. It is not denied that the train despatcher represented the company in the promulgation of the special orders. It is, however, asserted that this representation ceased by the promulgation of the orders, and that he was not required to repeat them or promulgate new ones. "There is no ground," it is insisted, "either upon reason or authority, for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them." There is an instant answer to the contention. Instead of according with principle and authority, it is opposed to both. It contradicts a concession elsewhere made in the argument, [442] that it is the *duty of a railroad company to promulgate adequate rules and regulations for the safety of employees engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. The duty is a continuing one and must be exercised whenever circumstances demand it. It may indeed often be discharged by one exercise. It may recur at any moment in keeping moving and opposing trains in safe relation. The rules of the company recognize this. They require telegraph operators to report the time of departure and passing of trains. This is absolutely necessary for supervision. The business is hazardous. Trains may be rushing towards each other upon a single track. All may go well. The observance of time alone may be sufficient for safety. But something may occur to one of the trains, with or without fault of anybody, which may endanger the other. May a train despatcher know it and not guard against it? A negative answer would be revolting.

There can be no doubt of the duty of the train despatcher in such case. His duty is clear if the circumstances call for action. Did the circumstances in the case at bar call for action? In answering this it will do no good to discuss cases. The principles of law are clear. A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty. Or, to put the matter more guardedly, there is no circumstance in this case which exempted from that duty. The special orders were an assurance of the company, through its train despatcher, to train No. 4, that it could run with safety between Mellen and Franconia if it arrived at the latter station before 5:17. If anything occurred to change that condition which came to the knowledge of the company, train No. 4 was entitled to know it; and we are brought to the simple question, Did anything occur? It is admitted all around that train No. 3 did not comply with orders, and arrived *and departed from Franconia [443] ahead of time. It is disputed whether it arrived at or departed from Yucca ahead of time. Both of the lower courts found that it did, and we cannot say that the evidence does not sustain the finding. The telegraph operator at Yucca notified the train despatcher that the train passed two minutes ahead of time,—passed at 4:55; its time was 4:57; and we know that it passed Franconia six minutes ahead of time,— a circumstance which tends to show that the operator at Yucca was right. That there was an error in the operator's clock was an afterthought of the train despatcher.

He received and recorded on the "train sheet" the time (4:55) which was given him. He testified (his deposition was taken by defendant in error) that he received the report of the operator at 4:58, and that he made the entry at 4:55, "just before the accident, and placed '7' over the second '5' just after the accident." He was asked no further explanation by either of the parties. The operator (who was also called by the defendant in error) testified that shortly after he had reported the passing of train No. 3 he was called up by the train despatcher, who asked: "What time have you got?" The operator gave the time 4:51 or 2, and the despatcher replied: "Your clock is two minutes slow," or such a matter. And this testimony has corroboration in the testimony of the operator at Kingman, who heard the conversation. It appears, therefore, that the attention of the train despatcher was challenged to the fact and felt the importance of the fact that train No. 3 was running contrary to orders. What should he have done considering that two trains were rushing toward each other upon a single track, the safety of both dependent upon the exact observance of time by both? Minutes were important, and how important the testimony exhibits everywhere. The clocks of the telegraph operators are adjusted by standard, and not allowed to vary three seconds. The practice and safety of special orders are recognized as dependent upon the exact observance of time. Their superiority to meeting points
[444] for trains is attempted to be *demonstrated by witness by saying that "it is one of the objects of good railroading to cover the greatest distance in the least time, and to keep in motion the largest number of trains on a division." The object was beset with dangers and demanded a proportionate care. It allowed little margin for inevitable delays. There was no place in it for any negligence. A train was in fault if it was behind time. It was the height of culpability to be ahead of time. A close connection at "clearance" points was expected. It was testified that trains of the first class, which No. 3 and No. 4 were, "can clear each other to a second." If the trains are of different classes the inferior must clear by at least five minutes.

Such was the system, and what it demanded the train despatcher must have known. In such a system minutes—and even seconds—are important, and it was the duty of the train despatcher to regard them. He knew, to use the testimony of the company's chief despatcher, that it was the duty of train No. 3 "not to run less than two hours late with reference to her schedule, as prescribed in the regular time-table." She was not allowed, was his emphatic declaration, "to make up one second of that two hours as long as that order was in effect." She (to keep up the personification of the witness) was running two minutes ahead of time. This might of itself have caused a collision. The other train was to be considered, and that minutes were important should not have been out of the train despatcher's mind an instant. He knew that No. 3 had the right of way, with no obligation to No. 4 but to observe time. He knew that No. 4 was "to get into the clear and out of No. 3's way," and had no other guide but the time prescribed.

These comments do not lose their force or application by reason of the fact that, under the special orders, the trains had an allowance of eleven minutes at Franconia. This allowance was made upon the basis of a strict observance of time, the perfect working of machinery, and exact accordance of clocks. But such perfection, in the nature of things, was liable to disturbance. *and, when disturbance was observed, should [445] have been provided against, and immediately provided against. It was no time to take chances or debate probabilities. It is to be remembered that at all stations there were not night telegraph offices. Yucca was the only one between Yucca and Franconia, and between those stations the train was lost to observation and control. The train despatcher indeed exhibited his concern. All of the fatal significance of train No. 3 running ahead of time came to his mind. His mistake was to account for it by an error in the telegraph operator's clock (giving to him this excuse against the finding of the lower courts), although he knew that the clock must have been adjusted that day under the rules with the standard time. If we were forced to find the fact, we should find it against him; but it is enough to say that there was brought to him, considering his position and the responsibilities upon him, a demand for a care which he omitted to observe. If he had been as considerate as he ought to have been, he would have stopped No. 3 at Franconia. And for this conclusion we need not the proof afforded by the collision. The collision, however, and the excuses offered for it, make the conclusion irresistible. Plaintiff in error excuses the train despatcher by a defect in the clock of the telegraph operator at Yucca. The engineer of No. 3 excuses himself by virtually condemning the clocks of the company by which he had tested his watch. He is sure if No. 4 had been running on time he would have met her at Haviland, the station between Yucca and Franconia. A system which permits such confusion and the endangering of human lives is wrong or

wrongly administered. We need go no farther in the present case than to say that it was wrongly administered. The train despatcher failed to take into account and do what a prudent man would have taken into account and have done.

Judgment affirmed.

Mr. Justice **Brewer** dissents.

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[446]*P. O. COX, Sam Levy, and W. H. Evans, *Plffs. in Err.*,

v.

STATE OF TEXAS. (No. 266.)

P. O. COX, Sam Levy, and W. M. Evans, *Plffs. in Err.*,

v.

W. B. THOMPSON. (No. 267.)

(See S. C. Reporter's ed. 446–452.)

1. **Constitutional law—equal protection of the laws—discrimination.**— Liquor sellers are not denied the equal protection of the laws because producers or manufacturers of domestic wines are exempted, by Tex. Rev. Civ. Stat. 1895, art. 5060*i*, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors.

2. **Constitutional law — privileges or immunities.**—Liquor sellers are not denied the privileges or immunities of citizens of the United States, under U. S. Const., 14th Amend., because producers or manufacturers of domestic wines are exempted by Tex. Rev. Civ. Stat. 1895, art. 5060*i*, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors.

3. **Error to state court—questions reviewable.**—The necessity of invoking the protection of the commerce clause of the Federal Constitution, if the repugnancy to that clause of certain state legislation is to be considered by the Supreme Court of the United States on writ of error to a state court, is not obviated by a reference to the 14th Amendment as invalidating such legislation.

4. **Error to state court—questions reviewable.**—A Federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court.

[Nos. 266, 267.]

Argued and submitted April 27, 1906. Decided May 21, 1906.

TWO WRITS OF ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review the affirmance in that court of two judgments of the District Court for Hamilton County, in that state, in favor of plaintiffs, in actions on a liquor seller's bond. *Affirmed.*

See same case below (Tex. Civ. App.) 85 S. W. 34.

The facts are stated in the opinion.

Mr. **J. C. McReynolds** argued the cause and filed a brief for plaintiffs in error:

Exemption from the general provisions of the Texas statute regulating the liquor business, of wines produced from domestic grapes while in the hands of producers or manufacturers, renders it obnoxious to the 14th Amendment, which forbids denial of the equal protection of the laws.

Scott v. *Donald*, 165 U. S. 58, 91, 41 L. ed. 632, 640, 17 Sup. Ct. Rep. 265; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 546, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431.

Messrs. F. E. Albright, E. C. Orrick, J. C. Terrell, Jr., and *Dewey Langford* also filed a brief for plaintiffs in error:

So long as the state, by its Constitution and laws, continues to recognize wines, beer, and spirituous liquors as articles of consumption, commerce, and sale, so long must the duty of the Federal court to afford such business the same measure of protection as is given to other businesses, and to protect those engaged in it against unjust discrimination in so far as the same is provided for under the United States Constitution, continue.

Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; Cooley, Const. 4th ed. 94; *Scott* v. *Donald*, 165 U. S. 110, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *Mugler* v. *Kansas*, 123 U. S. 673, 31 L. ed. 214, 8 Sup. Ct. Rep. 273; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup.

NOTE.—*As to the validity of class legislation*—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State *ex rel.* Hill v. Dockery, 63 L.R.A. 571.

Ct. Rep. 454; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Plumley* v. *Massachusetts*, 155 U. S. 471, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

The discrimination in the Texas statutes in favor of the dealers in wines made from grapes grown in the state of Texas while in the hands of the maker or producer thereof, exempting them from the giving of a bond, and from incurring penalties for the violations of the conditions of such bond, and imposing such penalties on all other dealers in liquors, wines, beer, or medicated bitters, and on all other dealers in wines made from other products than grapes, is repugnant to the 14th Amendment of the Constitution of the United States in respect to the equal protection of such dealers under the laws of the state of Texas.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *State* v. *Bengsch*, 170 Mo. 81, 70 S. W. 710; *Pullman Palace Car Co.* v. *State*, 64 Tex. 275, 53 Am. Rep. 758; *Ex parte Overstreet*, 39 Tex. Crim. App. 475, 46 S. W. 825; *Ex parte Jones*, 38 Tex. Crim. App. 482, 43 S. W. 513; *Gustafson* v. *State*, 40 Tex. Crim. App. 71, 43 L.R.A. 615, 45 S. W. 717, 48 S. W. 518; *Rainey* v. *State*, 41 Tex. Crim. Rep. 254, 96 Am. St. Rep. 786, 53 S. W. 882.

Mr. **Charles K. Bell** submitted the cause for defendant in error. *Messrs. R. V. Davidson* and *Claude Pollard* were on the brief:

There is no inherent right in a citizen to sell intoxicating liquors. It is not a privilege of a citizen of a state, or of a citizen of the United States which the states are forbidden to abridge. It is a right exercisable subject only to the police powers of the state.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Bartemeyer* v. *Iowa*, 18 Wall. 129, 21 L. ed. 929; *Mugler* v. *Kansas*, 123 U. S. 659, 31 L. ed. 209, 8 Sup. Ct. Rep. 273; *Foster* v. *Kansas*, 112 U. S. 206, 28 L. ed. 697, 5 Sup. Ct. Rep. 8, 97; *Norton* v. *Jamison*, 154 U. S. 591, 38 L. ed. 1089, 14 Sup. Ct. Rep. 1196; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

The statute in question is not repugnant to the 14th Amendment to the Constitution of the United States.

American Sugar Ref. Co. v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201.

The plaintiffs in error, not being engaged in the sale of wines exclusively, but being also engaged in the sale of other intoxicating liquors than wines, cannot challenge the validity of the Texas statutes.

Tiernan v. *Rinker*, 102 U. S. 123, 26 L. ed. 103; *Powell* v. *State*, 69 Ala. 13; *McCreary* v. *State*, 73 Ala. 482; *Logan* v. *State*, 84 Ala. 450, 4 So. 355.

Mr. Justice **Holmes** delivered the opinion of the court:

These are two suits upon a statutory bond executed by the plaintiffs in error as principal and sureties. There were verdicts and judgments against the plaintiffs in error, whereupon motions were made for new trials, setting up that the act under which the bond was given was contrary to the 14th Amendment of the Constitution of the United States, as denying to persons within the jurisdiction the equal protection of the law. The motions were overruled, and an appeal was taken to the court of civil appeals. That court affirmed the judgments below (85 S. W. 1199; 85 S. W. 34), a motion for a rehearing was overruled, an application for a writ of error was refused by the supreme court of the state, and thereupon the cases were taken to this court. [449]

The bond in suit was given by a liquor seller, and was conditioned, among other things, against selling intoxicating liquors to minors, or allowing minors to enter and remain in the obligor's place of business. The breaches found were breaches of the conditions recited. These suits were brought by the defendants in error respectively, the state of Texas and the parent of the minor. They seem to have been tried together, and the records are so similar that they properly have been treated by counsel as one.

The statutes of Texas provide for taxes on sellers of spirituous, vinous, or malt liquors, or medicated bitters. Rev. Civ. Stat. 1895, arts. 5060*a*, 5060*b*. They require an application for a license, giving details, a payment of the annual tax as a condition of obtaining the same, and the giving of a bond like the one in suit. Arts. 5060*c*–5060*g*. See amendments, Stat. 1897, chap. 158; 1901, chap. 136. They also enact, however, that "the provisions of this chapter shall not apply to wines produced from grapes grown in this state, while the same is in the hands of the producers or manufacturers thereof." Art. 5060*i*. This article is thought to invalidate those which precede. The matters of discrimination relied upon are the tax and the requirement

of the bond. It may be proper to add that there was a demurrer, setting up generally that the statute was unconstitutional because of this article, but, until the motion for a new trial was made, there was no
[450] sufficient setting up of a *defense under the Constitution of the United States. *Kipley* v. *Illinois*, 170 U. S. 182, 45 L. ed. 998, 18 Sup. Ct. Rep. 550; *Layton* v. *Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

The main argument addressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes of persons in the state, naturally existing there, as in *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, there was a discrimination with regard to trusts in favor of producers and raisers of agricultural products and live stocks. This argument seems to us a fallacy. Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings, and not likely to be engaged in any thing else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them to form trusts in their regular business was practically, and in fact, to discriminate between two classes and others. The case was discussed throughout on the footing of classification. But, so far as we know, there is no natural distinction of classes among liquor sellers,—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things, which, presumably, all liquor sellers would prefer to be free to do. Therefore, whatever other objections there may be to them, they do not deny the equal protection of the laws by forbidding, without justification, to one what they permit to another class.

There is one slight qualification necessary to what we have said. It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. To that extent, but to that extent alone, favor is shown to a class. But this is not the class discrimination put forward and insisted upon. The attack is not mainly on the distinction between producers and other sellers of domestic wine, but upon that between those producers and the sellers of other wine. The latter, as we have said, is not a true class distinction. Whether there is a difference in the scope of a state's general power
[451] to legislate and its power to tax or *not (*Kidd* v. *Pearson*, 128 U. S. 1, 26, 32 L. ed. 346, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 562, 563, 46 L. ed. 679, 690, 691, 22 Sup. Ct. Rep. 431), the former does not need an extended defense so far as the 14th Amendment alone is concerned. See *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201; *St. John* v. *New York*, 201 U. S. 633, *ante*, 896, 26 Sup. Ct. Rep. 554.

That part of the 14th Amendment which forbids the abridgment of the privileges or immunities of citizens of the United States was not referred to or relied upon in the motion for a new trial or in the assignment of errors before the court of civil appeals. It is mentioned for the first time in the assignment of errors before this court. *Chicago I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 132, 49 L. ed. 413, 417, 25 Sup. Ct. Rep. 200. In view of the decisions, we hardly suppose that the omission was by mistake. *Bartemeyer* v. *Iowa*, 18 Wall. 129, 21 L. ed. 929; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Cronin* v. *Adams*, 192 U. S. 108, 48 L. ed. 365, 24 Sup. Ct. Rep. 219. The truth is that the 14th Amendment does not touch the case, standing alone, and, if so, other provisions of the Constitution which were not invoked cannot be brought in now, under cover of the reference to the 14th Amendment, to give the latter a more extensive application to the case than it would have when taken by itself. If the states were restricted by the 14th Amendment only, and saw fit to encourage domestic production, or thought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them. If the statutes are open to objection as improperly interfering with commerce among the states (*Tiernan* v. *Rinker*, 102 U. S. 123, 26 L. ed. 103; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454), the right which springs from art. 1, § 8, of the Constitution cannot be used to enlarge, for the purposes of this case, the privileges and immunities or the equal protection of the laws secured by the 14th Amendment. *Dewey* v. *Des Moines*, 173 U. S. 193, 198, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379. The converse case of a right set up under art. 1, § 8, and an attempt to support it by the 14th Amendment, was decided in *Keokuk & H. Bridge Co.* v. *Illinois*, *175 U. S. 626, 633, 44 L. ed. 299,
[452] 302, 20 Sup. Ct. Rep. 205. See further,

Harding v. *Illinois*, 196 U. S. 78, 86, 49 L. ed. 394, 396, 25 Sup. Ct. Rep. 176.

It is proper to say that art. 1, § 8, is referred to in the assignments of error before the court of civil appeals and before this court. But it does not appear that the court of civil appeals dealt with the point, and probably it refused to do so on the ground that the section was not relied upon before the trial court. We cannot say that it erred, even if it did, unless that ground is excluded. *Jacobi* v. *Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; *Erie Railroad* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605. The case was argued before us on the 14th Amendment alone, and although there is some slight reference to interference with commerce in one of the briefs, it is rather in aid of the argument based on *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, than as an independent point. At all events, the question is not open here.

We believe that we have said enough to dispose of the cases. Whether, even if the statute is invalid as to wines made in other states, the bond may be valid, in view of the applications having extended to the sale of spirituous liquors (*Tiernan* v. *Rinker*, *supra*), or otherwise, it is unnecessary to inquire.

Judgments affirmed.

Mr. Justice **Harlan**, dissenting:

I do not understand that the court modifies the principles announced in *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, or in *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. In my judgment, those cases are applicable to and control this case, and require a reversal of the judgment below upon the ground that the statute of Texas is in violation of the Constitution of the United States. I therefore dissent from the opinion and judgment of the court.

Mr. Justice **Brewer** and Mr. Justice **Brown** concur in this dissent.

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[453]*MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, *Appt.*,

v.

VICKSBURG WATERWORKS COMPANY.

(See S. C. Reporter's ed. 453-473.)

1. Direct appeal from circuit court—case involving application of Federal Constitution.—A case which involves the application of the Constitution of the United States, and is therefore the subject of a direct appeal from a circuit court to the Supreme Court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, is presented by a bill in equity which alleges that a contract right of a waterworks company, with whose predecessors a municipality, with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on a contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract.

2. Appeal—review of discretion of trial court.—Permitting the withdrawal of an original bill of a waterworks company, alleging that it had become the owner of the contract involved in a suit between the municipality and another waterworks company, where such bill, being in the nature of a supplemental bill, was filed after the city, in answer to the company's petition to be admitted as a party complainant, had denied that it had any interest in the litigation, was not an abuse of the discretion of the trial court, and the same is true of its action in suppressing the testimony on this question, and in denying the municipality leave to file a further answer, setting up the alleged transfer of ownership.

3. Mortgage—of corporate property—what passes on foreclosure.—The contract rights under a municipal ordinance, which were the property of a waterworks company, authorized by Miss. Laws 1882, p. 50, to borrow money and secure its payment by mortgage or deed of trust upon its property and franchises, passed by foreclosure and a subsequent quitclaim deed of the property covered by a mortgage of all its property and franchises, privileges and rights.

4. Constitutional law—impairment of contract obligation—reserved right to repeal.—Impairment of the contract rights acquired by a corporation under a foreclosure sale of the franchise and rights conferred upon the mortgagor by a municipal ordinance adopted prior to the Mississippi Constitution of 1890 cannot be justified as an exercise of the right to alter, amend, or repeal corporate charters, reserved in § 178 of that Constitution, although the corporation in question was organized after the Constitution went into effect.

5. Constitutional law—impairment of contract obligations—reserved right to repeal.—The reserved right to alter, amend, or repeal corporate charters, given by Miss. Const. 1890, § 178, "provided, however, that no injustice shall be done to the stockholders," does not authorize the legislature to empower a municipality to construct waterworks of its own during the term of an

NOTE.—*On direct review in the Supreme Court of the United States of circuit and district court judgments*—see note to Gwin v. United States, 46 L. ed. U. S. 741.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna

exclusive waterworks franchise, possessed by a private corporation under a municipal ordinance adopted with legislative sanction.

6. **Municipal corporations—power to grant exclusive privileges.**—A municipality, in exercising the authority conferred by its charter to provide for the erection and maintenance of a system of waterworks to supply the city with water, and, to that end, to contract with a party or parties who shall build and operate waterworks, may exclude itself from constructing and operating waterworks of its own for the term covered by such contract.

7. **Municipal corporations—grant of exclusive privileges.**—A municipality excludes itself from competition during the period named with the grantee in an ordinance of the exclusive right to erect, maintain, and operate waterworks for a definite term, to supply water for public and private use.

8. **Mandatory injunction — municipal construction of sewer.**—A municipality cannot be required, by a mandatory injunction, to extend a sewer and construct an outlet therefor, so as to discharge the sewage below the intake of the waterworks, irrespective of the exercise of the discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and like matters.

[No. 133.]

Submitted December 13, 1905. Decided May 21, 1906.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi to review a decree enjoining municipal competition with a private waterworks company, and requiring the municipality to construct a sewer which shall discharge below the intake. Modified by eliminating the provision respecting the sewer, and, *as modified, affirmed.*

The facts are stated in the opinion.

Mr. **J. C. Bryson** submitted the cause for appellant. *Messrs. Bryson & Dabney* were on the brief:

The complainant's motion to dismiss and affirm must be overruled if the record discloses any material issue not decided on the former appeal, which involves the construction or application of the Constitution of the United States, or the construction of a state law alleged by appellee and denied by appellant to be in contravention of the Constitution of the United States, provided the same was by the court below decided against appellant.

Loeb v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Lampasas* v. *Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *Cornell* v. *Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *The Nuestra Señora de Regla* (*United States* v. *The Nuestra Señora de Regla*) 108 U. S. 92, 27 L. ed. 662, 2 Sup. Ct. Rep. 287.

There is no provision in the contract or ordinance, which requires the city to take or pay for water from Bullock & Company, except the stipulation for the rental of ninety-fire hydrants. In the absence of such agreement the city certainly had the right to supply itself and to build a plant for that purpose. If the city is to be denied such right under the Bullock contract, it is by implication, and implication alone, which this court has repeatedly held would not be permitted.

Stein v. *Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Collins* v. *Sherman* 31 Miss. 679; *Gaines* v. *Coates*, 51 Miss. 335; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

The exclusive feature is absolutely void, and does not preclude the city or anyone else, because the statute authorizing the city to provide a water supply, being general in its terms, did not empower the city council to grant to Bullock & Company any exclusive right and privilege.

Collins v. *Sherman* and *Gaines* v. *Coates*, *supra*; *Greenville Waterworks Co.* v. *Greenville* (Miss.) 7 So. 409.

A public-service corporation cannot sell and dispose of its property and franchises, and thus disable itself from performing the service for which it was created, except by the clearest and most explicit authority conferred by charter or statute.

Thomas v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *Brunswick Gaslight Co.* v. *United Gas, Fuel, & Light Co.* 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; *Com.* v. *Smith*, 10 Allen, 448, 87 Am. Dec. 672; *Chicago Gaslight & Coke Co.* v. *People's Gaslight & Coke Co.* 121 Ill. 530, 2 Am.

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v. Citizens' Trust & Surety Co. 24 C. C. A. 20, and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

As to reserved power to alter, amend, or repeal corporate charters—see note to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961.

On the establishment and regulation of municipal water supply—see note to State *ex rel.* Hallauer v. Gosnell, 61 L.R.A. 33.

As to the power of a court of equity to grant mandatory injunctions—see note to Moundsville v. Ohio River R. Co. 20 L.R.A. 161.

St. Rep. 124, 13 N. E. 169; *Richardson* v. *Sibley*, 11 Allen, 65, 87 Am. Dec. 700; *Coe* v. *Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Susquehanna Canal Co.* v. *Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Ragan* v. *Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *Gaines* v. *Coates*, *supra*; *New Albany Waterworks* v. *Louisville Bkg. Co.* 58 C. C. A. 576, 122 Fed. 776; *Bacon* v. *Mississippi Ins. Co.* 31 Miss. 116.

A right to amend a charter included the right to so amend the same as to take away the right of an exclusive franchise.

Hamilton Gaslight & Coke Co. v. *Hamilton*, *supra*.

The defendant in the case at bar was not, by the use of the word "exclusive" in the Bullock franchise, disabled from building a waterworks plant of its own.

Lehigh Water Co.'s Appeal, 102 Pa. 515; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Helena Waterworks Co.* v. *Helena*, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40.

Grants of public franchises are always construed in favor of the public.

Stein v. *Bienville Water Supply Co.* and *Freeport Water Co.* v. *Freeport*, *supra*.

The authority conferred by the legislature of the state did not authorize the city to grant an exclusive franchise.

Wright v. *Nagle*, 101 U. S. 791, 25 L. ed. 921; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Saginaw Gaslight Co.* v. *Saginaw*, 28 Fed. 529; *Greenville Waterworks Co.* v. *Greenville*, *Collins* v. *Sherman*, and *Gaines* v. *Coates*, *supra*.

The question of whether or not grants like the one presented in the case at bar operate to exclude the city making them is one that has on several occasions been before the courts of last resort, and it has invariably been held that they do not.

Smith v. *Westerly*, 19 R. I. 437, 35 Atl. 526; *Long* v. *Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547, 51 N. W. 913; *Brenham* v. *Brenham Water Co.* 67 Tex. 542, 4 S. W. 143; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381.

It may be urged that, while a general authority to make a grant will not support an exclusive grant, it nevertheless operates as an estoppel, and that, as applied to the case at bar, the city having attempted to grant to Bullock & Company an exclusive franchise, it is thereby estopped to set up its lack of authority to make such grant for the purpose of allowing itself to come in as a competitor; but the decisions of this and other courts are equally clear that such contention is not maintainable.

Sutro v. *Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442, 16 Pac. 7; *Dixon County* v. *Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County* v. *Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654.

There is one other contention along this line, that may be set up by complainant, *viz.*, that the authority given by the legislature to the defendant was in the alternative to supply itself with water, or to grant that privilege to another by contract, and, having adopted the latter, the city has thereby precluded itself. This was the contention successfully set up in the United State circuit court, in the case of *Westerly Waterworks* v. *Westerly*, 75 Fed. 181, in *Columbia Ave. Sav. Fund, S. D. Title & T. Co.* v. *Dawson*, 130 Fed. 152; and in *Southwest Missouri Light Co.* v. *Joplin*, 113 Fed. 817.

But whatever weight and authority this line of decisions might have had was destroyed utterly by the decisions of this court in the cases of *Skaneateles Waterworks Co.* v. *Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; *Joplin* v. *Southwest Missouri Light Co.* 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; and *Helena Waterworks Co.* v. *Helena*, *supra*.

A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the contract is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation.

Greenwood v. *Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

The constitutional inhibition against impairing contract obligations is against the legislative branch of the government, not against the administrative.

New Orleans Waterworks Co. v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

The resolution complained of does not, and did not at the time, warrant the grant-

ing of the injunction perpetuated in the final decree of the court below.

St. Paul Gaslight Co. v. *St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

It was held by this court at an early date that the judiciary could not in any manner interfere with the legislative or executive departments of the government either to restrain from action or to compel action by either, where any discretion is vested in either of the co-ordinates.

Mississippi v. *Johnson*, 4 Wall. 475, 18 L. ed. 437; Cooley, Const. Lim. 5th ed. 254.

It was clearly error to allow the withdrawal of the petition, and the original bill in the nature of a supplemental bill.

Ross v. *Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466; *Hazleton Tripod-Boiler Co.* v. *Citizens' Street R. Co.* 72 Fed. 327; 2 Bates, Fed. Eq. Proc. § 642, p. 682.

It was error to overrule defendant's motion for leave to file its supplemental answer.

Pue v. *Pue*, 4 Md. Ch. 386; *Hazleton Tripod-Boiler Co.* v. *Citizens' Street R. Co. supra.*

Messrs. L. W. Magruder, H. C. McCabe, and *M. Dabney* also filed a brief for appellant:

The contract was not assignable.

Matthews v. *Corporation Comrs.* 97 Fed. 400; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 482; *Norfolk & W. R. Co.* v. *Pendleton*, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Brunswick Gaslight Co.* v. *United Gas, Fuel, & Light Co.* 85 Me. 535, 35 Am. St. Rep. 385, 27 Atl. 525; *Com.* v. *Smith*, 10 Allen, 448, 87 Am. Dec. 672; *Chicago Gaslight & Coke Co.* v. *People's Gaslight & Coke Co.* 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169.

If the appellee corporation came into existence under the Constitution of 1890 and the municipal charter from the state of Mississippi enacted in 1892, it can exercise no powers and no rights which are prohibited by the Constitution and laws of Mississippi. Moreover, its charter was and is subject to alteration, repeal, or amendment, and has been amended by the act of 1904 above quoted. It cannot complain of any of these laws, which were in existence when it accepted its charter. Its rights and privileges are fixed by these laws.

Hamilton Gaslight & Coke Co. v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Norfolk & W. R. Co.* v. *Pendleton, supra; Griffin* v. *Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; *Redlands, L. & C. Domestic Water Co.* v. *Redlands*, 121 Cal. 365, 53 Pac. 843; *Matthews* v. *Corporation Comrs, supra; Greenwood* v. *Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 562, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; *Stanislaus County* v. *San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 202, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624 45 L. ed. 702, 21 Sup. Ct. Rep. 490; *Winchester & L. Turnp. Road Co.* v. *Croxton*, 98 Ky. 739, 33 L.R.A. 177, 34 S. W. 518; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 26, 45 L. ed. 395, 408, 21 Sup. Ct. Rep. 240, 282; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Unless it was plainly the intention of the state to authorize the city to make an exclusive grant, and unless that intent has been plainly expressed in the amendment of November 18, 1886, quoted above, the city had no power to make an exclusive grant. We insist that no such purpose was intended or expressed.

Freeport Water Co. v. *Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Wright* v. *Nagle*, 101 U. S. 791, 25 L. ed. 921; *Greenville Waterworks Co.* v. *Greenville* (Miss.) 7 So. 409; *Collins* v. *Sherman*, 31 Miss. 679; *Gaines* v. *Coates*, 51 Miss. 335; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Brenham* v. *Brenham Water Co.* 67 Tex. 542, 4 S. W. 143; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Helena Waterworks Co.* v. *Helena*, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; *Long* v. *Duluth*, 49 Minn. 290, 32 Am. St. Rep. 547, 51 N. W. 913; *Hamilton Gaslight & Coke Co.* v. *Hamilton, supra; Skaneateles Waterworks Co.* v. *Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; *Smith* v. *Westerly*, 19 R. I. 437, 35 Atl. 526; *Rogers Park Water Co.* v. *Fergus* and *Walla Walla* v. *Walla Walla Water Co. supra: Saginaw Gaslight Co.* v. *Saginaw*, 28 Fed. 529.

All doubts must be resolved in favor of the appellant and against the company.

Joplin v. *Southwest Missouri Light Co.* 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; *Bienville Water Supply Co.* v. *Mobile*, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820; *Freeport Water Co.* v. *Freeport, supra.*

In the exercise of their governmental

functions the appellants are subject to no direction and no control by the courts.

Cooley, Const. Lim. 5th ed. 255.

The court erred in proceeding to judgment without requiring the city Waterworks & Light Company to be made a party to the suit, as asked by the appellant.

2 Bates, Fed. Eq. Pr. 642; *Hazleton Tripod-Boiler Co.* v. *Citizens' Street R. Co.* 72 Fed. 327; *Ross* v. *Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466.

Messrs. **S. S. Hudson, Murray F. Smith** and **J. Hirsh** submitted the cause for appellee. *Messrs. Hudson & Fox* were on the brief:

Walla Walla v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, disposes of any questions relating to the exclusiveness of this contract, so far as the city's right to build its own waterworks is concerned.

Relief by mandatory injunction was properly granted.

Gould, Waters, §§ 552, 553; *Missouri* v. *Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Llano* v. *Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008.

The city's right to make drains does not indicate the right to create a nuisance, public or private.

Richardson v. *Boston*, 19 How. 270, 15 L. ed. 642.

Even as to the District of Columbia it has been held that the adoption of a sewer system, being a quasi-judicial act, is not reviewable in a private action for damages; but the construction and repair of sewers being ministerial, the city is liable for damages resulting from negligence therein.

Johnston v. *District of Columbia*, 118 U. S. 22, 30 L. ed. 77, 6 Sup. Ct. Rep. 923.

Where a municipal corporation discharges or threatens to discharge sewage from the outlet of a permanent sewer, directly upon private lands, without having acquired the right so to do, the owner is entitled to the judgment of a court of equity restraining the injury committed or threatened; and he is not confined to a recovery of his damages in an action of trespass.

New York C. & H. R. R. Co. v. *Rochester*, 127 N. Y. 591, 28 N. E. 416.

One entitled to the use of air or water in its natural condition, and who is injured by its pollution, may maintain an action against the party causing it, whether an individual or a corporation.

Chapman v. *Rochester*, 110 N. Y. 273, 1 L.R.A. 296, 6 Am. St. Rep. 366, 18 N. E. 88.

Equity will interpose, by mandatory injunction, to compel the restoration of running water to its natural channel, when wrongfully diverted therefrom, at the suit of the party whose lands include either the whole or a part of such channel.

Corning v. *Troy Iron & Nail Factory*, 40 N. Y. 191.

If a municipal corporation by its system of constructing sewers renders an outlet necessary, it must provide one.

Evansville v. *Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Crawfordsville* v. *Bond*, 96 Ind. 236; *Van Pelt* v. *Davenport*, 42 Iowa, 308, 20 Am. Rep. 622; *Byrnes* v. *Cohoes*, 67 N. Y. 204; *Ft. Wayne* v. *Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 S. W. 743.

Where the city undertakes to maintain a sewer, and thereby creates a private or a public nuisance, the city acts, not in a legislative or governmental, but in a ministerial, capacity, and is within the reach of the court.

Wood, Nuisances, pp. 1032, 1033, 1035.

If the contract was good in Bullock and his assignee for four long years, it has been unassailable in the subsequent grantee since the Constitution of 1890 was in force.

United States v. *Union P. R. Co.* 160 U. S. 1, 33, 40 L. ed. 319, 330, 16 Sup. Ct. Rep. 190.

Under reserved power to alter or amend a corporate charter, the legislature may make any alterations or amendments which do not defeat or substantially impair the objects of the grant or rights vested thereunder.

Holyoke Water Power Co. v. *Lyman*, 15 Wall. 522, 21 L. ed. 140; *Close* v. *Glenwood Cemetery*, 107 U. S. 476, 27 L. ed. 412, 2 Sup. Ct. Rep. 267; *Maine C. R. Co.* v. *Maine*, 96 U. S. 510, 511, 24 L. ed. 840, 841; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

The city had power to make the contract.

Light, Heat, & Water Co. v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167.

Mr. Justice **Day** delivered the opinion of the court:

This case was before this court at the October term, 1901, and is reported in 185 U. S. 65, 46 L. ed. 803, 22 Sup. Ct. Rep. 585. It was then here upon the question of jurisdiction, and it was held that it presented a controversy arising under the Constitution of the United States, such as gave the circuit court jurisdiction. There was no diversity of citizenship, and the bill was filed by the Vicksburg Waterworks Company, a corporation of the state of Mississippi, against the mayor and aldermen of the city of

Vicksburg, a municipal corporation of the same state. In view of the full statement of the contents of the bill and the amended bill in the case, as reported in 185 U. S., it is unnecessary to repeat it. On the present appeal a motion to dismiss or affirm was made, which was passed, to be heard with the merits. We regard the decision of this court, when the case was here at the former term, as settling the question of jurisdiction, and affirmatively determining that, upon the bill and amended bill, the complainant alleged a case which involved the application of the Constitution of the United States, and appealable to this court, within § 5 of the act of March 3, 1891, as amended. 26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.

The suit was brought by the waterworks company, claiming an exclusive right, as against the city, under a contract with it for the construction and maintenance for a period of thirty years of a system of waterworks, which exclusive contract, it was alleged, would be practically destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act of the legislature of Mississippi, authorizing the mayor and aldermen of the city of Vicksburg to issue bonds to the
[459] amount *of $375,000 to purchase or construct a waterworks system and a sewer system, and for certain other purposes. That act, among other things, required the vote of the electors of the city upon the question of issuing bonds and constructing or buying waterworks; an election was held, and it was voted by a majority of the votes cast that the city should issue bonds to the sum of $150,000 to purchase or construct waterworks for the city. A resolution was passed by the municipal authorities, instructing the mayor and aldermen to notify the waterworks company that liability was denied upon the contract for the use of the waterworks hydrants, and that from and after August, 1900, the city would pay a reasonable compensation for the use of said hydrants. A bill was filed in the equity court in Warren county, Mississippi, averring that the original contract to which the waterworks company claimed to have succeeded was null and void; that the mayor and aldermen had exceeded their powers in making the contract for thirty years; that rates charged to consumers were exorbitant and illegal; that the mayor and aldermen, at a meeting held on November 5, 1900, had resolved that they no longer recognized any liability under said contract; that the Vicksburg Water Supply Company (a former holder of said contract) and the complainant had no rights in said contract, and the city was entitled to have the same canceled and annulled. And it was held in 185 U. S. that the facts, taken together, presented something more than a case of mere breach of private contract and disclosed an intention and attempt, by subsequent legislation of the city, to deprive the company of its rights under the existing contract, and it was said: "Unless the city can point to some inherent want of legal validity in the contract, or to some disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court, as presenting a Federal question." And it was further *held that it was [460]
a valuable feature of equity jurisdiction to anticipate and prevent threatened injury, and the conclusion was reached that the allegations of the bill made a case for an injunction. The case was thus brought within § 5 of the act of March, 1891, as one in which the appeal is directly to this court. See also upon this point *Penn Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223. The motion to dismiss will be overruled.

Upon the case going back to the circuit court an answer was filed raising issues as to whether the complainant had accepted and performed the agreement in their contract to supply water to the city, and denying the right of the complainant to have and to own the contract and the authority of the city to make an exclusive contract, and detailing other matters not necessary to further set forth.

Certain questions of fact as to the character of the water supplied by the complainant, the pressure maintained, and similar questions were decided by the circuit court in favor of the appellees. An examination of the record makes it sufficient for us to say that we find no reason for disturbing the conclusions of the circuit court upon these questions.

The decree in the case below was in favor of the waterworks company, maintaining its right to the contract for hydrant rentals, and enjoining the city, during the period of the contract, from constructing a waterworks system of its own, and requiring the city to construct a sewer for the disposal of house sewage from the city.

The assignments of error necessary to be considered are:

1. As to the alleged error of the court below in permitting a corporation known as the City Waterworks & Light Company, which had intervened in the case, to withdraw from the files its original bill in the

nature of a supplemental bill, and striking out certain testimony which had been taken concerning the same.

2. In enforcing the contract with the city in favor of the complainant, and restraining [461] the city from erecting waterworks of *its own during the term covered by the contract with the complainant.

3. In requiring the construction of the sewer by the city.

We shall proceed to notice these in the order named.

The City Waterworks & Light Company, on December 2, 1903, filed its petition praying to be admitted as a party complainant in the cause, and set up that it was the owner of the contract sued upon. To this petition the city answered, denying that the City Waterworks & Light Company had purchased, by deed or otherwise, or owned the property, real and personal, of the complainant, the Vicksburg Waterworks Company, and denying that the City Waterworks & Light Company had any interest in the subject-matter of the suit or should be admitted as a party complainant therein. The City Waterworks & Light Company then filed its original bill in the nature of a supplemental bill, on May 5, 1904, after the city had denied that it had any interest in the suit. On May 13, 1904, it filed a motion asking leave to withdraw its petition and bill from the files, which motion was granted by the court, and the motion of the Vicksburg Waterworks Company to withdraw from the files its written consent to the filing of the bill was also sustained, and the court granted the withdrawal of the petition, bill, exhibits, and written consent. Thereupon the city offered a supplemental answer, and asked the court for leave to file the same. This answer made allegations setting forth the transfer of the contract to the City Waterworks & Light Company, and asked for a continuance of the cause, with leave to take testimony to support the averments of this supplemental answer. The court, on the same day, May 13, 1904, overruled the city's motion for leave to file the supplemental answer and for continuance, with leave to take testimony in support thereof, and proceeded to hear the case upon the original pleadings and proofs. It also permitted the withdrawal of certain testimony referring to the City Waterworks & Light Company and the transfer of the con- [462] tract to it. In view of *the action of the court upon the pleadings as to the City Waterworks & Light Company, this testimony had become immaterial.

In the action of the court just recited we can find no ground for a reversal. The City Waterworks & Light Company had come into the case claiming an ownership of the contract which was denied by the city; certain testimony was filed concerning this claim of the company. We think it was discretionary with the court to permit the withdrawal of these pleadings and the suppression of this testimony, and it was likewise within its discretion to permit or deny a further answer by the city setting up the alleged transfer of ownership. These matters, except in cases of gross abuse of discretion, are within the control of the trial court. *Chapman* v. *Barney*, 129 U. S. 677, 681, 32 L. ed. 800, 801, 9 Sup. Ct. Rep. 426; *Dean* v. *Mason*, 20 How. 198, 204, 15 L. ed. 876, 878.

The principal controversy in the case is as to the correctness of the decree of the court below restraining the city from erecting waterworks of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of water works of its own during that period. The contract for the construction of the waterworks was originally made on November 18, 1886, by an ordinance of that date, granting to Samuel R. Bullock & Company, their associates, successors, and assigns, the right and privilege to construct a waterworks system in the city of Vicksburg, for the period of thirty years from the date of the ordinance. Section 1 of the ordinance provided that, in consideration of the public benefit to be derived therefrom, the exclusive right and privilege was granted for the period of thirty years from the time the ordinance took effect, to Samuel R. Bullock & Company, their associates, successors, and assigns, to erect, maintain, and operate a system of waterworks in accordance with the terms of the ordinance, and of using the streets, alleys, etc., within the corporate limits of the city, as they then existed or might thereafter be extended, for the purpose of laying pipes and mains and other conduits, *and erecting hydrants and other [463] apparatus for the obtaining of a good water supply for the city of Vicksburg and for its inhabitants, for public and private use. There was a stipulation for certain hydrants for the term of thirty years at an annual rental of $65.00 each, and it was provided that Bullock & Company, their associates, successors, and assigns, might procure the organization of a waterworks company, and assign their rights and privileges under the ordinance to such corporation. It is disclosed in the record that Bullock & Company procured the organization of a waterworks company, the Vicksburg Water Supply Company, which company executed a mortgage to the Farmers' Loan & Trust Company of New York, which included "All of its real and personal property, goods,

chattels, owned now or which may hereafter be acquired by it, including its land, rents, waterworks, buildings, pump houses, standpipes, reservoirs, machinery, pipes, mains, hydrants, apparatus, and equipments, situated in the city of Vicksburg, county of Warren, state of Mississippi, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, issues, income, profits accruing therefrom; also all and singular the corporate franchises, privileges, rights, liabilites which the water company now has and can exercise, or shall hereafter acquire and possess, and also all the estate, right, title, interest, property, possessions, claim, and demand whatsoever, as well in law as in equity, of the water company, of and to the property above described or hereafter to be acquired, and each and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above granted and described premises with the appurtenances unto the trustee and its successors forever." Upon the foreclosure of this mortgage the property was bid off by M. O. Crumpler on the 8th day of August, 1900. He assigned his bid to the Vicksburg Waterworks Company, complainant in this case, and the Vicksburg Water Supply Company on October 18, 1900, by a quitclaim [464] *deed, conveyed all the property described in the deed of trust to the Farmers' Loan & Trust Company, to the Vicksburg Waterworks Company.

A preliminary question is made that the Vicksburg Waterworks Company did not acquire title to the contract rights by virtue of these proceedings. But we are cited to an act of the legislature of Mississippi, approved March 7, 1882 (Laws of 1882, p. 50), which, upon its face, is broad enough to authorize such corporations to borrow money and secure the payment of the same by mortgage or deed of trust upon their property and franchises, and we think the mortgage in question would include the contract rights of the Vicksburg Water Supply Company, and that they would pass by the sale and subsequent quitclaim deed to the Vicksburg Waterworks Company. Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at the foreclosure sale, although the corporate right to exist may not be sold. *Memphis & L. R. R. Co.* v. *Railroad Comrs.* (*Memphis & L. R. R. Co.* v. *Berry*) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299. The power to mortgage the privileges and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual. *New Orleans, S. F. & L. R. Co.* v. *Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009, cited and followed in *Julian* v. *Central Trust Co.* 193 U. S. 93, 106, 48 L. ed. 629, 636, 24 Sup. Ct. Rep. 399. We think the mortgage in this case covered and the decree passed the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 18, 1886.

It is further urged that the Vicksburg Waterworks Company was organized after the taking effect of the Constitution of Mississippi of 1890, which provided: "Sec. 178. Corporations shall be formed under general laws only. The legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interests to do so; provided, however, that no injustice shall be done to the stockholders." And it is insisted that the subsequent legislative authority given to the city to issue bonds and *build its own waterworks amount- [465] ed to a repeal of the exclusive feature of the grant in the ordinance of 1886, if any it contained. We are cited in support of that proposition to the case of *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90, considering the provisions of the Constitution of Ohio as to altering or revoking corporate privileges. But we think the right of the Vicksburg Waterworks Company was acquired under the foreclosure and sale of the contract rights conferred in the ordinance of 1886 and covered in the mortgage, as we have stated. Furthermore, the Mississippi Constitution contains this provision, which is not in the Ohio Constitution, considered in the *Hamilton Case*, namely: "Provided [in exercising the right of amendment or repeal of a charter] no injustice shall be done to the stockholders." If it be true that the complainant below had a binding contract excluding competition by the city in furnishing a water supply for a period of thirty years, we think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful operation in furnishing water to consumers by the private company.

Coming directly, then, to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect. The legislature of the state of Mississippi

on March 8, 1886, in the charter of the city of Vicksburg, among others, gave to the city the following powers: "To provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." The question is now, not whether the city might make a contract giving the exclusive right as against all third persons to erect a system of waterworks, but whether it can, in exercising this legislative power, exclude itself from constructing and operating waterworks for the period of years [466] covered by the contract. It is *said the supreme court of Mississippi has denied this power, and we are referred to *Collins* v. *Sherman*, 31 Miss. 679, *Gains* v. *Coates*, 51 Miss. 335, and *Greenville Waterworks Co.* v. *Greenville* (Miss.) 7 So. 409.

We do not think any of these cases decisive of the point. In *Collins* v. *Sherman*, it was held that the charter granting the right to a turnpike and ferry company to maintain a ferry upon a particular river, which contained no grant of an exclusive right, did not prevent the legislature from afterwards incorporating another company, authorized to establish a turnpike and ferry upon the same river and upon the same line of travel, although the establishment of the latter company might materially impair the value of the franchise granted to the first company. The cases were cited and the general principles stated that exclusive privileges could not be granted by implication; there was no attempt to make the first franchise exclusive in that case. In *Gaines* v. *Coates* it was held that the act in question did not confer upon a certain corporation the exclusive privilege of weighing cotton; that there was nothing in the charter indicating any intention to confer an exclusive right, and many cases were cited, including a number from this court, to the effect that exclusive privileges are not to be granted by implication. In *Greenville Waterworks Co.* v. *Greenville* the city of Greenville had made a contract with the Greenville Waterworks Company to build a system of waterworks by a certain time, but the company had failed to comply with the contract, the time was extended, and the company again defaulted. The city thereupon canceled the contract and made a new contract with the Delta Waterworks Company. Then the Greenville Waterworks Company filed a bill to enjoin the city and the other company from carrying out the contract, and prayed for a specific performance of its contract with the city. The court held that there was no power given by the charter of the city of Greenville to grant a monopoly for a long series of years for supplying the city and its inhabitants with water. The question whether the city could *exclude itself in such a contract as [467] we have now before us was not met or passed upon. But if the doctrine of Mississippi were otherwise, and with due respect to which the decisions of its highest court are justly entitled, it has been frequently held, in passing upon a question of contract, in circumstances such as exist in this case involving the constitutional protection afforded by the Constitution of the United States, this court determines the nature and character thereof for itself. *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. And we think the question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. In that case the city charter of Walla Walla provided, § 10, that no exclusive grant should be made, nor should prevent the council from granting the right to others; and § 11 provided: "The city of Walla Walla shall have power to erect and maintain waterworks within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water." The contract was made for twenty-five years. The grant was not made exclusive to the waterworks company, but the city agreed not to erect waterworks of its own, and reserved the right to take, condemn, and pay for the works of the company at any time after the expiration of the contract. It was held by this court that the city might thus exclude itself from competition during the period of the contract, and of this feature of the contract the following pertinent language was used by Mr. Justice Brown, who delivered the opinion of the court:

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the *laying of its pipes [468] through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition."

"Cases are not infrequent where, under a

general power to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party."

In the *Walla Walla Case* the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, the city might exclude itself from competition. We think that case is decisive of the present one on this proposition.

We shall proceed to consider whether the language of the contract is such as to prevent the city, during the period named therein, from erecting a waterworks of its own.

The case of *Lehigh Water Co.'s Appeal*, 102 Pa. 515, cited by counsel for appellant, is not in point. The act provided "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to 8 per centum per annum upon its capital stock." Of this grant Mr. Justice Paxon, who delivered the opinion of the court, observed:

[469] *"While the language from the act of 1874, above quoted, would seem to favor the exclusive right claimed by the water company, a careful examination of clause 3 of § 34 shows that the legislature intended that the right should be exclusive only as against other water companies; for, immediately in this connection, occur the words 'and no other company shall be incorporated for that purpose until the said corporation shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to 8 per centum per annum upon its capital stock.' The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury."

In considering this contract we are to remember the well-established rule in this court, which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of this contract, it cannot be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, *ante*, 353, 26 Sup. Ct. Rep. 224, decided at this term, citing previous cases.

The contract in the respect under consideration is found in § 1 of the ordinance, and undertakes to give to Bullock & Company, their associates, successors, and assigns, the exclusive right and privilege, for the period of thirty years from the time the ordinance takes effect, of erecting, maintaining, and operating a system of waterworks, with certain privileges named, for the furnishing of a supply of good water to the city of Vicksburg and its inhabitants, for public and private use.

*Without resorting to implication or in- [470] serting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors, and assigns, the exclusive right to erect, maintain, and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla Case*, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the

grantee upon different terms, and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right, at the same time, to erect and maintain a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time, be shared with another; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned.

The term "exclusive" is so plain that [471] little additional light *can be gained by resort to the lexicons. If we turn to the Century dictionary we find it defined to mean "Appertaining to the subject alone; not including, admitting, or pertaining to any other or others; undivided; sole: as, an exclusive right or privilege; exclusive jurisdiction." We think, therefore, it requires no resort to implication or intendment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right,—a sole and undivided privilege. To hold otherwise, in our view, would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the *Walla Walla Case*, the city had the power to exclude itself for the term of this contract, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that, for the term named, the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far, at least, as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed, and to permit one of the parties to the contract to destroy its benefit to the other. We think the court below did not err in reaching this conclusion.

The court decreed as to a sewer, which the record discloses was originally a surface-water sewer, that the city should refrain from permitting future connections therewith for the conveyance of house sewage. The company complaining that this sewer entered into the source of supply above the intake of the waterworks, the court, by a mandatory injunction, required the city of Vicksburg to extend the sewer and construct an outlet therefor, so as to discharge sewage into the Yazoo or Mississippi river, below the intake of the complainant, provided, if the city was unable to construct such sewer within *twelve [472] months from date, application might be made to the court for an extension of time. The error assigned in this behalf is as to the award of the mandatory injunction. We think the court erred in this respect, and that it had no authority to issue a mandatory injunction requiring the city to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and the like matters; and we think that the exercise of this authority is primarily vested in the municipality, and not in the courts.

We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect *the decree will be modified, and, as so modified, affirmed.*

Mr. Justice **Harlan**, dissenting:

I cannot agree to the opinion and judgment in this case.

In my opinion, the city of Vicksburg had no authority, under the Constitution and laws of Mississippi, to give an exclusive right to any person or corporation to maintain a system of waterworks for the benefit of that city and its people.

But if I am wrong in this view, it ought not, in my judgment, to be held upon the present record that the city has, by ordinance or otherwise, precluded itself from establishing and maintaining, at its own expense, a system of waterworks for the benefit of its people. The contrary cannot be maintained, unless we hold that a municipal corporation may, by mere implication, bargain away its duty to protect the public health and the public safety as they are involved in supplying the people with sufficient water. Nothing can be more important or vital to any people than that they should be supplied with *pure, wholesome [473] water. And yet it is now held that it was competent for the city of Vicksburg, by mere implication, to so tie its hands that it cannot perform the duty which it owes in that regard to its people.

JOSEPH NAGANAB, *Appt.*,
v.
ETHAN ALLEN HITCHCOCK, Secretary of the Interior.

(See S. C. Reporter's ed. 473–476.)

United States—immunity from suit.—A suit to restrain the Secretary of the Interior from carrying out the provisions of the act of June 27, 1902 (32 Stat. at L. 400, chap. 1157), controlling the disposition of the pine lands ceded by the Indians of the state of Minnesota, under the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), to the United States, to be administered for their benefit, and to require him to execute the trust, and account, is, in effect, a suit against the United States, which the courts have no jurisdiction to entertain.

[No. 247.]

Argued April 25, 1906. Decided May 21, 1906.

APPEAL from the Court of Appeals of the District of Columbia to review a decree affirming a decree of the Supreme Court of that District, sustaining a demurrer to, and dismissing, a bill to restrain the Secretary of the Interior from carrying out the provisions of congressional legislation controlling the disposition of pine lands ceded to the United States by the Indians of the state of Minnesota, to be administered for their benefit, and to require him to execute the trust and to account. *Affirmed.*

See same case below, 25 App. D. C. 200.

The facts are stated in the opinion.

Mr. **Tracy L. Jeffords** argued the cause and filed a brief for appellant.

Mr. **William C. Pollock** argued the cause, and, with *Assistant Attorney General Campbell*, filed a brief for appellee.

Mr. Justice **Day** delivered the opinion of the court:

In this suit a bill was filed in the supreme court of the District of Columbia by Joseph Naganab against Ethan Allen Hitchcock, Secretary of the Interior. Complainant brought the suit as a citizen of the United States and a member of the band and tribe of Chippewa Indians of the state [474] of Minnesota, *suing for himself and other members of the band and tribe. The bill is quite voluminous, but in substance sets out the alleged right and title of the Indians who had conveyed certain lands under the act of Congress of January 14, 1889 [25 Stat. at L. 642, chap. 24], to the United States, to be administered for their benefit. The bill averred that under the act of Congress the Indians of the state of Minnesota had conveyed to the United States upwards of 3,555,771 acres of land, constituting certain reservations named, all of which lands and reservations were held by the United States under conveyances in trust for the benefit of the Indians; that the Secretary of the Interior had caused the lands to be classified as required by the act, and that approximately 1,500,000 acres thereof were classified as pine lands, 1,855,000 acres as agricultural lands; 600,000 acres of the lands, classified under the said act as pine lands, were situated in certain reservations, to wit, Chippewas of the Mississippi, Leech lake, Cass lake, and Lake Winnibigoshish; that, upon said last-mentioned area, there was and is growing a large amount of merchantable pine timber, reasonably worth $10,000,000. The value of the lands classified as agricultural lands, to be sold under said act for $1.25 per acre, is $2,318,750. And it is averred that it is the right of the Chippewa Indians to have certain of the lands sold, the proceeds to draw 5 per cent interest for fifty years, and the interest money to be used for the benefit of the Indians, as provided in the act, and, at the expiration of the fifty years, the balance of the principal sum remaining to be paid to the Indians.

The complaint is of the act of June 27, 1902 [32 Stat. at L. 400, chap. 1157] amendatory of the act of January 14, 1889. It is averred that at the time of the passage of the latter act there yet remained 600,000 acres of pine lands, and 200,000 acres of agricultural lands, which ought to be disposed of in pursuance of said trust in favor of the Indians; that the pine lands are worth upwards of $10,000,000, and the agricultural lands $1.25 per acre; that, without the consent of the Indians, a portion of the pine lands was set off as a forest reservation, the timber on this land being of the *value [475] of $3,000,000; that the rules and regulations prescribed by the Secretary of the Interior for the selling and removal thereof would reduce the value of the pine timber to an amount exceeding $1,000,000; that the Secretary is about to sell and has advertised for sale the pine timber on 300,000 acres of said lands; that said act of June 27, 1902, if carried out, will deprive the complainant and other Chippewa Indians of the state of Minnesota of their property without compensation and without due process of law, in violation of the Constitution of the United States. The bill prays

NOTE.—*On suits against a state*—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842, and Tindall v. Wesley, 13 C. C. A. 165.

that the defendant, the Secretary of the Interior, may be temporarily enjoined from any further act or acts in execution of the act of Congress of June 27, 1902; that he be required to execute the trust in favor of the Indians, and account to the complainant, as required by the act of January 14, 1889, and for general relief.

The defendant demurred on three grounds, *viz.:* 1. That there is a defect of parties complainant. 2. That the bill is bad in substance, in that it does not set out any facts sufficient to entitle the complainant or the real party in interest, the Chippewa Indians of Minnesota, to the relief prayed for, or to any relief. 3. That the court has no jurisdiction over the subject-matter of the suit. The supreme court of the District of Columbia sustained the demurrer and dismissed the bill. This judgment was affirmed in the court of appeals.

It is apparent from the above statement of the allegations of the bill that the defendant, Hitchcock, Secretary of the Interior, has no interest in this controversy, and that it is in effect a suit against the United States to control the disposition of the lands, and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political, and subject to the control of Congress without judicial intervention, as was held in the court of appeals, we are of opinion that there is
[476] no jurisdiction to entertain *this case. In respect to this question, it is on all fours with *Oregon* v. *Hitchcock*, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, decided on April 23 of this term (202 U. S. 60, *ante*, 935, 26 Sup. Ct. Rep. 568). That case was distinguished from *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650, relied on here by the appellant, in the fact that in the *Minnesota Case* the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation, and an acceptance by the government of full responsibility for the result of the decision, so far as the Indians were concerned. Act of March 2, 1901 (31 Stat. at L. 950, chap. 808, U. S. Comp. Stat. 1901, p. 1384). In this case as in the *Oregon Case*, the legal title to all the tracts of land in question is still in the government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action. Upon the authority of the *Oregon Case* we hold that there is no jurisdiction to maintain the present suit, and *the action of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District, dismissing the complainant's bill, is affirmed.*

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*THOMAS G. BUSH, Thomas A. Gillispie, [477]
and Orion L. Hurlbut, as Trustees in Bankruptcy of the Southern Car & Foundry Company, a Bankrupt, *Plffs. in Err.*,

v.

J. M. ELLIOTT, JR. (No. 245.)

THOMAS G. BUSH, Thomas A. Gillispie, and Orion L. Hurlbut, as Trustees in Bankruptcy of the Southern Car & Foundry Company, a Bankrupt, *Plffs. in Err.*,

v.

ELLIOTT CAR COMPANY. (No. 246.)

(See S. C. Reporter's ed. 477–484.)

Bankruptcy—suit by trustee—jurisdiction of circuit court—citizenship of trustee.—Diversity of citizenship between the trustees in bankruptcy and the defendant is not necessary to the exercise by a Federal circuit court of its jurisdiction under the bankrupt act of July 1, 1898 (30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431), § 23, of a suit brought by such trustees upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where the citizenship of the bankrupt and the defendant is such that the former might have sued in the Federal court but for the bankruptcy proceedings.

[Nos. 245, 246.]

Argued April 24, 25, 1906. Decided May 21, 1906.

TWO WRITS OF ERROR to the Circuit Court of the United States for the Northern District of Alabama to review judgments dismissing, for want of jurisdiction, actions by trustees in bankruptcy to recover moneys due the bankrupt at and prior to the adjudication in bankruptcy, because of a want of diversity in citizenship between one of the trustees in bankruptcy and the defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. **James H. Beal,** and **George D. Lancaster** argued the cause, and, with *Messrs. John P. Tillman, Williams & Lancaster, Tillman, Grubb, Bradley, & Morrow,* and *Reed, Smith, Shaw, & Beal,* filed a brief for plaintiffs in error.

Mr. **Amos E. Goodhue** argued the cause, and, with *Messrs. Dortch, Martin, & Allen,* and *Goodhue & Blachwood,* filed a brief for defendants in error.

Mr. Justice **Day** delivered the opinion of the court:

These cases were heard together, and concern the same questions, upon practically the same facts. They involve the jurisdiction of the circuit court of the United States to entertain a suit to recover upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where one of the trustees in bankruptcy is a citizen of the same state with the defendant, and the bankrupt a citizen of another state.

The suits were brought by the plaintiffs as trustees in bankruptcy of the Southern Car & Foundry Company, a corporation organized under the laws of New Jersey and
[478] a citizen of *that state, against the Elliott Car Company, a corporation and a citizen of the state of Alabama and against J. M. Elliott, Jr., a citizen of the same state. They were to recover certain sums of money alleged to have been lent by the bankrupt, for goods sold and delivered to the defendants, and upon an account stated and for money paid for them by the bankrupt. In both cases motions to dismiss were filed upon the ground that the circuit court of the United States had no jurisdiction because Thomas B. Bush, one of the trustees in bankruptcy, is and was, at the time of the beginning of the suit, a citizen of the state of Alabama, the same state of which the defendants were citizens, and the defendants had not consented to be sued in the circuit court of the United States, in which the action was brought. The circuit court held that it had no jurisdiction and dismissed the suit.

The correctness of the decision of the court below depends upon the construction of § 23 of the bankruptcy act of 1898. [30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431.] This section, entitled "Jurisdiction of the United States and State Courts," prior to the amendment of February 5, 1903 [32 Stat. at L. 798, chap. 487, U. S. Comp. Stat. Supp. 1905, p. 686], read as follows: "*a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants. *b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." By the amendment of February 5, 1903, the following words were added to clause *b:* "Except suits for the recovery of property under section sixty, subdivision *b*, and section sixty-seven, subdivision *e*." The excepted suits, for the recovery of property, covered by the *amend-[479] ment of 1903, pertain to actions to recover property conveyed by the bankrupt in fraud of the act, and do not concern actions of the character of those now under consideration.

Both sides cite and rely upon the case of *Bardes* v. *First Nat. Bank,* 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, in which case it was held that a district court of the United States had no jurisdiction of an action brought by the trustee to set aside an alleged fraudulent transfer made by the bankrupt within four months before the proceedings in bankruptcy. That case pertained to an action to set aside a fraudulent conveyance of property which had not come into the control of the bankruptcy court. In latter cases it has been held that the decision did not extend to cases wherein the bankrupt court had acquired jurisdiction over the subject-matter of the property as that of the bankrupt, as to which the bankrupt courts have been held to have jurisdiction under the power conferred in subd. 7, § 2, of the act. *White* v. *Schloerb,* 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; *Bryan* v. *Bernheimer,* 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557 (in which case the opinion was given by Mr. Justice Gray, who also delivered the opinion in the *Bardes Case*); and *Whitney* v. *Wenman,* 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778.

While the *Bardes Case* involved only the jurisdiction of the district court, we think the principles announced in the opinion of Mr. Justice Gray in that case, when applied to the one now under consideration, are decisive in favor of the jurisdiction of the circuit court to entertain these suits. The elaborate consideration of the history of § 23 of the present bankruptcy act, given in the *Bardes Case,* renders it unnecessary to do more than epitomize from the opinion

so much thereof as is necessary to an understanding of the question now made as to the jurisdiction of the circuit court.

The bankruptcy act of 1898, in respect to the matters now under consideration, was a radical departure from the act of 1867 [14 Stat. at L. 517, chap. 176], in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to [480] preserve, to a *greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy. Under the act of 1867 the jurisdiction of the district and circuit courts of the United States was concurrent with the state courts of suits in law or in equity brought by or against the assignee in reference to property of the bankrupt or to claims alleged to be due from or to him. *Lathrop* v. *Drake*, 91 U. S. 516, 23 L. ed. 414; *Bardes* v. *First Nat. Bank*, 178 U. S. 531, 532, 44 L. ed. 1179, 1180, 20 Sup. Ct. Rep. 1000. The intention of Congress to prevent actions not strictly proceedings in bankruptcy from coming within the jurisdiction of the United States courts, except in certain cases, was enacted into law in the section of the statute now under consideration. Of clause *a*, Mr. Justice Gray, speaking for the court in the *Bardes Case*, said:

"The first clause provides that 'the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy on the one hand, and suits at law or in equity, on the other), 'between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees;' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.' [30 Stat. at L. 552, chap. 541, § 23, U. S. Comp. Stat. 1901, p. 3431.] This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

Clause *a* thus construed gives jurisdiction to such a controversy *as the present one, [481] for the jurisdiction is not attempted to be enlarged because of a title in the trustee derived under the bankruptcy proceedings, which it was the purpose of this clause to prevent. Loveland, Bankr. 2d ed. 105.

The suit concerns the right to recover a money debt which is property (*Pirie* v. *Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906), and, in the sense of the law, is with an adverse claimant "concerning property acquired or claimed by the trustee," and is a controversy of which the circuit court had jurisdiction, as between the bankrupt and the claimant, but for the bankruptcy proceedings.

The act of 1841 (§ 8) gave the circuit court concurrent jurisdiction with the district court of suits at law and in equity "which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee." [5 Stat. at L. 446, chap. 9.] It was held that the circuit court had jurisdiction to recover a debt due the bankrupt at the suit of the assignee, and that the debtor was a party claiming an adverse interest within the sense of the act. *Mitchell* v. *Great Works Mill. & Mfg. Co.* 2 Story, 648, Fed. Cas. No. 9,662; *Pritchard* v. *Chandler*, 2 Curt. C. C. 488, Fed. Cas. No. 11,436. While the phraseology of the present act is somewhat different, its provisions come to practically the same thing in this respect.

Of clause *b*, in the *Bardes Case*, it was said:

"But the second clause applies both to the district courts and to the circuit courts of the United States, as well as to the state courts. This appears not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, 'the courts,' as contrasted with the specific words, 'the United States circuit courts,' in the first and in the third clauses.

"The second clause positively directs that 'suits by the trustee shall only be brought or prosecuted in the courts where *the bank- [482] rupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'

"Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdic-

tional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the circuit court of the United States. Act of August 13, 1888, chap. 866 (25 Stat. at L. 434). He could not have sued in a district court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a district court has the powers of a circuit court, or is given jurisdiction of a particular class of civil suits."

And after pointing out that the bankruptcy act of 1898 did not intend to confer the jurisdiction given under the former bankruptcy acts, the opinion continues:

"Congress, by the second clause of § 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits, brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

Applying the principles thus announced, remembering that we are dealing with an action which might have been brought by the bankrupt, but for the bankruptcy proceedings, in a circuit court of the united States, we think it is apparent that this action comes within the provisions of § 23 of the act of 1898. The effect of clause *a*, [483] as pointed out by *Mr. Justice Gray, is to prevent the jurisdiction of the United States circuit court from attaching because of the appointment of a trustee in bankruptcy. In other words, the jurisdiction of the United States courts was not to be extended, as had been done under the former acts, because of the institution of the proceedings in bankruptcy. Under clause *b* the jurisdiction of all courts is affected, and this clause pertains to suits begun by the trustee, and he is not (prior to the amendment of February 5, 1903) permitted to prosecute suits unless by the consent of the defendant, except where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted. That is, while the jurisdiction of the courts was not to be extended because of the bankruptcy proceedings or the citizenship of the trustee, it was preserved to the trustee, in the jurisdiction where the bankrupt might have brought or prosecuted the suit but for the bankruptcy proceedings. While this section preserves the jurisdiction of the United States circuit courts over cases coming within clause *a*, in clause *b* the right of suit by the trustee is limited to courts wherein the bankrupt might have brought or prosecuted the action had the bankruptcy proceedings not been instituted.

The case of *Spencer* v. *Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174, relied upon by the counsel for defendant in error, does not militate against this construction. In that case the question was as to the right to appeal directly to this court where an action had been begun in the state court by the trustee and was removed, on the ground of diverse citizenship, to the Federal court. It was held that the jurisdiction of the circuit court was acquired because of diverse citizenship, and not under § 23 of the bankruptcy act, and consequently the judgment was final in the circuit court of appeals. The same principle was recognized in *Cochran* v. *Montgomery County*, 199 U. S. 260, *ante*, 182, 26 Sup. Ct. Rep. 58, decided at this term.

The action in the present case was to recover a sum of money alleged to have been due, prior to the bankruptcy proceedings, *to [484] the Southern Car & Foundry Company, which was a citizen of the state of New Jersey. The amount involved and the diverse citizenship of the parties were such that the car company might have sued the defendant, a citizen of the state of Alabama, in the circuit court of the United States independently of the bankruptcy proceedings. We think, by the terms of this section, it was intended to preserve this right to the trustee in bankruptcy, and that the citizenship of the trustee is wholly immaterial to the jurisdiction of such a case.

The Circuit Court erred in reaching the contrary conclusion, and its judgment is reversed.

FREDERIC W. LINCOLN, Henry W Peabody, John R. Bradlee, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody & Co., *Plffs. in Err.*,

v.

UNITED STATES. (No. 149.)

WARNER, BARNES, & COMPANY, Limited, *Appt.*,

v.

UNITED STATES. (No. 466.)

(See S. C. Reporter's ed. 484-500.)

Duties—on imports to Manila—ratification.—The collection of duties on imports to Manila, which was not authorized by the President's order of July 12, 1898, after the exchange of ratifications of the treaty of peace with Spain, was not ratified by the

act of July 1, 1902 (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 391), § 2, ratifying such order and the action of the authorities of the government of the Philippine Islands taken in accordance with its provisions.

[Nos. 149, 466.]

Reargued January 18, 19, 1906. Decided May 28, 1906.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment dismissing a suit to recover duties exacted on imports from New York to Manila after the ratification of the treaty of peace with Spain. *Reversed.* Also an—

APPEAL from the Court of Claims to review the dismissal of a petition which sought to recover other duties exacted under similar circumstances. *Reversed.*

The facts are stated in the opinion.

Messrs. **Paul Fuller, Frederic R. Coudert,** and **John G. Carlisle** argued the cause on rehearing, and, with *Mr. Henry M. Ward.* filed briefs for plaintiffs in error and appellant.

Messrs. H. A. Herbert and *Benjamin J. Micou* also filed briefs for certain claimants having interests similar to those of appellant in No. 466.

Attorney General **Moody** and *Solicitor General* **Hoyt** argued the cause and filed briefs for the United States.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

These are suits to recover duties exacted from plaintiffs in error and appellants upon merchandise shipped by them from New York to Manila, and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain were exchanged and the treaty proclaimed [30 Stat. at L. 1754], and October 25, 1901. The duties were levied under an order of the President, dated July 12, 1898. The cases were argued in this court March 3, 1905, and the judgments reversed April 3, 1905. 197 U. S. 429, 49 L. ed. 819, 25 Sup. Ct. Rep. 455.

We ruled that the order of July 12, 1898, [496] was a regulation *for and during the then-existing war with Spain, referred to as definitely as if it had been named, and that the right to levy duties thereunder on goods brought from the United States ceased on the exchange of ratifications. *Dooley* v. *United States,* 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

And that after title passed, April 11, 1899, there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act. *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59. As to the subsidiary point that whether the exaction of the duties was lawful or not, it had been ratified by the act of July 1, 1902 (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 391), § 2, we were of opinion that the ratification of "the actions of the authorities taken in accordance with the provisions of said order and subsequent amendments" was confined to actions which were taken in accordance with the provisions of the order and amendments, which these exactions were not. May 29, 1905, we allowed petitions for rehearing to be filed addressed solely to the matter of ratification, and subsequently (November 13) a rehearing was granted "as to the question whether Congress ratified the collection of the sums sought to be recovered in these suits."

The cases were reargued January 18 and 19 on that question.

That the moneys exacted from plaintiffs in error and appellants were illegally exacted is not open to question under our order, unless the act of July 1, 1902, operated to the contrary. The second section of that act reads as follows: "That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine *Islands, taken in accord- [497] ance with the provisions of said order and subsequent amendments, are hereby approved.

The order of July 12, 1898, by President McKinley, as Commander in Chief, directed that, upon occupation of any ports or places in the Philippine Islands by the forces of the United States, an accompanying tariff of duties and taxes should be levied and collected as a military contribution, and that regulations for its administration should take effect and be in force in the ports and places occupied. Manila was captured August 13, and the next day the custom house was opened and taxes were collected according to the prior Spanish tariff up to November 10, 1898, until which date the order of July 12 had been suspended.

On the rehearing an order of the military governor of the Philippines of October 26, 1898, which embodied the full text of the customs tariff and regulations, was brought forward, and was, in all essential respects, a repetition of the order of July 12.

The Porto Rican cases were decided May 27, 1901, and in June the Secretary of War cabled the commission at Manila that: "The most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the court, is in the fact that Porto Rico was, at the time of cession, in full peaceable possession, while a state of war has continued in the Philippines. As the question of the President's power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court, the President has determined to continue to impose duties as heretofore."

Undoubtedly the order of July 12, 1898, contemplated vessels from America as well as others, yet that order, having been made in time of war, for a military contribution, when the Philippines did not belong to us, must be taken to have contemplated them, as it contemplated those from other countries, as vessels foreign to the country, and to have imposed the tax upon them *qua* foreign. The military tax was, so to speak, a seizure of Spanish revenues. That was what
[498] the order meant *when it was passed, and a change of circumstances did not change its meaning. Neither was the meaning changed by any amendment. The ground on which it was kept in force by the Secretary of War, June 8, 1901, was that the Philippines were still in a state of war. If that view had been correct the order would have applied and would have had lawful effect; but it turned out not to be correct.

The ratification may be assumed to apply to the order as actually made, and not to have been limited to such an order or so much of this order as the President had a right to make. But it does not construe the order, and, as it confines the ratification to actions in accordance with the order and amendments, the question what actions were in accordance with them is for us. The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order. If the order, properly construed, did not purport to apply to vessels unless they were either enemy or foreign, then, when a vessel ceased to be foreign, the order did not apply, and a tax upon such a vessel, not being in accordance with the order, is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (*Hamilton* v. *Dillin*, 21 Wall. 73, 22 L. ed. 528), still it is not to be presumed to do so on language which, literally taken, has a narrower sense.

Moreover, the act of July, 1902, was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubt, at least, had been thrown upon its power to ratify a tax under circumstances like the present. *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200, 45 L. ed. 1041, 1057, 1058, 21 Sup. Ct. Rep. 743. This affords a special reason for believing that if it had intended to encounter the limitations of that case, it would have done so in clear words from which there was no escape.

It should also be remembered that there was a powerful opposition in Congress, and that the phraseology of the act probably *rep-
[499] resents all that it was deemed safe to ask. Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words. In a literal sense they ratify only actions in accordance with the order, construed as it would have been construed by this court had it come before us upon the day when it was made.

It is not a sufficient answer to say that the ratification was meaningless unless it embraced duties collected on imports from the United States after April 11, 1899, because the exactions before were legal. The instances are many where Congress, out of abundant caution, has ratified what did not need, or was afterwards found not to have needed, ratification. *Cross* v. *Harrison*, 16 How. 164, 14 L. ed. 889; *Prize Cases*, 2 Black, 635, 17 L. ed. 459.

It would be inadmissible to lay down as a general rule that a particular ratification covered what was not, in the judgment of the courts, included or intended to be, simply because it might be thought to have been otherwise unnecessary.

In these cases, however, the ratification act was not otherwise meaningless. Duties were collected under the order of July 12, 1898, as a military contribution while the war with Spain was in progress. The treaty was signed December 10, 1898, and the President, on December 21, issued an order proclaiming the sovereignty of the United States in the islands, and directing duties and taxes to be collected in future as public revenues for the support of the government.

When the treaty was ratified the applicable laws of the United States became operative; but the President, nevertheless, continued in force the tariff created by the order of July 12, 1898, and, by an order of April 21, 1899, established a collection district with Manila as the chief port of entry, and under these orders collections of duties were made. This involves the question whether, after April 11, 1899, the President could have enforced any tariff other than such as existed under acts of Congress or might be sanctioned by Congress. And that question was put at rest by this ratification.

[500] *Much more might be said, but we think it would needlessly prolong this opinion.

Notwithstanding the able argument of the Attorney General, we adhere to the conclusion previously announced.

Judgments reversed.

Mr. Justice **White**, with whom concurs Mr. Justice **McKenna**, dissenting:

Although I dissented in *De Lima* v. *Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Dooley* v. *United States*, 182 U. S. 220, 45 L. ed. 1065, 21 Sup. Ct. Rep. 743; and *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59,—nevertheless I agreed to the judgment of reversal as previously rendered in this case. 197 U. S. 429, 49 L. ed. 819, 25 Sup. Ct. Rep. 455. I was constrained so to do because to me it seemed that the determination of the substantial issues in the case were foreclosed by the prior cases above mentioned, which were binding on me under the rule of *stare decisis*. It is true that in this case, as previously argued and decided, there was present the question of an alleged ratification by Congress of the imposition and collection of the taxes in controversy; but, on the former argument, my attention was not directed to public reports and documents throwing light upon the scope of the ratifying act, as was done on the present argument. Construing the act of Congress which is relied upon to establish the ratification, by the light of the public documents referred to, my mind sees no possible escape from the conclusion that that act was intended to, and did, ratify the collection of the charges complained of. Having no doubt of the power of Congress to ratify, to my mind it clearly results that I erred in giving my assent to the previous judgment of reversal, and I therefore dissent from the opinion and conclusion of the court now announced.

I am authorized to say that Mr. Justice **McKenna** concurs in this dissent.

*THOMAS O'CONOR, *Plff. in Err.*, [501]

v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 501-510.)

1. **Removal of causes—by alien nonresident.**—An alien nonresident can no longer claim the privilege, under U. S. Rev. Stat. § 639 (U. S. Comp. Stat. 1901, p. 520), subsec. 1, of removing to a Federal circuit court an action commenced against him in a state court, since the enactment of the acts of March 3, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508).

2. **Error to state court—Federal question—statutory construction.**—Questions respecting the construction of state statutes on which the title to land depends are not Federal, and cannot be considered by the Supreme Court of the United States on writ of error to a state court.

3. **Error to state court—Federal question—land titles.**—The defense to an action by a state to recover possession of a tract of land, so far as based upon a Spanish grant, involves no question of a Federal nature which can be considered in the Supreme Court of the United States on writ of error to a state court, where neither the validity nor construction of any treaty of the United States nor the validity of the grant were challenged.

[No. 236.]

Argued and submitted April 19, 1906. Decided May 28, 1906.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which, reversing the judgment of the Court of Civil Appeals of that state, and sustaining the decision of the District Court of

NOTE.—*On removal of causes in cases of diverse citizenship*—see notes to Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Huskius v. Cincinnati, N. O. & T. P. R. Co. 3 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; Brodhead v. Shoemaker, 11 L.R.A. 567; Delaware R. Constr. Co. v. Meyer, 25 L. ed. U. S. 593; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

Error to state courts in cases involving land titles.

Federal questions respecting land titles.

The decision of a state court against a right or title to land set up under an act of Congress is reviewable in the Supreme Court of the United States. Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Silver v. Ladd, 6 Wall. 440, 18 L. ed. 828; Atherton v. Fowler, 91 U. S. 144, 23 L. ed. 265; Glasgow v. Baker, 128 U. S. 560, 32 L. ed. 513, 9 Sup. Ct. Rep. 154; Minnesota v. Bachelder, 1 Wall. 109, 17 L. ed. 551; Carondelet v. St. Louis, 1 Black, 179, 17 L. ed.

Travis County, entered judgment in favor of the state in an action to recover possession of a tract of land. *Affirmed.*

See same case below, 96 Tex. 484, 73 S. W. 1041; on rehearing, 96 Tex. 492, 74 S. W. 899.

The facts are stated in the opinion.

Mr. **H. G. Dickinson** argued the cause and filed a brief for plaintiff in error:

If this case is one in which there was drawn in question a title claimed under a treaty or the statutes of the United States, then the judgment of the supreme court of Texas is reviewable by this court.

Owings v. *Norwood*, 5 Cranch, 347, 3 L. ed. 120; *Smith* v. *Maryland*, 6 Cranch, 286, 3 L. ed. 225; *Martin* v. *Hunter*, 1 Wheat. 359, 4 L. ed. 110; *Henderson* v. *Tennessee*, 10 How. 311, 13 L. ed. 434.

The courts of Texas have long held that the treaty of Guadalupe Hidalgo is applicable to the title to the lands in that territory of the state in which the land in controversy in this case is situated.

State v. *Sais*, 47 Tex. 309; *Baldwin* v. *Goldfrank*, 88 Tex. 249, 31 S. W. 1064; *Haynes* v. *State* (Tex. Civ. App.) 85 S. W. 1029; *Texas-Mexican R. Co.* v. *Locke*, 74 Tex. 370, 12 S. W. 80.

A case arising under the Constitution and laws of the United States is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by law or treaty. A case consists of the right of one party as well

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102; Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733; Cousin v. Labatut, 19 How. 202, 15 L. ed. 601; Ross v. Doe, 1 Pet. 655, 7 L. ed. 302; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; Chouteau v. Eckhart, 2 How. 344, 11 L. ed. 293.

A claim of title under a purchase from the United States which depends upon the laws of the United States concerning the sale of its public lands presents a Federal question. Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848.

And a decision of a state court against a claim of title under a purchase from the United States on the ground that an older patent had been issued by the United States in favor of another party may be reviewed by the Supreme Court of the United States. Bell v. Hearne, 19 How. 252, 15 L. ed. 614. The principle on which jurisdiction was upheld is not stated in this case; but it would seem sustainable, either on the ground that the controversy involved a claim of title under Federal law, or that the question presented was one respecting Federal authority.

Somewhat analogous cases are referred by the court to the latter principle. Thus, a claim of title founded upon a pre-emption entry has been said to present a question as to the validity of an authority exercised under the United States. Lytle v. Arkansas, 22 How. 193, 16 L. ed. 306.

Within the principle declared in this case was held to be a claim of title set up under a survey identifying the locality and boundaries of a concession from the lieutenant governor of upper Louisiana, confirmed by the board of commissioners. Magwire v. Tyler, 1 Black, 195, 17 L. ed. 137.

And Lytle v. Arkansas, *supra*, was regarded as controlling in a case where a title to land confirmed by United States commissioners under the act of March 3, 1807, was drawn in question. Berthold v. McDonald, 22 How. 334, 16 L. ed. 318.

A somewhat similar case is Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170, where a claim of title under a patent from the United States in alleged confirmation of a Spanish grant was regarded as presenting a Federal question.

A decision of a state court adverse to a title to land claimed under an authority alleged to have been exercised by the Secretary of the Treasury in behalf of the United States is against the validity of the authority thus alleged to have been exercised. Neilson v. Lagow, 7 How. 772, 12 L. ed. 908.

A denial of a right claimed under the authority of the United States is involved in the refusal of a state court to give the effect claimed for an equitable title apparently conveyed by proceedings in the United States Land Office. Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

A question respecting a right conferred by a supposed decision of the register and receiver of the Land Office is involved in the contention in ejectment that the boundaries of the land in suit were settled by such officials, acting under the authority of acts of Congress. Doe *ex dem.* Barharie v. Mobile, 9 How. 451, 13 L. ed. 212.

But it is a mistake to suppose that every suit for real estate in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title necessarily raises a question of Federal cognizance. Carpenter v. Williams, 9 Wall. 785, 19 L. ed. 827.

A decision of a state court which recognizes a title confirmed by an act of Congress, and only determines the person to whom the confirmation was made, gives no appellate jurisdiction to the Supreme Court of the United States. *Ibid.*

Where both parties claim under a common grantor whose title from the United States is admitted, the Supreme Court of the United States has no jurisdiction to review the decision of the state court as to the title acquired by the several parties under their respective grants. California *ex rel.* Hastings v. Jackson, 112 U. S. 233, 28 L. ed. 712, 5 Sup. Ct. Rep. 113; Romie v. Casanova, 91 U. S. 379, 23 L. ed. 374; White v. Leovy, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604; Shaffer v. Scudday, 19 How. 16, 15 L. ed. 592.

Nor is a Federal question presented by a decision of a state court as to whom, under the law of the state, a title which had passed from the United States to a probate judge had been transferred. Chever v. Horner, 142 U. S. 122, 35 L. ed. 959, 12 Sup. Ct. Rep. 184.

And a decision of a state court that a party was given no right by state authority to purchase from the state land granted to that state by Congress, because the state had already sold

as of the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the acts of Congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted.

Tennessee v. *Davis*, 100 U. S. 264, 25 L. ed. 650.

In the case at bar the plaintiff in error interposes the acts of Congress and a treaty of the United States as a defense and protection against the practical confiscation of his property; and these acts and this treaty are parts of the supreme law of the land, of which all courts must take notice.

Head Money Cases (*Edye* v. *Robertson*) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *United States* v. *Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *New Orleans* v. *De Armas*, 9 Pet. 224, 9 L. ed. 109.

The case at bar can be readily distinguished from the following cases:

Crystal Springs Land & Water Co. v. *Los Angeles*, 82 Fed. 114, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Phillips* v. *Mound City Land & Water Asso.* 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 657; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *New Orleans* v. *De Armas*, *supra*.

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the land to another, involves no Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of the state court. Mace v. Merrill, 119 U. S. 581, 30 L. ed. 503, 7 Sup. Ct. Rep. 330.

In reviewing a decision of a state court adverse to a title which depends upon the construction of a land law of the United States, the Supreme Court cannot take into consideration any distinct equities arising out of the contracts or transactions between parties, and creating a new and independent title, but is confined to an examination of the validity of the title under the statute in question. Matthews v. Zane, 7 Wheat. 165, 5 L. ed. 425.

See also note to State *ex rel.* Hill v. Dockery, 63 L.R.A. 571, on *What questions the Federal Supreme Court will consider when reviewing the judgments of state courts.*

The effect of the conquest upon the power of the pueblo of San Francisco under the Mexican laws to make a valid grant of pueblo lands is not a Federal question, where its solution does not depend upon any congressional legislation, or upon the treaty of Guadalupe Hidalgo, but is a question of general public law. San Francisco v. Scott, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688.

The issue as to whether one of the two Mexican grants confirmed by the United States under which the parties respectively claim was forged or obtained by fraud does not present a question respecting right or title under the treaty of Guadalupe Hidalgo or the act creating a special tribunal for the determination of private land claims. California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

The right to bring questions of title decided in a state court before the Supreme Court of the United States is not one of the immunities of citizens of the United States. Hence, the provision of the act of Congress admitting the state of Louisiana into the Union on an equal footing with the original states cannot be construed as giving appellate jurisdiction over all questions of title between citizens of Louisiana. "If in any case such jurisdiction could be supposed to be given," said Mr. Chief Justice Marshall, "it might be where an act of Congress attempted to devest a title which was vested under the pre-existing government." New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109.

A claim that title to real property was secured by the compact entered into between the United States and Georgia for the cession of the territory in which the land lies does not raise a Federal question where the claimants fail to prove that the ancestor or person under whom they claim was an actual settler on October 27, 1795, which is essential to bring the case within the terms of the condition in the compact on which they rely. Hickie v. Starke, 1 Pet. 94, 7 L. ed. 67.

The claim that a title was not destroyed by an act of Congress does not present a Federal question. Menard v. Aspasia, 5 Pet. 505, 8 L. ed. 207.

And the claim that a lease of school lands, made under the laws of the state, was valid, although in direct opposition to the provisions of an act of Congress, where no right is claimed under the Constitution or laws of the United States, presents a question exclusively for the state court. Congdon v. Goodman, 2 Black, 574, 17 L. ed. 257.

A decision by a state court that the statutory formalities governing tax sales were fully observed does not present a Federal question which will sustain a writ of error from the Supreme Court of the United States, where the claim is not that the statutes were unconstitutional, but that the manner of their observance was not due process of law. French v. Taylor, 199 U. S. 274, *ante*, 189, 26 Sup. Ct. Rep. 76.

Where a state court only applies the local laws to the construction of a title to land set up under Federal law, its decision cannot be reviewed by the Supreme Court. McDonogh v. Millaudon, 3 How. 693, 11 L. ed. 787.

This principle applies where the question involved is merely one as to the boundary of the land. *Ibid.*; Moreland v. Page, 20 How. 522, 15 L. ed. 1009; Lanfear v. Hunley, 4 Wall. 204, 18 L. ed. 325.

The question where a dividing line runs between two tracts of land is not a Federal one. Almonester v. Kenton, 9 How. 1, 13 L. ed. 21.

Whether parol proof can control written, or monuments restrain distances, are questions which depend on common-law principles or the peculiar laws of the state; and the decision of a state court on such questions is not reviewable in the United States Supreme Court, although the land is held under title confirmed by the United States. Doe *ex dem.* Barbarie v. Mobile, 9 How. 451, 13 L. ed. 212.

Whether or not the courses alleged and distances set forth in a patent from the United

This court has jurisdiction of this writ of error.

Grogan v. *San Francisco*, 18 Cal. 590; *Fletcher* v. *Peck*, 6 Cranch, 87, 3 L. ed. 162.

Mr. **Charles K. Bell** submitted the cause for defendant in error. *Messrs. Robert V. Davidson* and *William E. Hawkins* were on his brief:

In a suit in a district court of the state of Texas for land lying within that state, wherein the state of Texas is plaintiff and the defendant is an alien and a subject of the United Kingdom of Great Britain and Ireland and a resident of the state of Tamaulipas, in the Republic of Mexico, the defendant is not entitled to have the case removed to the United States circuit court.

Postal Teleg. Cable Co. v. *United States* (*Postal Teleg. Cable Co.* v. *Alabama*) 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *State* v. *O'Connor*, 96 Tex. 492, 73 S. W. 1041, 74 S. W. 899; Garland & R. Fed. Pr. § 156.

Whether the district court of Travis county, Texas, or the district court of the county in which the land in controversy is situated, alone had authority to try and determine the question of title to said land, is a local or state question upon which the decisions of the courts of the state of Texas are final, and not subject to review in this court.

Bacon v. *Texas*, 163 U. S. 219, 41 L. ed. 137, 16 Sup. Ct. Rep. 1023; *Avery* v. *Popper*, 179 U. S. 315, 45 L. ed. 207, 21 Sup. Ct. Rep. 94; *Telluride Power Transmission*

States as a matter of fact bring the eastern boundary of the land to the waters of the Mississippi river is not a Federal question, where the validity of the grant is not in any way controverted or drawn in question, and no question is made as to the authority of the government to convey the land to the water's edge if it chooses to do so. Sweringen v. St. Louis, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

So, where a state court only applies the local laws to a controversy respecting alluvion between a party claiming under a Spanish land grant recognized and sanctioned by Congress as a perfect title and a party claiming by virtue of an act of Congress confirming an incomplete Spanish concession, its decision cannot be reviewed by the Federal Supreme Court. Kennedy v. Hunt, 7 How. 586, 12 L. ed. 829.

The claim of riparian rights and ownership of percolating waters, set up under Mexican and Spanish grants, confirmed and patented under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), is not the claim of a title or right under Federal law. Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

But a Federal question is presented by an unsuccessful contention, in an action to recover possession of land, that a proper construction of the government survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents. French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; French-Glenn Live Stock Co. v. Colwell, 185 U. S. 54, 46 L. ed. 804, 22 Sup. Ct. Rep. 566.

Whether or not a title claimed under a location of school-land warrants under a state law was invalid because not made upon vacant and unappropriated lands within the meaning of the state law under which the warrant was located is not a Federal question. Athearn v. Poppe, 25 Cal. 631.

The defense of the state statute of limitations has no connection with the title, and the Supreme Court of the United States cannot revise the state court's decree in that respect. Lytle v. Arkansas, 22 How. 193, 16 L. ed. 306.

The judgment of a state court denying the right of possession of real property under a title founded on an act of Congress, which rests upon the ground that the title of the adverse party under a tax deed was made good by prescription under the state Constitution, involves no Federal question which will sustain a writ of error from the Supreme Court of the United States. Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, *ante*, 143, 26 Sup. Ct. Rep. 41.

Whether a claim of title under a United States patent is barred by laches is not a Federal question. Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co. 178 U. S. 270, 44 L. ed 1065, 20 Sup. Ct. Rep. 931.

Whether the state may be estopped by its acts, silence, and acquiescence from asserting a title to certain lands under the swamp-land grant is not a Federal question. Michigan *ex rel.* Atty. Gen. v. Flint & P. M. R. Co. 152 U. S. 363, 38 L. ed. 478, 14 Sup. Ct. Rep. 586.

Whether a county is, by its conduct, estopped to set up title to land under the swamp-land act, as against a railroad company, is not a Federal question, where the validity of the county's original title was not disputed or involved. Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77.

And the validity, in ejectment to recover lands confirmed to the city of San Francisco by an act of Congress, of the defenses of the state statute of limitations and the transfer of the city's title to defendant, is not a Federal question. McStay v. Friedman, 92 U. S. 723, 23 L. ed. 767.

Whether the title of the true owner of lands in California is extinguished by an adverse possession under color of right for the length of time which would be a bar to a recovery in ejectment is not a Federal question. Poppe v. Langford, 104 U. S. 770, 26 L. ed. 922.

Whether a person has a legal title to land is purely a local question, and is not reviewable in the Supreme Court of the United States on writ of error to a state court. Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Whether an equitable title can be set up in bar of an action at law brought by the holder of a legal title, to recover possession of land, is a question of state law, for the state court alone to decide. Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340.

Error in the admission of evidence to estab-

Co. v. *Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; *White* v. *Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604.

No Federal question was involved in the decision of the state courts that the judgment of March 13, 1872, in the case of *Ruggles* v. *Texas*, under which the defendant claims the land in controversy, was void.

White v. *Leovy, supra; California* v. *Holladay*, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co. supra; Lynde* v. *Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; *Gulf & S. I. R. Co.* v. *Hewes*, 183 U. S. 67, 46 L. ed. 87, 22 Sup. Ct. Rep. 26; *Bacon* v. *Texas*, 163 U. S. 219, 41 L. ed. 137, 16 Sup. Ct. Rep. 1023; *Quimby* v. *Boyd*, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147; *Merced Min. Co.* v. *Boggs*, 3 Wall. 310, 18 L. ed. 247; *Eastern Bldg. & L. Asso.* v. *Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566; Taylor, Jurisdiction, § 249.

The questions as to the effect to be given to the judgment of January 8, 1862, in the case of *Ruggles* v. *Texas*, and as to which of the recitals, and as to how far such recitals, in said judgment are binding upon the state of Texas upon the issue of outstanding title, are local or state questions, and the judgment of the supreme court of Texas thereon will not be reviewed by this court, no Federal question being involved.

Ibid.; San Francisco v. *Itsell*, 133 U. S.

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lish the boundaries of a Spanish land grant confirmed by act of Congress cannot be reviewed in the Supreme Court of the United States, on writ of error to a state court. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes, which involve questions over which the Supreme Court has jurisdiction, then the decision of the state court on the effect of such evidence may be considered and its judgment reversed or affirmed in a similar manner as if a like question had arisen in the highest court of a state when reviewing the proceedings of an inferior court. Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038.

A controversy in the state court over conflicting claims to public lands which depends upon a mixed question of law and fact, submitted to the trial court without a jury, is within the appellate jurisdiction of the Supreme Court of the United States, where the facts giving rise to the controversy call for the construction of congressional legislation to give the facts effect. Jourdan v. Barrett, 4 How. 169, 11 L. ed. 924.

A finding of a state court that when a commutation entry under the homestead laws was allowed neither the entryman nor the land officers had actual knowledge of an amendment to the Revised Statutes which made such commutation premature is a finding of fact, and therefore conclusive on the Federal Supreme Court, on writ of error to the state court. Hill v. McCord, 195 U. S. 395, 49 L. ed. 251, 25 Sup. Ct. Rep. 96.

The rule that a real, and not fictitious, Federal question is essential to the exercise of this jurisdiction (see div. IV. a in note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts*) is, of course, applicable.

Thus, the claim that the action of surveyors for the Federal government in segregating and setting apart a lake by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, was an adjudication by the Federal government, by its authorized officers and agents, that such lake is the property of the state, and not a part of the public domain, is so obviously without foundation that a denial by a state court of the state's claim of title to the bed of such lake cannot be reviewed in the Supreme Court of the United States. Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

There is not sufficient foundation for the contention that the sovereignty of the state of Iowa over the bed of an inland lake meandered by the Federal government depends upon the treaty ceding Louisiana to the United States, or the act of Congress in pursuance thereof admitting Iowa into the Union on an equal footing with the original states, to render the decision of a state court adverse to the state's claim of title by virtue of such sovereignty reviewable in the Supreme Court of the United States. *Ibid.*

And the mere averment by defendant, in an action by a patentee of public land to recover possession, that his possession was taken with a view to entering the land under the United States homestead laws, does not so raise a genuine Federal question as to give the Supreme Court of the United States jurisdiction to review a decision of a state court adverse to such claim, unless there is some reason to believe that the apparent legal title transferred by the patent was wrongfully conveyed, and that the real title in fact remains in the government. Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

Alleging a title in the United States by way of defense in ejectment is not claiming a personal interest affecting the subject in litigation, which is necessary to make the decision of a state court adverse to such claim subject to review in the Supreme Court of the United States. Hale v. Gaines, 22 How. 144, 16 L. ed. 264.

A person who has no interest in land but a naked possession cannot claim the protection of an act of Congress so as to present a Federal question. Wynn v. Morris, 20 How. 3, 15 L. ed. 800.

How the question must be raised in and decided by the state court.

See also note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

A mere claim of title in a pleading, without indicating the source, does not sufficiently indicate that title is claimed under an act of Congress, so as to give the Supreme Court of the United States jurisdiction to review the judgment of a state court denying the validity of such title. Yesler v. Washington Harbor

65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; *Thayer* v. *Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Clipper Min. Co.* v. *Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; *Semple* v. *Hagar*, 4 Wall. 431, 18 L. ed. 402; *Merced Min. Co.* v. *Boggs*, 3 Wall. 309, 18 L. ed. 247; *Jacks* v. *Helena*, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; *East Tennessee, V. & G. R. Co.* v. *Frazier*, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; *Minder* v. *Georgia*, 183 U. S. 559, 46 L. ed. 328, 22 Sup. Ct. Rep. 224; *M'Kinney* v. *Carroll*, 12 Pet. 66, 9 L. ed. 1002; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. ed. 506; *Crowell* v. *Randell*, 10 Pet. 368, 9 L. ed. 458.

Whether a grant should be presumed is primarily a question of fact for a jury, or, in the absence of a jury, for the trial court. The trial court having found against the defendant upon that issue, and its judgment having been affirmed by the supreme court of Texas, that question is not open for review by this court.

Crespin v. *United States*, 168 U. S. 218, 42 L. ed. 441, 18 Sup. Ct. Rep. 53; *Chavez* v. *United States*, 175 U. S. 563, 44 L. ed. 273, 20 Sup. Ct. Rep. 201; *Hays* v. *United States*, 175 U. S. 248, 44 L. ed. 150, 20 Sup. Ct. Rep. 80; *Paschal* v. *Dangerfield*, 37 Tex. 305; 2 White's Recopilación, 562.

Mr. Justice **Brewer** delivered the opinion of the court:

On July 5, 1901, the state of Texas, under the authority of an act of its legislature,

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Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

An allegation in an answer in a suit in a state court to foreclose a deed of trust that, if any lien existed, it was wholly devested by certain foreclosure proceedings in a Federal court, is such an assertion of a right and title under an authority exercised under the United States as gives the Supreme Court of the United States jurisdiction to re-examine the final judgment of the state court. Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

The objection to the admission in evidence, to show defendant's title, of a certificate of a register and receiver of the Land Office, which appeared on its face to have been canceled and reinstated by the Land Department, does not draw the validity of the authority of that department in question. Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

A decision of a state court adverse to a claim of title founded upon a pre-emption entry, although rested on the ground that such entry was obtained by fraud, is reviewable in the Supreme Court of the United States as a decision against the validity of an authority exercised under the United States. Lytle v. Arkansas, 22 How. 193, 16 L. ed. 306.

A decison by a state court settling a boundary line on general principles of law amounts to a decision against a right set up under the supposed decision of the register and receiver of the Land Office in ejectment, where it was claimed that the boundaries of the land were settled otherwise by such officials acting under the authority of acts of Congress. Doe *ex dem.* Barbarie v. Mobile, 9 How. 451, 13 L. ed. 212.

A judgment of a state court that a grant from the United States passed no right or title as against subsequent deeds from the state in lands below high-water mark is a direct adjudication against the validity of a right or privliege claimed under the law of the United States. Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The presence of a question respecting the construction and application of the congressional legislation as to swamp and over-flowed lands gives no jurisdiction to the Supreme Court of the United States to review the judgment of a state court in an action for ejectment, holding defendants' title invalid on the independent ground of noncompliance with an act of the state legislature. Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

No decision upon the validity of a state's title to land under Federal laws is so necessarily involved in a judgment of the highest state court in favor of a pre-emption claimant over one claiming title by virtue of a subsequent location of a school-land warrant, under a statute of the state authorizing such location upon any vacant and unappropriated lands belonging to the United States within the state, as to render such decision reviewable in the Supreme Court of the United States, where the state's title under the Federal laws may have been perfect when the location was made, and yet such location must fail under the terms of the state statute, because not made upon vacant and unappropriated lands. Athearn v. Poppe, 25 Cal. 631.

A judgment of a state court in a suit to quiet title, which rests upon a decision of the question where a dividing line runs between two tracts of land covered by Spanish grants, is not reviewable by the Supreme Court of the United States, although the defeated party claimed that her adversary's title was avoided by an act of Congress. Almonester v. Kenton, 9 How. 1, 13 L. ed. 21.

Nor is such jurisdiction aided by the award of a perpetual injunction restraining the defeated party from selling the land covered by the other's grant, as the injunction is a mere incident to the final adjudication establishing a right to real property, and was rather in execution of the decree than a substantial part of it. *Ibid.*

It was said in Udell v. Davidson, 7 How. 769, 12 L. ed. 907, that a decision of a state court establishing a trust in a pre-emption claim created by contract could be no impeachment of the grant made by the United States, and, hence, would give no jurisdiction to the Supreme Court of the United States.

But a state-court decree that a patentee from the United States is a mere trustee, and may be restrained from prosecuting ejectment under his patent, is a decision against the title asserted under such patent, and, therefore, reviewable in the Supreme Court of the United States. Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473.

A decision of a state court adverse to defend-

filed its petition in the district court of Travis county against Thomas O'Conor, to recover possession of a tract of over 19,000 acres, situated in Webb county.

The defendant appeared and filed a petition for removal to the circuit court of the United States, on the ground that he was an alien, domiciled in the Republic of Mexico.
[507] The removal *was claimed under subsection 1 of § 639, Revised Statutes (U. S. Comp. Stat. 1901, p. 520), but, as said by Mr. Chief Justice Waite, delivering the opinion of the court, in *Baltimore & O. R. Co.* v. *Bates*, 119 U. S. 464, 467, 30 L. ed. 436, 438, 7 Sup. Ct. Rep. 285: "Subsections 1 and 2 of § 639 were repealed by the act of 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), *Hyde* v. *Ruble*, 104 U. S. 407, 26 L. ed. 823; *King* v. *Cornell*, 106 U. S. 395, 398, 27 L. ed. 60, 61, 1 Sup. Ct. Rep. 313; *Holland* v. *Chambers*, 110 U. S. 59, 28 L. ed. 70, 3 Sup. Ct. Rep. 427; *Ayers* v. *Watson*, 113 U. S. 594, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641."

Further, in *Fisk* v. *Henarie*, 142 U. S. 459, 466, 35 L. ed. 1079, 1082, 12 Sup. Ct. Rep. 207, it was held that the purpose of the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), was to restrict the jurisdiction of the circuit courts, and it was said (p. 468, L. ed. p. 1082, Sup. Ct. Rep. p. 210):

"The repealing clause in the act of 1887 does not specifically refer to these prior acts, but declares that 'all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed.' The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of the former acts, that we think the intention to substitute the one for the other is necessarily to be inferred, and must prevail."

See also *Smith* v. *Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Shaw* v. *Quincy Min. Co.* (*Ex parte Shaw*) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Martin* v. *Baltimore & O. R. Co.* (*Gerling* v. *Baltimore & O. R. Co.*) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Hanrick* v. *Hanrick*, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Wabash Western R. Co.* v. *Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

It is clear from these authorities that the petition for removal, which, as will appear, presented the only definite Federal question, was rightfully denied.

Thereupon the defendant filed an answer containing several defenses; a claim of title under and by virtue of a grant made in the year 1767, by the government of Spain to Joaquin Galan; a decree of the district court of Webb county on March 13, 1872, in

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ant's claim of title under a congressional land grant is reviewable in the Supreme Court of the United States, although the answer discloses certain proceedings in the Land Department in which it was decided that the land in question was exempted from the grant, where such proceedings were set up merely by way of answer to plaintiff's claim that such decision was controlling in his favor. Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.

A writ of error from the Supreme Court of the United States to the highest court of Tennessee cannot be maintained on the theory that the decision of the latter court in favor of a person claiming title to land under the state of North Carolina, and against one claiming under the state of Tennessee, was against either the compact between these states granting to the state of Tennessee the right reserved by the state of North Carolina, in a cession of land to the United States, of perfecting titles where entries had been made, or the act of Congress assenting to such compact, and making a cession of the land in question to the state of Tennessee on several conditions, one of which respects all existing claims to lands under the state of North Carolina. Williams v. Norris, 12 Wheat. 117, 6 L. ed. 571. The court said that, if the title in question was valid according to the laws of North Carolina, then the decision in its favor was in pursuance of such compact; and that, if the act of Congress had any influence in the case, the title for the benefit of which it was intended had prevailed; and that, consequently, neither the compact nor the statute could have been violated.

A decision of a state court supporting a French title to land to the extent of the grant supports the claim to the same extent that the treaty with France of 1803 protected it, and is, therefore, not against the title or right set up under such treaty, and, hence, cannot be reviewed by the Supreme Court of the United States. McDonogh v. Millandon, 3 How. 693, 11 L. ed. 787.

A decision of a state court in a controversy between parties claiming title to the same tract of land under different Spanish grants against defendant's claim that plaintiff's grant was not protected by the act of Congress of March 26, 1804, cannot be reviewed by the Supreme Court of the United States, where the court found that no interference existed between the tracts of land covered by the paper titles of the contesting parties, as the defendant, having no opposing title to the land in dispute, could not be injured by the opinion expressed as to the plaintiff's title. Almonester v. Kenton, *supra*.

a suit for confirmation of title, wherein Daniel Ruggles, claiming to be the owner of
[508] the grant to *Galan, was plaintiff and the state of Texas defendant, prosecuted under and by virtue of an act of the legislature of Texas approved February 11, 1860; a confirmation of this decree by an act of the legislature of Texas of April 4, 1881; title by adverse possession under claim of right and title for a period of more than ninety-six years; title by estoppel, in that the state of Texas was estopped by long acquiescence from questioning the decree of the district court of Webb county of March 13, 1872; title under and by virtue of a decree of the district court of Webb county, Texas, rendered on January 8, 1862; and a claim of outstanding title in the settlers of the town of Palafox, or their heirs or assigns, as shown by the recitals in the last-mentioned decree.

The case was tried by the court without a jury, which rendered a judgment in favor of the state. From this judgment the defendant prosecuted an appeal to the state court of civil appeals, which reversed the judgment of the trial court and ordered a judgment for the defendant. This judgment was taken to the supreme court of the state, which reversed the judgment of the court of civil appeals, and, sustaining the decision of the trial court, entered a judgment in favor of the state.

It is obvious that most of the questions raised by the defenses are of a purely local nature, involving no Federal right. Some explanation may, however, be proper in reference to the decrees of the Webb county district court. The record is somewhat obscure, but we take the facts to be as stated in the opinions of the court of civil appeals and the Supreme Court. Under the law of 1860 Daniel Ruggles instituted two suits in the district court of Webb county for confirmation of title to separate tracts of land, one designated as the Palafox and the other as the Balconcitas tract. One suit came to trial on January 8, 1862, and resulted in a decree in favor of Ruggles and a confirmation of his title to a large tract of land. In 1869 a motion was filed by him, seeking a construction and modification of this decree
[509] of January 8, 1862, but it was *overruled. In 1871 the other suit was dismissed for want of jurisdiction. The same year he made a motion to redocket the two cases, which was granted, and at the same time he filed a petition in which he sought to have the decree of 1862 set aside and a confirmation of title of both the tracts, but, on March 9, 1872, these motions were refused. On March 12, 1872, he filed in the same court another petition seeking to set aside the decree of January 8, 1862. This motion was sustained. On March 13, 1872, Ruggles filed an amended petition, in which he sought confirmation of title to both tracts, and upon this a decree was the same day entered in favor of Ruggles. The land which was covered by the decree of 1862 was patented to Ruggles, and the state has not since questioned the validity of the decree or Ruggles's title. The land in controversy here is located entirely in that portion of the grant which the court, in its decree of 1862, declined to confirm in favor of Ruggles, but is included in that which purports to have been confirmed by the decree of March 13, 1872. The suits originally brought by Ruggles were authorized by special statute, to wit, the act of the legislature passed February 11, 1860. That act expired by its own limitations in 1865, and, as the supreme court of the state held, the district court had thereafter no power to set aside the decree of January 8, 1862, or to enter the decree of March 13, 1872. The construction of the state statute and the power which it gave to the district court of Webb county, and the length of time for the exercise of that power, are matters arising under state law, and the decision of the supreme court of the state is conclusive upon us and presents no question arising under the Federal Constitution. So the alleged confirmation of the decree of March 13, 1872, by an act of the legislature of 1881, is also a question arising in the construction of a state statute. The supreme court held that it applied only to those decrees which were rendered while the Webb county district court had authority under the special statute, and did not apply to those which that court assumed to render thereafter.

*So far as any defense is based upon the [510] grant made by the government of Spain in the year 1767, it involves no question of a Federal nature. Neither the validity nor construction of any treaty of the United States, nor the validity of the grant, were challenged. Indeed, it may be observed that during the progress of the case in the several state courts no appeal was made to the Federal Constitution, or to any acts of Congress save the one providing for the removal of cases from state to Federal courts.

It is apparent that the only Federal question which was presented, to wit, the right of removal, was correctly decided, and, therefore, *the judgment of the District Court is affirmed.*

JOHN W. McDONALD, Receiver, etc., *Appt.*,
v.
CHAUNCEY DEWEY *et al.*, Executors,
(No. 220.)

CHAUNCEY DEWEY *et al.* Executors. *Appts.*,
v.
JOHN W. McDONALD, Receiver, *et al.*
(No. 530.)

(See S. C. Reporter's ed. 510–542.)

1. **National banks—stockholder's liability—colorable transfer.**—A colorable transfer of shares of stock in a national bank, made for the benefit of the registered owner, cannot relieve the latter from his liability under U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465, as a shareholder, for the debts of the bank.
2. **National banks—stockholder's liability—sale to irresponsible vendee.**—A stockholder in a national bank cannot evade his liability under U. S. Rev. Stat. § 5151, for the debts of the bank, by a transfer of his shares of stock to a person financially irresponsible, provided he knew or should have known at the time that the bank was then insolvent.
3. **Evidence—burden of proof—insolvency of vendee of national bank stock.**— One who relies upon a sale of shares of stock in a national bank, made with knowledge of its insolvency, to escape his liability as a shareholder under U. S. Rev. Stat. § 5151, for the debts of the bank, has the burden of proving that the vendee was financially responsible to the extent of the assessment.
4. **National banks—stockholder's liability—sale to irresponsible vendee.**— One who, with knowledge of the insolvency of a national bank, transfers his stock to an irresponsible vendee with intent to evade his liability under U. S. Rev. Stat. § 5151, for the debts of the bank, can only be held responsible for the unsatisfied debts existing when the fraudulent transfer was made, in view of the requirement of § 5210 (U. S. Comp. Stat. 1901, p. 3498), that the list of the names and residences of all the shareholders and the number of shares held by each be kept by the bank, subject to the inspection of all shareholders and creditors, and of the provision of § 5139 (U. S. Comp. Stat. 1901, p. 3461), that every person becoming a shareholder by a transfer of shares to himself shall succeed to all the rights and liabilities of the prior holder of such shares, and that no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired.

[Nos. 220, 530.]

NOTE.—*As to who are liable as shareholders in national banks*—see note to Beal v. Essex Sav. Bank, 15 C. C. A. 130.

Argued April 11, 12, 1906. Decided May 28, 1906.

APPEAL and CROSS APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree reversing a decree of the Circuit Court for the Northern District of Illinois, and remanding the case to that court with directions to enter a decree holding liable for the debts of a national bank the estate of a person whose shares stood in the name of an agent, and exonerating his estate from any liability upon such shares as had been transferred by him. *Reversed* on the latter point, and remanded to the Circuit Court for further proceedings.

See same case below, 67 C. C. A. 408, 134 Fed. 528.

Statement by Mr. Justice **Brown:**

The first of these cases was an appeal from a decree of the circuit court of appeals, rendered in a case wherein John W. McDonald, receiver of the First National Bank of Orleans, Nebraska, was complainant, and Charles P. Dewey and others were defendants, reversing a decree of the circuit court for the northern district of Illinois, and remanding the case to that court with directions to enter a decree against Dewey for his full assessment on twenty-five shares of stock of the First National Bank, and for interest thereon.

The second case is a cross appeal by Chauncey Dewey and his co-executor from the same decree.

Charles P. Dewey having died pending the litigation, the suits were revived in the name of Chauncey Dewey and Charles T. Killen, executors of his will.

The original was a bill in equity to enforce an assessment of $86 a share on 105 shares of stock of the First National Bank of Orleans, Nebraska, which failed on May 20, 1897. These shares, having been originally owned by Charles P. Dewey, were sold by him in December, 1894, and in January, 1895. Eighty shares were duly transferred on the books of the bank within a few weeks after the sale. The remaining twenty-five shares had been previously transferred by Dewey to his agent, Frederick L. Jewett, who was admitted to be irresponsible, and stood on the books of the bank in the name of Jewett when the bank went into the hands of a receiver, on May 20, 1897, although they had been sold by Dewey. The bill alleged that Hedlund, the original receiver (since superseded by McDonald, *the[512] present receiver), was appointed and took possession on June 5, 1897, a fortnight after the failure of the bank; that on September 14, 1897, the Comptroller leied an assess-

ment of $86 a share upon the capital stock; that on May 8, 1894, Charles P. Dewey was the owner of 105 shares of stock, and was registered as such; that the bank was then, and continuously remained, insolvent; that this insolvency was known to Dewey, who, on that day, May 8, assigned ninety-five of these shares to the defendant Jewett, who was wholly irresponsible; that the transfer was colorable only, and made for the sole purpose of evading Dewey's liability as a stockholder; that Jewett thereafter, at various times, transferred eighty of the ninety-five shares to the several other defendants, and that on January 3, 1895, Dewey transferred his remaining ten shares to Jewett, so that at the time the bank failed said 105 shares were registered on the books of the bank in the names of the several transferees; that the several transfers were made at a time when the bank was insolvent, and known by Dewey to be so, for the purpose of evading his liability for assessments, and to irresponsible persons.

The answer of Dewey contained a general denial of all material allegations, and set up that the transfers were outright and for the par value of the stock; that he had sold all his stock, and, with the exception of the twenty-five shares, all transfers had been made on the books of the bank prior to its suspension.

The circuit court found that the sales of stock were all made through Jewett, who acted merely as the agent of Dewey and had no interest in the stock, but held it for Dewey in his name; that the bank failed about two years and five months after the sale by Dewey; that the bank was insolvent in December, 1894, and January, 1895, at the time Dewey sold the 105 shares, and that Dewey, who was vice president of the bank from 1892 to 1895, knew, or ought to have known, that fact; that three certificates, aggregating twenty-five shares, were not transferred on the books of the bank, and still stood in the name of Jewett when the bank suspended; that the claims of the creditors of the bank, who were such when
[513] Dewey sold his *stock and remained such at the time of the failure, aggregated $11,839.15, of which, however, only $2,787.97 remained unsatisfied, and that of this the ratable share of Dewey was $585.48, for which sum a decree was rendered.

On appeal by the receiver to the circuit court of appeals the decree of the circuit court was reversed and a new decree directed to be entered for the full amount of the assessment on the twenty-five shares standing in the name of Jewett at the time of the failure; that as to the eighty shares there could be no recovery, although the bank was insolvent at the time of the sale of the stock, and was known to be insolvent, and the transfer was made for the purpose of evading liability; but that there could be no recovery without proof of the additional fact that the several transferees were likewise insolvent; that, as to the twenty-five shares, Dewey remained liable, as he had not surrendered the certificate to the bank or given the officers such *data* as to enable them to make such transfer on its books. The case was remanded to the circuit court, with directions to render a decree against Dewey for his full assessment on twenty-five shares. From this decree both parties appealed to this court.

Mr. **Frank M. Hall** argued the cause, and, with *Messrs. Roscoe Pound* and *E. E. Prussing*, filed a brief for the receiver:

Upon proof of insolvency of the bank at the time of the assignment, knowledge thereof by Dewey at that time, and that the purpose and intent of the transfer was to escape his liability upon the stock in an insolvent bank, a decree should be rendered for the full assessment on 105 shares.

Stuart v. *Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Earle* v. *Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254; *Germania Nat. Bank* v. *Case*, 99 U. S. 632, 25 L. ed. 450; *Bowden* v. *Johnson* (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246.

The purpose of the statutory provision as to sale of the stock is to permit sale of stock in a solvent bank, not to permit evasion of liability upon stock in a bank known to be insolvent; and the statute should be construed accordingly.

Germania Nat. Bank v. *Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden* v. *Johnson* (*Adams* v. *Johnson*) *supra; Stuart* v. *Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 402.

The liability of a stockholder in a national bank is contractual in its nature.

Richmond v. *Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *First Nat. Bank* v. *Hawkins*, 174 U. S. 365, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Whitman* v. *National Bank*, 176 U. S. 559, 565, 44 L. ed. 587, 591, 20 Sup. Ct. Rep. 477.

It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder, instead of by the corporation.

Stuart v. *Hayden*, 169 U. S. 1, 8, 42 L. ed. 639, 641, 18 Sup. Ct. Rep. 274.

Insolvency of a national bank changes at once the relation between stockholders and creditors.

McDonald v. *Williams*, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743.

The general rule is, undoubtedly, that a stockholder may freely transfer his shares to any person capable of acquiring them, and thus substitute the latter as a member of the corporation in his stead. This rule, however, which permits a transfer of a liability, without the concurrence of those for whose benefit the liability exists, is anomalous, and rests upon special reasons, which are the measure of its extent.

National Carriage Mfg. Co. v. *Story & I. Commercial Co.* 111 Cal. 537, 44 Pac. 157.

While by no means conclusive, it must be admitted to be a very suggestive circumstance, that, in substantially every case in which courts have held that a transfer of stock would devest the stockholder's liability, they have qualified this statement by the proviso that the transfer must be in good faith.

Moss v. *Oakley*, 2 Hill, 265; *Tucker* v. *Gilman*, 121 N. Y. 189, 24 N. E. 302; *Rochester & K. F. Land Co.* v. *Raymond*, 158 N. Y. 576, 47 L.R.A. 246, 53 N. E. 507; *Middletown Bank* v. *Magill*, 5 Conn. 28; *Aultman's Appeal*, 98 Pa. 505; *Harpold* v. *Stobart*, 46 Onio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; *Cole* v. *Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052; *Stewart* v. *Walla Walla Printing & Pub. Co.* 1 Wash. 521, 20 Pac. 605.

In cases where courts having controversies before them in which the transfer was both in bad faith and to insolvent assignees have coupled these ideas in passing upon this point, the same courts have in other cases pointed out that the one element alone, without the other, will suffice.

People's Home Sav. Bank v. *Rickard*, 139 Cal. 285, 73 Pac. 858; *Welch* v. *Sargent*, 127 Cal. 72, 59 Pac. 319; *McClaren* v. *Franciscus*, 43 Mo. 452; *Provident Sav. Inst.* v. *Jackson Place Skating & Bathing Rink*, 52 Mo. 557.

Even in those cases in which intent to evade liability, and irresponsibility or insolvency on the part of the transferees coexisted, the courts have uniformly insisted upon the former as the material and important element.

Schofield v. *Twining*, 127 Fed. 486; *Ward* v. *Joslin*, 100 Fed. 676; *Foster* v. *Lincoln*, 24 C. C. A. 470, 45 U. S. App. 623, 79 Fed. 170; *Cox* v. *Montague*, 24 C. C. A. 364, 47 U. S. App. 384, 78 Fed. 845; *Miller* v. *Great Republic Ins. Co.* 50 Mo. 55; *Burt* v. *Real Estate Exchange*, 175 Pa. 619, 34 Atl. 923; *National Carriage Mfg. Co.* v. *Story & I. Commercial Co. supra.*

It has been held in many cases, by courts of high authority, that there need not be both intent to escape liability and insolvency of the transferees, but that one of these, coupled with known insolvency of the corporation, will suffice.

These cases are of two types: Those which hold the original stockholder liable upon proof of known insolvency of the corporation and insolvency of the transferees, alone, without regard to proof of the intent with which the transfer was made; and those which hold him liable by reason of the known insolvency of the corporation and intent to escape liability, alone, without regard to the financial condition of the transferees.

National Carriage Mfg. Co. v. *Story & I. Commercial Co.* and *Welch* v. *Sargent*, *supra.*

Cases like *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525, where pledgees, seeking to protect their claims, put the stock in the name of irresponsible trustees, are quite different. Such a transaction is no fraud, since the pledgee is merely interested in the extent of security. These cases do not conflict with those cited.

Cases of the second type, holding that a transfer with knowledge of insolvency of the corporation, made for the purpose and with the intent to escape the impending stockholder's liability, will not devest such liability, without regard to the financial status of the transferees, are:

Marcy v. *Clark*, 17 Mass. 330; *McClaren* v. *Franciscus, Provident Sav. Inst.* v. *Jackson Place Skating & Bathing Rink*, and *Stewart* v. *Walla Walla Printing & Pub. Co. supra; Sykes* v. *Holloway*, 81 Fed. 432.

So long as Killough was not responsible, if advantage may be taken of the assumed responsibility of his transferee,—which is very doubtful,—the burden was upon Dewey to establish that fact.

People's Home Sav. Bank v. *Rickard*, *supra.*

The transfers being fraudulent and invalid when made, the assignor remained liable down to the failure, and should be held for the full amount of the assessment.

Earle v. *Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254; *Stuart* v. *Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Bowden* v. *Johnson* (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Germania Nat. Bank* v. *Case*, 99 U. S. 632, 25 L. ed. 449.

Mr. **William B. McIlvaine** argued the cause, and, with *Messrs. John P. Wilson* and *Nathan G. Moore*, filed a brief for Dewey *et al.*:

The right of transfer by a stockholder is favored by the courts.

Earle v. *Carson*, 188 U. S. 42, 47 L. ed.

373, 23 Sup. Ct. Rep. 254; *First Nat. Bank* v. *Lanier*, 11 Wall. 377, 20 L. ed. 174.

This court, in the case of *Brunswick Terminal Co.* v. *National Bank*, 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. Rep. 314, in construing a statute of Georgia imposing this double liability, held that the statute was in derogation of the common law, and should be strictly construed. While statutes of the United States, strictly speaking, may not be in derogation of the common law, as there is no common law of the United States, nevertheless the same principle of construction should be applied in construing a statute which imposes a liability in the nature of a penalty. The rights conferred should not be extended further than absolutely necessary to accomplish the purpose intended. The purpose of the statute imposing a double liability on bank stockholders is unquestionably the protection of creditors of the bank. The liability imposed is for the benefit of creditors only. It is not an asset of the bank. It cannot be collected by the bank or in its interest.

Richmond v. *Irons*, 121 U. S. 27, 50, 30 L. ed. 864, 871, 7 Sup. Ct. Rep. 788.

In all of the cases which we have been able to find in this court, the restriction placed upon the right of a shareholder in an insolvent bank to sell his stock and escape liability has been limited to sales to irresponsible transferees.

Bowden v. *Johnson* (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *Germania Nat. Bank* v. *Case*, 99 U. S. 628–632, 25 L. ed. 448, 449; *Robinson* v. *Southern Nat. Bank*, 180 U. S. 295, 45 L. ed. 536, 21 Sup. Ct. Rep. 383. See also *Sykes* v. *Holloway*, 81 Fed. 434.

A colorable transfer, or an out and out transfer to an irresponsible person, to escape liability, is not good against creditors of the bank.

Morse, Banks & Banking, § 683.

In equity, as at law, fraud and injury must concur to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance. Truly, there are strong grounds of suspicion, but fraud ought not to be conceived; it must be proved, and expressly found.

Ming v. *Woolfolk*, 116 U. S. 599, 29 L. ed. 740, 6 Sup. Ct. Rep. 489; *Clarke* v. *White*, 12 Pet. 178, 196, 9 L. ed. 1046, 1054.

If Dewey did not know of the alleged insolvency of the bank, then his sale of the eighty shares out and out, in good faith, clearly relieved him from any further liability thereon.

Earle v. *Carson*, *supra*.

We are entitled to be heard in this court in support of the judgment of the lower court without assignments of cross error.

The Stephen Morgan (*The Stephen Morgan* v. *Good*) 94 U. S. 599, 24 L. ed. 266.

In support of the judgment of the lower court we are entitled to show that the judgment was right upon any ground disclosed by the record.

Ridings v. *Johnson*, 128 U. S. 212–218. 32 L. ed. 401–403, 9 Sup. Ct. Rep. 72; 3 Enc. Pl. & Pr. p. 372.

Insolvency is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. An act of insolvency takes place when this condition is demonstrated and the person has actually failed to meet some of his obligations.

Dodge v. *Martin*, 17 Fed. 660; *Buchanan* v. *Smith*, 16 Wall. 277, 21 L. ed. 280.

Although the liabilities of a corporation may greatly exceed its assets, it is not insolvent in such sense that its assets become a trust fund for *pro rata* distribution among its creditors, so long as it continues to be a going concern, and conducts its business in the ordinary way.

Comfort v. *McTeer*, 7 Lea, 652; *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Insolvency expresses the inability of a party to pay his debts as they become due in the ordinary course of business.

Toof v. *Martin*, 13 Wall. 47, 20 L. ed. 482.

In the recent case of *Earle* v. *Carson*, *supra*, this court took occasion to say that mere inadequacy of assets of a bank to pay its debts was not insolvency, but that the true definition of insolvency is failure and consequent suspension of business.

Dewey was liable only for his *pro rata* share of the debts of the bank existing at the time when he transferred his stock, and remaining unpaid at the time of the failure.

The statute provides the manner in which creditors shall be notified of the transfer of stock. The purpose of the statute is to furnish notice to future creditors.

Lantry v. *Wallace*, 182 U. S. 536, 554, 45 L. ed. 1218, 1226, 21 Sup. Ct. Rep. 878; *Waite* v. *Dowley*, 94 U. S. 527, 534, 24 L. ed. 181, 182.

The exact question involved here has been decided by the supreme court of Ohio, and upon a statute substantially similar to § 5151 of the national banking act.

Peter v. *Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894.

This court has held that only creditors who may be presumed to have extended

credit to a corporation on the faith of an increase of stock, or other stock liability, are entitled to base claims thereon.

Coit v. *North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Bank of Ft. Madison* v. *Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; *Handley* v. *Stutz*, 139 U. S. 417, 435, 35 L. ed. 227, 237, 11 Sup. Ct. Rep. 530.

The principle for which we contend is recognized in the case of *Stuffebeam* v. *De Lashmutt*, 83 Fed. 449, in which a stockholder who had been defrauded into purchasing his stock, and who had immediately rescinded the contract, was held liable nevertheless to pay his proportion of the assessment necessary to pay debts that were contracted by the bank during the period that he was the owner of the stock. The basis of the decision was the fact that creditors would be presumed to have extended credit upon the faith of his connection with the bank. As to such creditors the court could not relieve him, even in case fraud had been practised upon him.

In *Young* v. *Wempe*, 36 Fed. 354, the court held that stockholders were liable to be assessed, equally and ratably, to the extent of their statutory liability, for all debts existing while they held the stock and before they made a valid transfer of the same.

If it be contended that a person has no right deliberately to avoid future liability as a stockholder, we reply that this court has expressly held that pledgees of stock may take stock in the name of an irresponsible party without in any way indicating that the stock is held as collateral, and for the express purpose of avoiding liability.

Anderson v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *Rankin* v. *Fidelity Ins. Trust & S. D. Co.* 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.

The sale of the twenty-five shares not transferred on the books of the bank should have been sustained by the court of appeals.

Upon the authority of *Whitney* v. *Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 67, and *Earle* v. *Coyle*, 95 Fed. 99, we contend that Dewey did all that was reasonably necessary, under the circumstances, to give notice of the transfer of the stock, and that he should be relieved from liability thereon.

By taking a decree against the transferees the receiver has elected to ratify the sales made by Dewey, and this election amounts to an abandonment of his claim against the vendor of the stock.

Morrill v. *Crawford*, 51 Neb. 287, 70 N. W. 954.

Mr. Justice **Brown** delivered the opinion of the court:

Three sections of the national bank act, which are printed in the margin,† are pertinent in connection with the leading questions involved in this case.

*That the transfer of stock in corporations, [520] even when in failing circumstances, should not be unduly impeded, is essential not only to the prosperity of such corporations and the value of their stock, but to the interest of stockholders who may desire, for legitimate reasons, to change their investments or to raise money for debts incurred outside the business of such corporation. *First Nat. Bank* v. *Lanier*, 11 Wall. 369, 377, 20 L. ed. 172, 174. At the same time, the frequency with which such transfers are made for the purpose of evading the double liability imposed by the national banking act has given rise to a large amount of litigation turning upon their legality. In this connection certain propositions have been laid down by so many courts and in so many cases that they

†Sec. 5139 (U. S. Comp. Stat. 1901, p. 3461). The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

(The shares of this Nebraska bank were transferable only on the books of the bank, in person or by attorney, on surrender of the certificate that represented the shares proposed to be transferred.)

Sec. 5210 (U. S. Comp. Stat. 1901, p. 3498). The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

Sec. 5151 (U. S. Comp. Stat. 1901, p. 3465). The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; . . .

may be regarded as fundamental principles of law, applicable to all cases of this character.

(1) That a party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank and puts his name on the registry as owner, incurs an immediate liability as a stockholder, and cannot relieve himself therefrom by making a colorable transfer of his stock to another person for his own benefit, as was done by the sale to Jewett in this case. *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448; *Marcy* v. *Clark*, 17 Mass. 330; *Nathan* v. *Whitlock*, 9 Paige, 152; Cook, Stock & Stockholders, § 263.

(2) The same result follows if the stockholder, knowing, or having good reason to know, the insolvency of the bank, colludes with an irresponsible person with design to substitute the latter in his place, and thus escape individual liability, and transfers his stock to such person. It is immaterial in such case that he may be able to show a full or partial consideration for the transfer as between himself and the transferee. *Bowden* v. *Johnson* (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246.

Upon the other hand, in *Whitney* v. *Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61, certain stockholders employed an [521] auctioneer to sell their shares *at public auction. They were bidden in by a purchaser who paid the auctioneer for them and received from him the certificate of stock with a power of attorney to transfer the same in blank. The auctioneer paid the money to the original owner of stock, but no formal transfer was made on the books of the bank. Shortly afterwards the bank became insolvent and went into the hands of a receiver, who made an assessment upon the original stockholders. We held that the responsibility of the stockholders ceased upon the surrender of the certificate to the bank, and the delivery to its president of a power of attorney to transfer the stock on the books of the bank. The controlling considerations were the good faith of the stockholders in making the sale, believing the bank to be solvent, and the fact that they had done all that they could reasonably be expected to do to make a valid sale of the stock and a transfer of the certificate on the stock register.

Under the English law a shareholder may transfer his shares to an irresponsible party for a nominal consideration, though the sole purpose of the transfer be to escape liability, provided the transfer be out and out, and not merely colorable or collusive, with a secret trust attached. Under such circumstances the person making the transfer is released from liability, both as to corporate creditors and the other shareholders. Cook, Stock & Stockholders, § 266; 2 Morawetz, Priv. Corp. § 859.

The law is quite different in this country. At the same time the original stockholder cannot be held liable, unless the bank were practically insolvent at the time the transfer was made, and its condition was known or ought to have been known to the stockholder making the transfer. If the bank were in fact solvent and able to pay its debts as they matured when the transfer was made, the creditors, having ample security in the solvency of the bank, have no special interest in knowing who the stockholders are, since their only recourse to them would be in the remote contingency of the insolvency of the bank. The transferrer can only be held liable if the bank be insolvent, and such insolvency be known, or ought to have been known, *to him from his [522] relations to the bank, since the transfer is prima facie valid, and shifts to the transferee the burden of the responsibility, which can be laid upon the original stockholder only in case of bad faith, or evidence of a purpose to evade liability.

This bad faith may be shown by the fact that the bank was known to him to be insolvent; but, notwithstanding this, the transfer would be valid if made to a person of known financial responsibility, since the creditors could not suffer by the substitution of one solvent stockholder in place of another. The court of appeals, however, went further, and held that the transfer would be valid unless made to an irresponsible person unable to respond to an assessment, whose financial condition was known, or ought to have been known, to him.

There is no such limitation intimated in the case of *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465, which involved a question as to the liability of a pledgee, but in which certain rules were stated (p. 619, L. ed. p. 849, Sup. Ct. Rep. p. 470) as to the liability of shareholders, one of which was "that if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by § 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed." The case, however, is not directly in point.

The most pertinent in this connection is that of *Stuart* v. *Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274. In that case, Stuart, being an owner of one hundred shares of stock in a national bank, a director

of the bank, and a member of its finance committee, purchased certain real property of Gruetter and Joers, and, as a consideration, assumed a mortgage debt, turned over his stock in the bank as of the value of $18,000, delivered to them the certificate of the shares, and paid the balance of the agreed price in cash.

These certificates of stock were returned to the bank and new certificates issued to Gruetter and Joers, to whom Stuart repre-
[523] sented *that the bank was in a solvent and prosperous condition. The circuit court found that such representation was false to the knowledge of Stuart, and made for the purpose of inducing them to purchase the stock, and of evading and escaping his liability as a shareholder for his assessment thereon. Upon this state of facts Stuart was held liable to the receiver as the holder and owner of these shares.

The principal inquiry was whether Stuart transferred his stock to escape the liability imposed by the statute, his contention being that, if the transfer were absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made was of no consequence.

In answer to this it was said by Mr. Justice Harlan:

"There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition.

. . . . . .

"One who holds such shares—the bank being at the time insolvent—cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, . . . that it is insolvent or about to fail. A transfer with such intent and under such circumstances is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee."

The court found upon the facts "that Stuart, with knowledge of the insolvency of the bank, or, at all events, with such knowledge of facts as reasonably justified the belief that insolvency existed or was impending, sold and transferred his stock with the intent to escape individual liability. . . .
[524] *And the bank having been in fact insolvent at the time of the transfer of his stock,—which fact is not disputed,—he remained, notwithstanding such transfer, and as between the receiver and himself, a shareholder, subject to the individual liability imposed by § 5151." Although it was alleged in the bill by the receiver that Gruetter and Joers were, at the time of the transfer, pecuniarily irresponsible, there was no finding to that effect, and, in treating of the liability of Stuart, no stress was laid upon their financial condition, but the case was disposed of as one of bad faith on Stuart's part in transferring the shares at a time when he knew the bank to be insolvent. There is certainly nothing in this case to justify the inference that the receiver was bound, in making out his case, to establish the fact that the transferee was insolvent, and was known to the stockholder to be so when he transferred his stock.

In *Matteson* v. *Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419, the stockholder, while the stock was yet owned by him and stood registered in his name, died intestate, and the stock was distributed to the widow and heirs by decree of the probate court. Shortly thereafter the bank became insolvent and the receiver brought suit against the widow and children for an assessment. The defendants were held to be liable upon the ground that the obligation of a subscriber of stock is contractual in its nature, and is not extinguished by death, but, like any other contract obligation, survives and is enforceable against the estate of the stockholder, notwithstanding that the estate of the decedent had been settled and fully administered according to law, and that the insolvency of the bank occurred after the death of the intestate, citing *Richmond* v. *Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788. It is true that the case did not involve the question here presented, but, in delivering the opinion, the prior cases of *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448, and *Bowden* v. *Johnson* (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246, were cited in support of the proposition, treated as elementary, that, "where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner be held liable." P. 531, L. ed. p. 576, Sup. Ct. Rep. p. 423.

*Much stress is laid, in the opinion of the [525] court of appeals, upon the case of *Earle* v. *Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254, supposed to lend countenance to the doctrine that the receiver is bound, as part of his case, to establish the fact that the transferee was insolvent and known to the transferrer to be so at the time of the transfer. The defense was that, prior to the

suspension of the bank, the defendant had, in good faith, sold the stock standing in her name for the full market price, which had been paid her; that she had delivered up to the bank her stock certificate, with a power of attorney to make the transfer, and requested that the stock be transferred; that the officer of the bank said the transfer would be made, but it seems that the officer had failed to discharge that duty; that, as the defendant had done everything which the law required her to do to secure the transfer, she had ceased to be a stockholder, and was not responsible. It was alleged as error that the trial court refused to instruct the jury that the sale of the stock, though lawful in every other respect, could not be so treated if it were found that, at the time of the sale, the reserve of the bank was, to the knowledge of the defendant, below the limit fixed by law. P. 44, L. ed. p. 374, Sup. Ct. Rep. p. 254. This refusal was held not to be error. "Certainly," said Mr. Justice White in the opinion (p. 46, L. ed. p. 376, Sup. Ct. Rep. p. 256), "it cannot in reason be said that the power would exist to sell stock like any other personal property, if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities, in order to form an accurate judgment as to the precise condition of the bank."

In discussing the question in regard to the validity of the transfer, it was said (p. 49, L. ed. p. 377, Sup. Ct. Rep. p. 257) that "the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that, where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets [526] were then unequal to the *discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale."

The argument was made (p. 54, L. ed. p. 379, Sup. Ct. Rep. p. 259) that, as the "person to whom the stock was sold . . . was . . . insolvent, and hence unable to respond to the double liability, the sale was void, although the fact of such insolvency of the buyer was unknown to the seller." This was held to be unsound, "since it but insists that the validity of the sale of the stock is to be tested, not by the bad faith of the seller, but upon the unknown financial condition of the buyer." We find nothing in this case which impugns in any degree the authority of the prior cases, or holds that the validity of the sale is to be gauged by the financial condition of the transferee, or the knowledge of that condition by the transferrer.

1. We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling with notice of the insolvency of the bank, and with intent to evade the double liability imposed upon the stockholder by the national banking act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the ruling in *Earle* v. *Carson*, in which we held that a bona fide sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case of *Earle* v. *Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction.

The solvency of the vendee, however, is pertinent in showing that no damage could have resulted to the creditors of the bank by the transfer. Though not a necessary part of the plaintiff's *case, it may be a com- [527] plete defense, if it be shown that the sale, however fraudulent, was made to a vendee who was as able to respond to the double liability as was the vendor. The proposition that the executors are not responsible because the sales were made to solvent vendees, being defensive in its character, the burden of proof was upon them. In this particular the case is not unlike that of an ordinary action upon a contract, where the plaintiff relies upon the contract and the breach, and sues for such damages as may be reasonably supposed to follow therefrom. But it may be shown in defense that no damages really resulted; as, for instance, in an action for services, that plaintiff might have obtained other employment at the same wages; or, in an action for a failure to deliver goods, that plaintiff might have gone into the market and purchased other goods at the same price at which the defendant had agreed to sell them. In such case defendant assumes the burden of proving that no damage in fact resulted. The argument in this case really is that the receiver was bound to show, not only that Dewey was guilty of fraud, but that damages necessa-

rily resulted and that he knew that fact. The reply is that the fraud was consummated by the sale of the stock of a bank known to be insolvent, with intent to evade liability, and that the fraud is not less though the transferees happened to be solvent, but that their solvency may be proved to rebut the presumption that injury resulted to the creditors from the transfers.

While there is no express finding of the court of appeals (though there was in the circuit court) that Dewey knew, or should have known, of the insolvency of the bank at the time of the transfer, and that the transfer was made with the intent to evade his double liability as stockholder, the decree of both courts is based upon this assumption; and, as stated in the dissenting opinion, "that the final suspension of the bank, though it occurred two years and five months after Dewey's transfer of stock, is traceable, in the line of cause and effect, to the insolvency of the bank at the time of the transfer." [67 C. C. A. 414, 134 Fed. [528]534.] *We do not understand these facts to be seriously disputed.

In this connection it only remains to consider whether the transferees were financially responsible to the amount of the assessment. It is not necessary to show that they were persons of a responsibility equal to that of the original stockholder. It is sufficient that they were responsible to the amount called for by the necessities of the case,—in other words, in an amount sufficient to indicate that the creditors of the bank were not damnified by the change of ownership.

Although the evidence does not show affirmatively the insolvency of the ultimate transferees, it falls far short of showing that a decree against them for their assessment could be collected. Without going into details of the property of each one of the seven transferees, it is sufficient to say that they were either working on salaries, with no evidence of available property, outside of such salaries, or that their property consisted of encumbered real estate in Chicago of a largely speculative value; and that, in some cases, at least, the shares were paid for in real estate conveyed for the purpose of getting rid of the property and avoiding the payment of interest on the encumbrances. There is no satisfactory evidence that a decree against any one of these parties for the amount of his assessment could have been collected by ordinary process of law.

2. But, except so far as the twenty-five shares held by Jewett as the agent of Dewey at the time of the failure, we think the executors should not be held liable to the creditors who became such after the transfer. The national banking act requires (Rev. Stat. § 5210, U. S. Comp. Stat. 1901. p. 3498) a list of the names and residences of all the shareholders, and the number of shares held by each to be kept in the banking house, subject to the inspection of all the shareholders and creditors of the association; and (§ 5139, U. S. Comp. Stat. 1901, p. 3461) that every person becoming a shareholder by transfer of shares to himself shall succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles *of as- [529] sociation by which the rights, remedies, or securities of the *existing creditors* of the association shall be impaired.

The object of this legislation is evidently to apprise persons dealing with the bank of the names of the shareholders, upon whom the double liability shall be imposed in case of the insolvency of the bank. In the event of such insolvency it is only existing creditors who can claim to have been damnified by a fraudulent transfer of shares. As to them such transfer is voidable. Subsequent creditors are apprised by the published list of the names of the shareholders, to whom transfers have been made, and of the persons to whom they may have recourse for the double liability. The injustice of holding a stockholder liable for an indefinite time in the future to creditors who may have become such years after he had parted with his stock, and who were apprised of the names of the stockholders by the published list, is too manifest to require an extended comment. We are only applying to this case by analogy the ordinary rule of the common law, that a voluntary deed by a person heavily indebted is fraudulent and void as to prior creditors merely upon the ground that he was so indebted; but, as to subsequent creditors, is only void upon evidence that the deed was made in contemplation of future indebtedness. *Sexton* v. *Wheaton*, 8 Wheat. 229, 5 L. ed. 603; *Schreyer* v. *Scott*, 134 U. S. 405, 33 L. ed. 955, 10 Sup. Ct. Rep. 579; *Ridgeway* v. *Underwood*, 4 Wash. C. C. 129–137, Fed. Cas. No. 11,815; *Bennett* v. *Bedford Bank*, 11 Mass. 421.

This was the interpretation given to a similar statute by the supreme court of Ohio in *Peter* v. *Union Mfg. Co.* 56 Ohio St. 181–204, 46 N. E. 894. It is true that in Ohio a stockholder cannot escape liability to existing creditors by a transfer of his stock, however bona fide such transfer may be. But we do not see how that affects the ruling in the *Peter Case*, that he does not continue liable as to future creditors.

The case of *Bowden* v. *Johnson* (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246, turned upon the question of the fraud in a certain transfer of stock, the

conclusion being that such transfer was fraudulent, and that the original owner continued liable to the creditors of the bank.

[530] *The question as to whether such liability was limited to existing creditors or extended to future creditors was not touched upon in the opinion of the court, but, as the insolvency of the bank seems to have occurred soon after the fraudulent transfer was made, it is improbable that any future creditors existed.

There are undoubtedly cases in which we have used the general expression that, in the event of a fraudulent transfer of stock, the stockholder remains liable to the creditors of the bank, but in none of them were we called upon to discriminate between existing and subsequent creditors, since, as a rule, the insolvency of the bank followed soon after the transfer, and the distinction was not called to our attention by counsel.

It results that there must be a decree affirming the decree of the Circuit Court of Appeals so far as it holds Dewey liable for his full assessment on the twenty-five shares standing in Jewett's name, and reversing it so far as it exonerated his estate from assessment upon the remaining shares, to such amount as is necessary to satisfy the creditors existing at the time the transfer of the stock was made, and that the cause be remanded to the Circuit Court for the Northern District of Illinois for further proceedings consistent with this opinion.

Mr. Justice **White**, with whom concur Mr. Justice **McKenna** and Mr. Justice **Day**, dissenting:

To make clear the reasons for my dissent, I briefly recapitulate the facts, the issues, and the matters decided.

As a result of the failure in May, 1897, of the First National Bank of Orleans, Nebraska, the Comptroller appointed a receiver and subsequently levied an assessment of $86 a share to make good a deficiency of assets required to enable the payment of the creditors of the bank existing at the date of the failure.

In May, 1894, Dewey was the registered owner of 105 shares of the stock of the bank. In that month and year he assigned ninety-five of these shares to Jewett and they were

[531] transferred on the *stock register in the name of Jewett. Jewett then transferred on the stock register eighty of these shares to six other persons, Jewett thus remaining the registered holder of but fifteen out of the ninety-five shares transferred to him by Dewey. Subsequently Dewey transferred on the stock register the remaining ten of the original 105 shares to Jewett. At the time, therefore, of the failure of the bank, the 105 shares originally owned by Dewey had been put out of his name, and stood on the stock register of the bank as follows: twenty-five shares in the name of Jewett and eighty shares in various proportions in the names of the six persons to whom Jewett had transferred them.

The object of the bill is to hold Dewey liable on the 105 shares for the assessment levied by the Comptroller. Questions of fact and of law are involved. The first are: At the time of the failure of the bank did the 105 shares of stock stand in the name of the agent of Dewey, or if not, did they stand in the name of irresponsible persons to whom Dewey, with the knowledge of the insolvency of the bank, and to escape liability, transferred the stock? And the question of law is, If the stock was still Dewey's, or if it was transferred by him, as stated, is he liable for the assessment or for any part thereof?

The court now determines both questions of fact against Dewey. In other words, the court holds that Dewey was the owner of the twenty-five shares standing in the name of Jewett, because Jewett received the transfer merely as the agent of Dewey, and never became the owner of the stock. As to the eighty shares standing in the names of the six persons to whom Jewett transferred them, the court holds that they were transferred by Dewey to his agent, Jewett, with knowledge of the insolvency, and to avoid the statutory liability, and, to carry out this purpose, were transferred by Jewett as his (Dewey's) agent, into the names of six irresponsible persons. The questions of fact being thus decided against Dewey, the proposition of law is, in substance, decided in his favor. I say this because it is now held that Dewey is not liable, except as to the twenty-five shares, for the assessment of $86 a share to pay the debts of the bank *existing at the time of the fail- [532] ure, but only for such proportion of such assessment as may be required to pay such unsatisfied debts of the bank, if any there be, which were in existence at the several dates when the transfers of the eighty shares were made by Jewett as the agent of Dewey.

My dissent is constrained by a deep conviction of the unsoundness of the proposition now upheld exempting Dewey from liability, in respect to the eighty shares, for the call made by the Comptroller to pay the debts of the bank existing at the time of the failure, and the decision that he is only liable for such sum as may be necessary to pay the unsatisfied debts, if any, which existed when the fraudulent transfer of the stock was made.

As it is given to me to see it, this ruling is both novel and dangerous, and without the support of any administrative or ju-

dicial construction applied to the statute since it was originally enacted, more than forty years ago. To me it, moreover, seems that the ruling is repugnant both to the text and spirit of the statute, considered as an original question, and is, besides, contrary to a line of adjudications of this and other Federal courts. My endeavor shall be briefly to state the reasons by which I am led to this conclusion.

It cannot be denied that, from the date of the original enactment of the national banking act, in 1863 [12 Stat. at L. 665, chap. 58], to the present time, the Comptroller of the Currency, in making an assessment under the law to pay the debts of a failed national bank, has always made such call upon the assumption that the stockholders who were liable for assessment were so liable ratably for the amount required to pay the debts of the bank existing at the time of the failure. Such also is the case viewed from the standpoint of judicial decisions, for, although in numerous cases in this court and many cases in the lower Federal courts for years and years, questions in every aspect have been considered concerning the liability of a stockholder in a national bank who, it was alleged, had transferred his stock in fraud of the statute, no case can [533] be found where even a suggestion was *made by counsel or by the courts of the existence of the rule of limited liability which the court now upholds. In saying this I do not overlook the fact that the court in its opinion refers to an Ohio case (*Peter* v. *Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894) as sustaining the doctrine which is now announced. That case, however, did not concern a national bank, but related to an Ohio corporation; and, as I shall hereafter endeavor to demonstrate, rested solely upon the provisions of the Constitution and laws of the state of Ohio, which were not only peculiar to that state, but were directly in conflict with the principle of liability expressed in the acts of Congress concerning the responsibility of stockholders in national banks.

Whilst, of course, the absence, during such a long period of time, in administrative execution and judicial exposition, of even a suggestion that the limitation of liability now sustained was warranted by the statute, is not conclusive, it certainly is persuasive that, if such a limitation can be evolved from the law, it must be occult and strained, since it has been latent and undiscovered for forty years. But a consideration of the statute, it seems to me, will at once make clear the fact that the limitation now sanctioned has never before been intimated, because that limitation must have been considered to be repugnant to the text of the statute.

Both by the national banking act as originally adopted in 1863 and as re-enacted in 1864 [13 Stat. at L. 99, chap. 106], and as now embodied in § 5139 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3461), owners of stock in national banks were empowered to transfer that stock as personal property. The purpose of Congress to render this transfer effectual is evidenced by the omission in the re-enactment in 1864 of a provision found in the act of 1863, which might have had the effect of limiting transfers. *Earle* v. *Carson*, 188 U. S. 42, 46, 47 L. ed. 373, 376, 23 Sup. Ct. Rep. 254. And, following the plain text of the act, it has not been questioned that creditors existing at the time a stockholder made and completed a lawful transfer of his stock had no right to complain or hold the outgoing stockholder for existing debts of the bank, since, by the statute, the result of such a transfer *was to sever all connection between such [534] stockholder and the bank, wholly without reference to the consent of the then-existing creditors, and to substitute the person to whom the valid and completed transfer had been made. Now, whilst it is true that the statute requires a registry of stockholders to be kept and transfers to be noted thereon, in view of the unlimited right of a stockholder to make a lawful transfer without the consent of the creditors existing at the time of the transfer, it cannot be said that the statute gave to the creditors a right to prevent transfers or presupposed that they would contract with the bank upon the faith of a particular state of the registry, when, by the statute, that registry could be changed by lawful transfers without the power of the creditor to complain. It is true also that the statute declares (Rev. Stat. § 5139) that when a lawful transfer is made the shareholder "shall succeed to all the rights and liabilities of the prior holder of such shares." But this does not imply that existing creditors have a contract right against the transferring stockholder, since the right of such stockholder to make a lawful transfer and substitute another for himself without the consent of the creditors is an affirmance instead of a negation of the absence of the contract relation between the transferring stockholder and then-existing creditors. And this is emphasized, since the new stockholder becomes ratably liable not only for debts contracted after the transfer made to him, but for all the prior unsatisfied debts. Of course, by the statute as originally enacted and as now existing (Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465) those who were stockholders in a national bank at the

time of its failure are made equally and ratably liable to the amount of their stock for the debts of the bank then existing. But this provision does not destroy or impair the right to make a lawful transfer before the failure of a bank, since it only attaches the double liability to those who have not made a lawful transfer, and who are, in contemplation of law, stockholders at the time of the failure. Harmonizing these two sections of the statute, they import the purpose to secure the great advantage resulting [535]*from the untrammeled power to make a lawful transfer of stock, as pointed out by this court in *Earle* v. *Carson, supra*, and *First Nat. Bank* v. *Lanier*, 11 Wall. 377, 20 L. ed. 174, and yet, at the same time, when failure ensues, to give the then-existing creditors the benefit of the double liability of the then-existing stockholders.

And when the repeated adjudications of this court are considered, to me it seems that they expound the text and spirit of the statute as above pointed out; and, therefore, the rule now announced cannot be consistently upheld without overthrowing those decisions and substituting a new statute. In *Germania Nat. Bank* v. *Case* (1878) 99 U. S. 628, 25 L. ed. 448, the principle controlling the question of the liability of a stockholder in a national bank who had made a fraudulent disposition of his stock was considered. On the one hand it was insisted that, as the stockholder had a right to transfer his stock without the consent of then-existing creditors of the bank, every "out-and-out" transfer, as it was termed, should be held to be efficacious to relieve from liability at the date of the failure. On the other hand, it was contended that if a transfer was made with a knowledge of the insolvency of the bank, and to escape the statutory liability, the stockholder remained a stockholder, and was, therefore, subject to the double liability. The latter contention was sustained. The court recognized the fact that in England, when a stockholder had a right to dispose of his stock at pleasure, the rule was that every out-and-out transfer which was not a mere sham severed the connection of the stockholder with the corporation, thus causing him to be no longer a stockholder, and leaving him entirely free from liability. But the American rule was held to be different. Expounding that rule, it was declared that, both in the case where a stockholder made a sham sale or transferred his stock to an irresponsible person, with knowledge of the insolvency of the bank, and for the purpose of escaping the statutory liability, the transferrer remained a stockholder for the purpose of the statutory double liability. In [536]other words, *the court declared that, in both such cases, the transfer, in legal intendment, at the election of creditors, would be held to be a mere simulation, leaving the stockholder, despite such transfer, continuously subject to his statutory liability.

Without attempting to review all of the many other cases decided by this court involving controversies on this subject, it may not be doubted that the substantial doctrine of the case just reviewed has been reiterated time and time again and is the settled law of this court. Thus in *Bowden* v. *Johnson*, (*Adams* v. *Johnson*) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246, Johnson was the holder of stock in a national bank. On February 14, 1874, his stock was transferred on the books of the bank in the name of a Mrs. Valentine. On May 26, 1874, more than three months after such transfer, the bank failed and the Comptroller made an assessment to pay the debts existing at the time of the failure, and the suit had for its object the enforcement of this assessment against Johnson. It was found that the transfer to Mrs. Valentine was not a sham, but that, at the time it was made, the bank was insolvent, that Johnson knew of the insolvency, and transferred his stock to avoid liability, and with the knowledge that Mrs. Valentine was irresponsible. Coming to consider the contention, under these facts, that Johnson could not be held for the debts existing at the time of the failure, the court expressly reiterated the ruling in the *Case Case*, held that a shareholder who made a fraudulent transfer of the kind under consideration continued liable as a stockholder, and the assessment which had been made by the Comptroller for the debts existing at the time of the failure was adjudged to be valid, although such failure happened months after the fraudulent transfer. In the course of the opinion the court said (p. 261, L. ed. p. 389, Sup. Ct. Rep. p. 254):

"But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect *of the shares of [537] stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee.

"The appellees contend that the statute

does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in *Germania Nat. Bank* v. *Case, supra,* that a transfer on the books of the bank is not, in all cases, enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out-and-out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made with the intent of escaping liability, and defeating the rights given by statute to creditors. Mrs. Valentine might be liable as a shareholder succeeding to the liabilities of Johnson, because she has voluntarily assumed that position; but that is no reason why Johnson should not, at the election of creditors, still be treated as a shareholder, he having, to escape liability, perpetrated a fraud on the statute. This is the view enforced by the decision of the Chief Justice in *Davis* v. *Stevens,* 17 Blatchf. 259, Fed. Cas. No. 3,653."

Again, in *Stuart* v. *Hayden,* 169 U. S. 1; 42 L. ed. 639, 18 Sup. Ct. Rep. 274, where it was found that a transfer of stock in a national bank had been made with knowledge on the part of the transferrer of the insolvency of the bank, and to escape the double liability, the court, after approvingly citing the previous cases, said (p. 14, L. ed. p. 643, Sup. Ct. Rep. p. 278):

"And the bank having been, in fact, insolvent at the time of the transfer of his
[538] stock—which fact is not disputed—he *[the transferrer] remained, notwithstanding such transfer, as between the receiver and himself, a shareholder, subject to the individual liability imposed by § 5151."

I need not stop to refer to the subsequent adjudications of this court which expressly reiterate the rulings just reviewed, since they are approvingly cited in the opinion of the court, and, indeed, are made the basis of the ruling. But to my mind it seems clear that the limited liability of Dewey which the court now applies to the eighty shares is repugnant to the previous decisions, and therefore the effect of citing approvingly the cases in question and yet deciding, as the court now does, is but, at one and the same time, to approve and disapprove the previous decisions. Let me briefly state why I think this conclusion inevitable. Certain it is that the previous cases expressly and unequivocally decided that a stockholder who, in fraud of the liability as stated, makes a transfer of his stock, remains, at the election of the creditors, a stockholder to the same extent as if the transfer had not been made, or as if it had been a mere sham. Can there be doubt of this in view of the language of the *Case Case,* announcing the American rule, of the express statement to that effect in the *Bowden Case,* and the fact that, in that case, the liability, under the call of the Comptroller, was enforced for the debts existing months after the completed transfer, and not merely for the unsatisfied debts existing at the time of the transfer? Is this not certain also, in view of the declaration in *Stuart* v. *Hayden,* that, because of the fraudulent transfer, the stockholder continued to be liable under the statute? And mark, in the *Hayden Case,* as if *ex industria* to exclude the conception that the fraud was only relative as to creditors existing at the time of the fraudulent transfer, the court expressly declared that the liability of the transferring stockholder was to the receiver and according to the terms of the statute. And this, but in different form, reiterated the declaration made in the *Bowden Case,* that the fraud was a fraud on the statute, and not, therefore, *simply relative as to particu- [539
lar creditors existing at the time.

Besides, to me it seems that the rule of limited liability now announced is self-destructive. What is the liability which the statute imposes? Is it a responsibility only to pay debts of the bank as they existed at the time a fraudulent transfer was made? Not so; for the only liability imposed by the statute on the stockholders is an obligation to respond to an equal and ratable assessment made by the Comptroller to pay the debts existing at the time of the failure, Rev. Stat. §§ 5151, 5234, U. S. Comp. Stat. 1901, pp. 3465, 3507. From this it results that, if a person is not a stockholder at the time of the failure, he is liable for nothing; and if he is such stockholder, he is liable for the statutory sum, and no other. This plain result of the statute to my mind demonstrates the error of the conclusion as to limited liability now announced. For, if Dewey was not a stockholder at the time of the failure, there is an entire absence of statutory authority to make any assessment whatever upon him; and, if he was such stockholder, then the statute fixed the measure of liability, and there is no power to substitute, by judicial discretion, a liability which the statute does not impose, and which, on the contrary, is excluded by its express terms. In other words, the statute imposes a uniform and ratable liability upon all stockholders who are liable at all, and affords no justification for assessing one

stockholder at one amount and another stockholder in another sum, upon the theory that the date of the contracting of debts, and not the date of the failure, is the test of liability.

And that this departure from the long-received and judicially-sanctioned construction of the statute will tend to destroy the security of the national banking system by rendering the double liability impossible of enforcement results from a few obvious considerations. Thus, under the rule now announced, one who owns or controls a majority of the stock of a national bank, knowing it to be insolvent, can transfer his stock to wholly irresponsible persons in order to [540]avoid the statutory liability, *and, by postponing the date of open failure until the existing debts of the bank have been extinguished by novation, leave the creditors existing at the time of the failure with substantially no stockholder to respond to the double liability. Indeed, this condition of things cannot be more cogently made manifest than by considering the facts in this case, as found by the court. What are they? They are that Dewey was an officer of the bank and knew its hopelessly insolvent condition, and that he transferred his stock to avoid the liability, leaving the share in the name of his agent, or causing that agent to put the same in the names of irresponsible people. In effect controlling the affairs of the bank, Dewey delays the open failure until, by a change of the situation, although the indebtedness of the bank may not have diminished, yet, by a mere substitution of creditors, the particular debts due at the time of his fraudulent transfers have largely been extinguished. And thus, when the open failure comes, it is now decided that, as to the shares fraudulently transferred by his agent, Dewey owes nothing towards payment of the debts of the bank, except as to debts still existing, which were contracted prior to the fraudulent transfers. In other words, it is held that, although the bank was insolvent prior to and at the time of the commission of the fraudulent acts, and continued so to the time of the failure, the fraudulent transferrer has accomplished the wrong which the statute was intended to prevent by holding back and preventing the open failure until he had discharged, at the expense of the subsequent creditors of the bank, the indebtedness existing at the time of the fraudulent transfers. Under the rule hitherto prevailing the duty of the administrative officer was plainly marked out in the statute,—to realize the assets, and, if necessary to meet a deficiency of assets, to assess ratably the legal stockholders, —a simple and effective rule. Now the duty of the administrative officer is wholly changed. He must analyze the situation at the bank, he must determine who were creditors at this time and that, in order to fix the liability of stockholders, and, when this process is gone through *with, instead of [541]levying the equal and ratable statutory liability, he must call upon the shareholders for unequal and unratable contributions.

I can see no reason for now changing the construction of the national banking act as applied in forty years of administration, as embodied in the text and spirit of the statute, and as sanctioned by a long line of decisions of this court, especially when the inevitable consequence of such change will, in my judgment, operate to the detriment of the public interest and the security and stability of national banks which it was the purpose of Congress by the statute to secure.

It remains only to briefly notice the case of *Peter* v. *Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894, heretofore referred to and cited by the court in its opinion. To understand that case a prior decision of the supreme court of Ohio (*Brown* v. *Hitchcock*, 36 Ohio St. 667), of which the opinion in the *Peter Case* was but an evolution, must be taken into view. In *Brown* v. *Hitchcock*, interpreting the Ohio law, the supreme court of Ohio held that, by the effect of the Constitution and laws of that state, a stockholder in an Ohio corporation who was subjected to a double liability was impotent to dispose of his stock, however bona fide might be the sale or disposition thereof, so as to escape liability to creditors who were such at the time of the transfer. In other words, the court held that the effect of that double liability imposed by the Ohio statutes was to prevent an efficacious transfer of the stock without the consent of the creditors, since such creditors, despite a bona fide sale, as long as debts contracted previously remained unsatisfied, had the power, if circumstances required, to proceed against the stockholders who were such at the time the debt was contracted, and this irrespective of whether the corporation was, at the time of the transfer, solvent or insolvent. Subsequently, in the *Peter Case*, the Ohio court was called upon to determine how far a transfer of stock by a stockholder in an Ohio corporation operated to relieve him from future debts of the corporation. As to this question the court, in effect, *ap- [542]plied to the Ohio statutes the English "out-and-out" rule; in other words, that court, whilst reiterating its ruling as to existing creditors, decided that a stockholder who made an out-and-out sale, although the corporation was insolvent and the purpose was to escape the double liability, was dis-

charged from any responsibility to future creditors, although remaining liable to existing creditors. The difference between the Ohio statutes, as thus expounded, and the national banking act, as expounded by this court, is at once demonstrated by the statement that, under the national banking act, the stockholder, as repeatedly decided by this court, has a right, when acting in good faith, to dispose of his stock and escape liability both as to existing and future creditors, and that the theory of out-and-out transfers as to future debts, applied by the Ohio court to the statute of that state, was expressly repudiated by this court as to the national banking act in the Case and subsequent decisions. To treat, then, the Ohio case as authoritative here, is, in effect, but to expunge the national banking act from the statutes of the United States, and to substitute in its stead the statutes of Ohio, when such statutes have a wholly different significance as interpreted by the highest court of that state.

I therefore dissent.

I am authorized to say that Mr. Justice **McKenna** and Mr. Justice **Day** concur in this dissent.

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[543]*FRANKLIN McNEILL, Samuel L. Rogers, Eugene C. Beddingfield, and the Greensboro Ice & Coal Company, *Appts.*,

v.

SOUTHERN RAILWAY COMPANY. (No. 370.)

SOUTHERN RAILWAY COMPANY, *Appt.*,

v.

FRANKLIN McNEILL, Samuel L. Rogers, Eugene C. Beddingfield, and the Greensboro Ice & Coal Company. (No. 594.)

(See S. C. Reporter's ed. 543–563.)

1. Courts—jurisdiction of circuit court—amount in dispute.—A controversy between a state corporation commission and a railway company, which involves not only the right to enforce against the railway company the payment of statutory penalties in excess of $2,000, but also the right of that company to carry on interstate commerce in the state without being subject to orders and directions of the corporation commission, which so directly burdened such commerce as to amount to a regulation thereof, which right is alleged in the bill to be of the necessary jurisdictional value, such allegation being supported by testimony, and found to be the fact, is within the jurisdiction of a Federal circuit court, although a dispute of some $146 demurrage may have been the origin of the litigation.

2. State—immunity from suit.—A suit to restrain the interference by a state corporation commission with the property and interstate business of a railway company upon the assumed authority of a state statute, which the bill alleges to violate rights of the railway company protected by the Constitution of the United States, is not, in any proper sense, a suit against the state.

3. Interstate Commerce—state regulation.—An order of a state corporation commission compelling a railway company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding is an unlawful interference with interstate commerce, whether viewed as an assertion by the commission of its general powers over carriers, or of its power to make the order in a particular case in favor of a given person or corporation.

[Nos. 370, 594.]

Argued April 2, 3, 1906. Decided May 28, 1906.

APPEAL and CROSS APPEAL from the Circuit Court of the United States for the Eastern District of North Carolina to review a decree enjoining the enforcement of any orders of a state corporation commission relating to interstate commerce, and enjoining actions to recover penalties or damages for the violations of such orders. Modified by limiting the decree so as to adjudge the invalidity of the particular order complained of, to restrain actions for the recovery of penalties or damages founded upon the disobedience of such order, and to forbid future interference under like circumstances and conditions with the interstate business of the railway company, and *as so modified, affirmed.*

See same case below, 134 Fed. 82.

Statement by Mr. Justice **White:**

The Southern Railway Company, a corporation organized under the laws of the state of Virginia, operates, among others, a line of railway passing through Greensboro, North Carolina. At that place the Greensboro Ice & Coal Company, during the times hereafter mentioned, had a coal and

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NOTE.—*On the jurisdiction of a Federal circuit court as depending upon amount in controversy*—see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent Stribling Shoe Co. v. Roper, 36 C. C. A. 459; and Rich v. Bray, 2 L.R.A. 226.

On suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842; and Tindall v. Wesley, 13 C. C. A. 165.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

wood yard, located some distance from the main track and right of way of the railroad. From this main track, however, there was a private siding or spur track extending across the land of private persons to the establishment of the ice and coal company. In consequence of the views expressed in the opinion it is unnecessary to review the facts as to the construction of this spur track, or to detail the course of dealing between the parties concerning it prior to the origin of this controversy. Certain it is that at one time the railroad delivered cars consigned to the ice and coal company from its main track onto the spur track in question. A dispute arose between the railway company and the ice and coal company concerning demurrage on thirteen cars containing coal and wood consigned to the latter company. In consequence of the refusal of the ice and coal company to pay these charges, the railway, on October 12, 1903, notified the ice and coal company that after October 17, 1903, it would only deliver cars, consigned to the ice and coal company on the public tracks of the railway company at a place known as the team track, set aside for the delivery to the public generally of merchandise of that character. After receiving this notice the ice and coal company ordered four cars of coal from points in the states of Pennsylvania, West Virginia, and Tennessee. These cars reached Greensboro between October 18, 1903, and October 22, 1903, were placed upon the team track, and delivery was tendered to the ice and coal company. That company, however, declined to receive or unload the cars elsewhere than on the siding above referred to. An informal complaint on the subject was made by letter on October 20, 1903, to the North Carolina corporation commission, composed of the appellants Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield. After con-
[545] versations had with *officers of the railway company, the commission, on October 31, 1903, made an order requiring the railway company, upon payment of freight charges, to make delivery of the cars beyond its right of way and on the siding referred to. Hearing was had on exceptions filed on behalf of the railway company, and on December 10, 1903, the commission made an order overruling the exceptions. The railway company appealed to the circuit court of Guilford county.

In the meantime, on November 2, 1903, after demurrage or car service charges had attached in respect to the four cars of coal, and to prevent unnecessary interference with its other business, the railway company removed the cars in question from the team track and placed them on a distant siding.

By chapter 164 of the Public Laws of North Carolina for 1899, creating the corporation commission, and by the acts amendatory thereof, as contained in chapter 20, revisal of 1905, as amended in 1905, it was provided as follows:

"1086. For Violating Rules.—If any railroad company doing business in this state, by its agents or employees, shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if, after due notice of such violation, given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer, if residing in the state, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by the commission, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of $500. 1899, chap. 164, § 15.

"1087. Refusing to Obey Orders of Commission.—Any railroad or other corporation which violates any of the provisions of this chapter, or refuses to conform to or obey any rule, order, or regulation of the corporation commission, shall, in addition to the other penalties prescribed in this chapter, forfeit and *pay the sum of $500 for each [546]
offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter, or continues to refuse to obey or perform any rule, order, or regulation prescribed by the corporation commission, shall be a separate offense. 1899, chap. 164, § 23.

. . . . . .

"1091. Violation of Rules, Causing Injury; Damages; Limitation.—If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have the right of action and recovery for such wrong or injury in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that, in case of wilful violation of law, such railroad company shall be liable to exemplary damages; Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. 1899, chap. 164, § 16."

On January 5, 1904, the bill in this case was filed in the circuit court of the United States for the eastern district of North Carolina to perpetually enjoin the bringing of actions by the ice and coal company and

by the commission to recover penalties or damages under the authority of the aforesaid statutory provisions, because of the noncompliance of the railway company with the order of the commission. As grounds for the relief prayed it was averred that the railway company had a common defense based upon the commerce clause of the Constitution of the United States, the provisions of the act of Congress to regulate commerce, and the due process clause of the Constitution, and also because the corporation commission was an illegal body, as it was empowered to exercise judicial, executive, and legislative functions, contrary to the Constitutions of the state and of the
[547] United States. After the filing *of answers the cause was referred to a master to report the testimony and findings of fact to the court. The court, concluding that the order of the corporation commission was repugnant to the commerce clause of the Constitution, entered a decree in favor of the railway company, and perpetually enjoined the enforcement of the order of the corporation commission and the bringing of actions to recover penalties or damages for a violation of that order. 134 Fed. 82. The corporation commission and the ice and coal company appealed and the railway company prosecuted a cross appeal upon the ground that the court below erred in not deciding that the corporation commission was an unconstitutional body because of the alleged mixed and peculiar character of the functions conferred upon it by the state statutes.

Messrs. **R. H. Battle, E. J. Justice,** and **Robert D. Gilmer** argued the cause and filed a brief for McNeill *et al.:*

The requisite jurisdictional amount was not involved.

Elgin v. *Marshall,* 106 U. S. 578, 27 L. ed. 249, 1 Sup. Ct. Rep. 484; *Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *United States ex rel. Trask* v. *Wanamaker,* 147 U. S. 149, 37 L. ed. 118, 13 Sup. Ct. Rep. 279; *Washington & G. R. Co.* v. *District of Columbia,* 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; *New England Mortg. Secur. Co.* v. *Gay,* 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Baltimore* v. *Postal Teleg. Cable Co.* 62 Fed. 500.

Where state legislation is not intended to impede or interfere with interstate commerce, but rather to aid in transportation or safe and prompt delivery of freight to consignees after it has reached its place of destination, such legislation is not in conflict with the Constitution of the United States.

New York v. *Miln,* 11 Pet. 102, 9 L. ed. 648; *Mobile County* v. *Kimball,* 102 U. S. 691, 26 L. ed. 238; *Bagg* v. *Wilmington, C. & A. R. Co.* 109 N. C. 281, 14 L.R.A. 597, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 571, 14 S. E. 79; *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Western U. Teleg. Co.* v. *James,* 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Covington & C. Bridge Co.* v. *Kentucky,* 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

Under the police power the state can legislate for the public convenience as well as for the public health, morals, and safety.

Lake Shore & M. S. R. Co. v. *Ohio,* 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Gilman* v. *Philadelphia,* 3 Wall. 713, 729, 18 L. ed. 96, 100; *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 294, 45 L. ed. 197, 21 Sup. Ct. Rep. 115; *Olsen* v. *Smith,* 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; *Pennsylvania R. Co.* v. *Hughes,* 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Railroad Commission Cases,* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Missouri, K. & T. R. Co.* v. *Haber,* 169 U. S. 613, 42 L. ed. 879, 18 Sup. Ct. Rep. 488; *Chicago, M. & St. P. R. Co.* v. *Solan,* 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

Messrs. **Claudian B. Northrop** and **Fabius H. Busbee** argued the cause and filed a brief for the Southern Railway Company:

The matter in dispute involves a sum or value exceeding $2,000, exclusive of interest and costs.

Butchers' & D. Stock-Yards Co. v. *Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35; *Nashville, C. & St. L. R. Co.* v. *McConnell,* 82 Fed. 65; *Scott* v. *Donald,* 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *Texas & P. R. Co.* v. *Kuteman,* 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547; *Louisville & N. R. Co.* v. *Smith,* 63 C. C. A. 1, 128 Fed. 1.

This is not a suit against the state of North Carolina.

Scott v. *Donald, supra.*

The question whether a suit against the state official is or is not a suit against the state itself depends not at all upon the parties named in the record, but upon the nature of the wrong complained of, and the character and extent of the relief sought.

Louisiana v. *Jumel,* 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Louisiana ex rel. New York Guaranty & I. Co.* v. *Steele,* 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; *Hagood* v. *Southern,* 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608;

Hans v. *Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *North Carolina* v. *Temple*, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; *Christian* v. *Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

Cases of the class in which it has been held that actions against state officials, to restrain them from the commission of wrongful acts to the prejudice of the plaintiff's rights, are not suits against the state, are quite numerous, and seem to cover the entire ground in controversy in this case.

Osborn v. *Bank of United States*, 9 Wheat. 738, 842, 6 L. ed. 204, 229; *Davis* v. *Gray*, 16 Wall. 203, 220, 21 L. ed. 447, 453; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 16, 35 L. ed. 363, 367, 11 Sup. Ct. Rep. 699; *Hans* v. *Louisiana*, *supra*; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. ed. 623; *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *United States* v. *Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457; *The Siren* (*The Siren* v. *United States*) 7 Wall. 152, 19 L. ed. 129; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Dodge* v. *Woolsey*, 18 How. 331, 15 L. ed. 401; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Scott* v. *Donald*, *supra*; *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Belknap* v. *Schild*, 161 U. S. 10–18, 40 L. ed. 599–601, 16 Sup. Ct. Rep. 443.

The four cars of coal in question were and are interstate commerce, and beyond control of the North Carolina corporation commission.

Rhodes v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Wall* v. *Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; *The Daniel Ball* (*The Daniel Ball* v. *United States*) 10 Wall. 565, 19 L. ed. 1002; *Connery* v. *Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365; *Kelley* v. *Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.

The act to regulate commerce, itself, provides that it shall and does apply to the transportation of passengers or property from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country.

Congress having legislated, no state regulations can apply.

Gulf, C. & S. F. R. Co. v. *Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Gulf, C. & S. F. R. Co.* v. *Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

Switching and terminal charges are exclusively covered by act of Congress.

Fielder v. *Missouri, K. & T. R. Co.* (Tex. Civ. App.) 42 S. W. 362; *Walker* v. *Keenan*, 19 C. C. A. 668, 34 U. S. App. 691, 73 Fed. 755; *Interstate Commerce Commission* v. *Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.* 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824.

An article of interstate commerce remains wholly free from state control as long as it is in the original package.

Leisy v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

Unquestionably coal stored in a car in which it originally started on its transit is still in the original package. There can be no possible doubt on this subject.

Austin v. *Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

And it has been decided by the supreme court of North Carolina that said state has no control over interstate commerce.

McGwigan v. *Wilmington & W. R. Co.* 95 N. C. 428, 59 Am. Rep. 247.

The rules and orders of the North Carolina corporation commission are void because they deal with a subject national in its character, requiring uniform treatment throughout the United States, and a subject over which the action of Congress is exclusive, the states being powerless to interfere at all.

Covington & C. Bridge Co. v. *Kentucky*, 154 U. S. 204, 209, 216, 38 L. ed. 962, 965, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Covington & C. Elev. R. & Transfer & Bridge Co.* v. *Kentucky*, 154 U. S. 224, 38 L. ed. 970, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 1094; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Western U. Teleg. Co.* v. *James*, 162 U. S. 650, 655, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 416, 41 L. ed. 489, 494, 17 Sup. Ct. Rep. 130; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U.

S. 578, 586, 41 L. ed. 560, 562, 17 Sup. Ct. Rep. 198; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 153, 41 L. ed. 953, 954, 17 Sup. Ct. Rep. 532; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 623, 43 L. ed. 823, 834, 19 Sup. Ct. Rep. 553; *Keokuk & H. Bridge Co.* v. *Illinois*, 175 U. S. 626, 632, 44 L. ed. 299, 302, 20 Sup. Ct. Rep. 205; *Hanley* v. *Kansas City Southern R. Co.* 187 U. S. 617, 620, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; *Lottery Case* (*Champion* v. *Ames*) 188 U. S. 321, 352, 47 L. ed. 492, 499, 23 Sup. Ct. Rep. 321; *St. Clair County* v. *Interstate Sand & Car Transfer Co.* 192 U. S. 454, 457, 465, 48 L. ed. 518, 520, 523, 24 Sup. Ct. Rep. 300; *Robbins* v. *Taxing District*, 120 U. S. 489, 492, 493, 30 L. ed. 694, 695, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Fargo* v. *Michigan* (*Fargo* v. *Stevens*) 121 U. S. 230, 238, 247, 30 L. ed. 888, 892, 895, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 346, 30 L. ed. 1200, 1205, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 357, 30 L. ed. 1187, 1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Mugler* v. *Kansas*, 123 U. S. 623, 676, 31 L. ed. 205, 215, 8 Sup. Ct. Rep. 273; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 494, 508, 31 L. ed. 710, 715, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Dow* v. *Beidelman*, 125 U. S. 680, 689, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Leloup* v. *Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 589, 591, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Leisy* v. *Hardin*, 135 U. S. 100, 110, 120, 152, 34 L. ed. 128, 132, 136, 147, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 120, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Budd* v. *New York*, 143 U. S. 517, 537, 547, 36 L. ed. 247, 253, 256, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass* v. *North Dakota*, 153 U. S. 391, 405, 38 L. ed. 757, 761, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 234, 41 L. ed. 683, 700, 17 Sup. Ct. Rep. 305; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 303, 43 L. ed. 702, 709, 19 Sup. Ct. Rep. 465; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 687, 43 L. ed. 858, 860, 19 Sup. Ct. Rep. 565; *Lindsay & P. Co.* v. *Mullen*, 176 U. S. 126, 147, 44 L. ed. 400, 408, 20 Sup. Ct. Rep. 325; *Cleveland, C. C. & St. L. R. Co.* v. *Illinois*, 177 U. S. 514, 518, 44 L. ed. 868, 870, 20 Sup. Ct. Rep. 722; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 85, 86, 46 L. ed. 92, 99, 22 Sup. Ct. Rep. 30; *Louisville & N. R. Co.* v. *Eubank*, 184 U. S. 27, 36, 46 L. ed. 416, 420, 22 Sup. Ct. Rep. 277; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 150, 46 L. ed. 847, 849, 22 Sup. Ct. Rep. 605; *Hanley* v. *Kansas City Southern R. Co.* 187 U. S. 617, 619, 620, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; *Lottery Case* (*Champion* v. *Ames*) *supra*; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 378, 48 L. ed. 679, 717, 24 Sup. Ct. Rep. 436; *Illinois C. R. Co.* v. *Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Central Stock Yards Co.* v. *Louisville & N. R. Co.* 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339.

Cases which this court has decided from time to time wherein certain state statutes have been upheld as not interfering with interstate commerce will be searched in vain for any language showing the slightest modification of the doctrine laid down in the *Wabash Case*, and that doctrine remains firmly established to this day; namely, that no state can pass any law to regulate, fix, or make "rules for prices, for modes of transfer, for times and modes of delivery" of interstate freight.

Missouri, K. & T. R. Co. v. *Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Reid* v. *Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Plessy* v. *Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Hennington* v. *Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 325, 43 L. ed. 702, 717, 19 Sup. Ct. Rep. 465; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Gladson* v. *Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Richmond & A. R. Co.* v. *R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep.

335; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Illinois C. R. Co.* v. *Illinois*, *supra*; *Cleveland, C. C. & St. L. R. Co.* v. *Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Because Congress has in fact legislated on this particular subject and the field is exclusively occupied by existing acts of the Federal government.

Gulf, C. & S. F. R. Co. v. *Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Louisville & N. R. Co.* v. *Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; *Interstate Commerce Commission* v. *Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.* 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824; *Central Stock Yards Co.* v. *Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; *Riddle* v. *Pittsburgh & L. E. R. Co.* 1 Inters. Com. Rep. 688; *Riddle* v. *New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787; *Heck* v. *East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 775; *Re Mallory*, 1 Inters. Com. Rep. 294; *Rice* v. *Western New York & P. R. Co.* 3 Inters. Com. Rep. 162; *Independent Refiners' Asso.* v. *Western New York & P. R. Co.* 4 Inters. Com. Rep. 162; *Cattle Raisers' Asso.* v. *Fort Worth & D. C. R. Co.* 7 Inters. Com. Rep. 513; *American Warehousemen's Asso.* v. *Illinois C. R. Co.* 7 Inters. Com. Rep. 556; *Pennsylvania Millers' State Asso.* v. *Philadelphia & R. R. Co.* 8 Inters. Com. Rep. 531; *Palmer's Dock Hay & Produce Bd. of Trade* v. *Pennsylvania R. Co.* 9 Inters. Com. Rep. 61; *United States ex rel. Greenbrier Coal & Coke Co.* v. *Norfolk & W. R. Co.* 143 Fed. 266; *Fielder* v. *Missouri, K. & T. R. Co.* (Tex. Civ. App.) 42 S. W. 362.

[558] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The legal principle which controls the determination of this cause renders it unnecessary to state many of the facts contained in this voluminous record, or to consider and pass upon a number of the legal propositions urged in the cause. But three questions are essential to be passed upon. They are: First. Whether the record discloses that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. Second. Whether, as to the individual defendants below, this cause in fact was a suit against the state of North Carolina. Third. Whether the order and decision of the corporation commission of North Carolina, and the statutes of that state upon which the same was based, were void because in conflict with the commerce clause of the Constitution and the act of Congress to regulate commerce.

1. It was urged in argument on behalf of the commission and the ice and coal company that the extra cost or expense, if any, of placing the four cars of coal on the siding, was the matter in controversy. In the court below it would seem to have been claimed that the $146 demurrage was the question at issue. However this may be, as said by the trial court, although the demurrage dispute may have been the origin of the litigation, there is involved in the controversy presented by the bill not only the right to enforce against the railway company the payment of statutory penalties much in excess of $2,000, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burdened such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony, and the master and the court below have found such to be the fact. *There is no merit in the contention that [559] there is a want of jurisdiction to entertain the writ of error.

2. We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not, in any proper sense, one against the state. *Scott* v. *Donald*, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; *Fitts* v. *McGhee*, 172 U. S. 529, 530, 43 L. ed. 541, 19 Sup. Ct. Rep. 269.

3. The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that state, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of. *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

By § 1066 of the revisal of 1905, the general powers of the North Carolina corporation commission were thus defined:

"1066. General Powers.—The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations, and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks, and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter and the laws regulating such companies. 1899, chap. 164; 1901, chap. 679."

By § 1100 it was provided as follows:

"1100. Demurrage; Storage; Placing and Loading of Cars.—The commission shall make rules, regulations, and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing *railroad companies in the placing of cars [560] for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment. 1903, chap. 342."

Under these circumstances it is undoubted that, by a circular, numbered 36, and dated July 9, 1903, the corporation commission promulgated rules fully regulating the right of railway companies to exact and the amount of charges which might be made for storage, demurrage, etc. And the pleadings make it clear that the order of the corporation commission complained of was not made upon the assumption of any supposed contract right which the corporation commission, as a judicial tribunal, was enforcing as between the ice and coal company and the railway company, but was exclusively rested upon the general administrative authority which the corporation commission deemed it had power to exercise in virtue of the rights delegated to it by the statutes of North Carolina, as above stated. Thus, in paragraph 12 of the answer, the corporation commission averred as follows:

"These defendants are advised that the orders made by them, hereinbefore referred to, do not constitute an interference with interstate commerce, as alleged in said paragraph 12 (referring to bill of complaint); nor with the right of the complainant to conduct its business according to its reasonable rules and regulations, except so far as the corporation commission has the right and power to control its rules and regulations by virtue of said act creating the corporation commission, and the amendment thereto, contained in chapter 342, Public Laws 1903, whereby the power is expressly conferred upon the North Carolina corporation commission, by subsection 26, 'to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment.' And these defendants further say that, having full power to provide for placing cars for unloading, and in conformity with the rules of the said North *Carolina [561] corporation commission, the orders complained of in the bill were in strict conformity to the law, and finally adjudged and made after the complainant company had full opportunity to make defense as to its alleged rights in the premises."

Without at all questioning the right of the state of North Carolina, in the exercise of its police authority, to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the state, or under its authority, which directly burdens interstate commerce, is a regulation of such commerce, and repugnant to the Constitution of the United States. *Houston & T. C. R. Co.* v. *Mayes*, 201 U. S. 321, *ante*, 772, 26 Sup. Ct. Rep. 491; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

Not being called upon to do so, we do not pass upon all the general regulations formulated by the commission on the subject stated, but are clearly of opinion that the court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was, in its very nature, a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations *and the subjecting to undue disadvantages [562] by carriers engaged in interstate commerce.

The direct burden and resulting regula-

tion of interstate commerce operated by an alleged assertion of state authority similar in character to the one here involved was passed upon by the circuit court of appeals for the sixth circuit in *Central Stock Yards Co.* v. *Louisville & N. R. Co.* 63 L. R. A. 213, 55 C. C. A. 63, 118 Fed. 113. The court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock, moving in the channels of interstate commerce, at a particular place beyond its own line, different from the general place of delivery established by the railway company. In pointing out that, if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said (p. 219, 63 L. R. A., p. 70, 55 C. C. A. and p. 120, 118 Fed):

"It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

As we conclude that the court below rightly decreed that the order complained of was invalid because amounting to an unlawful interference with interstate commerce, we deem it unnecessary to consider the contentions made on the cross appeal of the railway company. And because we confine our decision to the issue which necessarily arises,
[563] we do not intimate any *opinion upon the question pressed at bar as to whether an order which was solely applicable to purely state business, directing a carrier to deliver property upon a private track beyond the line of the railway company, would be repugnant to the due process clause of the Constitution.

The final decree which the circuit court entered, and the writ of perpetual injunction issued thereon, were, however, much broader than the necessities of the case required, and should be limited so as to adjudge the invalidity of the order complained of, restrain the institution by the defendant of suits or actions for the recovery of penalties or damages founded upon the disobedience of such order, and forbid future interferences, under like circumstances and conditions, with the interstate commerce business of the railway company. *As so modified, the decree below is affirmed.*

UNITED STATES, *Appt.*,
v.
AMERICAN SUGAR REFINING COMPANY.

(See S. C. Reporter's ed. 563–580.)

1. **Treaties—when operative.**—The date when a treaty is to go into effect is to be fixed, not by its provision that it is to become operative ten days after exchange of ratifications, but by an act of Congress, where the Senate has added an amendment to the treaty, declaring that it shall not take effect until approved by Congress.
2. **Statutes—retrospective effect—legislation to render treaty operative.**—A retrospective operation will not be given to the provision of the act of December 17, 1903 (33 Stat. at L. 3, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 393), that the treaty with Cuba of December 11, 1902, shall become effective on the tenth day after the exchange of ratifications, because such ratifications had in fact been exchanged some time before the statute was enacted.
3. **Duties on Cuban imports.**—Imports from Cuba were not entitled, under the treaty of December 11, 1902, to the 20 per cent reduction from the duties imposed by the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), until December 27, 1903,— the date proclaimed by the President of the United States and the President of the Cuban Republic for the commencement of the operation of the treaty.

[No. 269.]

Argued April 27, 1906. Decided May 28, 1906.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment reversing the decision of the board of appraisers that goods imported from Cuba between June 12 and September 28, 1903, were chargeable with full duties. *Reversed* and remanded, with instructions to affirm the order of the Board of General Appraisers.

See same case below, 136 Fed. 508.

NOTE.—*As to retrospective legislation*—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Stewart v. Vandervort, 12 L.R.A. 50; Otoe County v. Baldwin, 28 L. ed. U. S. 331; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

Statement by Mr. Justice **McKenna:**

The question in the case is whether certain sugars which were imported between the 12th of June and the 28th of September, 1903, were chargeable with full duties under the tariff act of July 24, 1897 [30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626], or were entitled to 20 per cent reduction of duties prescribed by that act, under the treaty between the United States and Cuba of the date December 11, 1902, and an act of Congress of December 17, 1903 [33 Stat. at L. 3, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 393]. The answer to the question depends upon when the treaty went into effect; whether upon the 10th of April, 1903, or the 27th of December, 1903. The appellant contends for the former and the appellee for the latter date. Duties were assessed under the act of 1897 without reduction. Protests were filed and an appeal taken to the board of appraisers, who sustained the collector. The decision of the board was reversed by the circuit court. The treaty provided (33 Stat. at L. 2136, 2142) among other things as follows:

"The President of the United States of America . . . and the President of the Republic of Cuba . . . have, in consideration of and in compensation for the respective concessions and engagements made by each to the other, as hereinafter recited, agreed, and do hereby agree, upon the following articles for the regulation and government of their reciprocal trade, namely:

. . . . .

Article 2.

"During the term of this convention all articles of merchandise not included in the foregoing article 1, and being the product of the soil or industry of the Republic of Cuba, imported into the United States, shall be admitted at a reduction of 20 per centum of the rates of duty thereon, as provided by the tariff act of the United States, ap-
[565] proved July 24th, 1897, or *as may be provided by any tariff law of the United States subsequently enacted."

Article 11 was as follows:

"The present convention shall be ratified by the appropriate authorities of the respective countries, and the ratifications shall be exchanged at Washington, District of Columbia, United States of America, as soon as may be before the thirty-first day of January, 1903, *and the convention shall go into effect on the tenth day after the exchange of ratifications*, and shall continue in force for the term of five (5) years from date of going into effect, and from year to year thereafter until the expiration of one year from the day when either of the contracting parties shall give notice to the other of its intention to terminate the same."

By supplemental treaty signed January 26, 1903 (33 Stat. at L. 2145), it was provided that "the respective ratifications of the said convention shall be exchanged as soon as possible, and within two months from January 31, 1903."

March 19, 1903, the Senate added the following amendment at the end of article 11: "This convention shall not take effect until the same shall have been approved by the Congress."

On March 31, 1903, ratifications were exchanged. At this date Congress was not in session, but was convened in special session November 9, 1903, and passed on December 17, 1903 (33 Stat. at L. 3, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 393) an act entitled: "An Act to Carry into Effect a Convention between the United States and the Republic of Cuba, Signed on the 11th Day of December in the Year 1902." Section 1 provides as follows:

"That whenever the President of the United States shall receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the articles of the convention between the United States and the Republic of Cuba, signed on the eleventh day of December, in the year nineteen hundred and two, he is hereby authorized to issue his proclamation declaring that he has received such evidence, *and thereupon, on the tenth day after exchange of ratifications of such convention* between *the United States and the Republic of Cuba, [566] *and so long as the said convention shall remain in force*, all articles of merchandise being the product of the soil or industry of the Republic of Cuba, which *are now* imported into the United States free of duty, *shall continue* to be so admitted free of duty, and all other articles of merchandise being the product of the soil or industry of the Republic of Cuba imported into the United States *shall be admitted* at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-four, eighteen hundred and ninety-seven, or as may be provided by any tariff law of the United States subsequently enacted. The rates of duty herein granted by the United States to the Republic of Cuba are, and shall continue, *during the term of said convention*, preferential in respect to all like imports from other countries: *Provided*, That, while said convention is in force, no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than

twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven, and no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven: *And provided further,* That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House."

The same day (December 17, 1903) the President issued his proclamation (33 Stat. at L. 2136), which, after setting forth the treaty and the act of Congress, and reciting the above facts, together with the fact that ratifications of said convention had been exchanged on March 31, 1903, declared:

[567] *"And whereas satisfactory evidence has been received by the President of the United States that the Republic of Cuba has made provision to give full effect to the articles of said convention;

"Now, therefore, be it known that I, Theodore Roosevelt, President of the United States of America, in conformity with the said act of Congress, do hereby declare and proclaim the said convention, as amended by the Senate of the United States, to be in effect on *the tenth day from the date of this, my proclamation.*"

Solicitor General **Hoyt** argued the cause, and, with *Attorney General Moody* and *Mr. William R. Harr,* filed a brief for appellant:

The propriety of referring to the history of this legislation in order to ascertain the intention of Congress is affirmed by numerous authorities.

United States v. *Union P. R. Co.* 91 U. S. 72, 79, 23 L. ed. 224, 228; *Platt* v. *Union P. R. Co.* 99 U. S. 48, 64, 25 L. ed. 424, 429; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 463, 36 L. ed. 227, 229, 12 Sup. Ct. Rep. 511; *United States* v. *Burr,* 159 U. S. 78, 85, 40 L. ed. 82, 84, 15 Sup. Ct. Rep. 1002; *United States* v. *Laws,* 163 U. S. 258, 262, 41 L. ed. 151, 153, 16 Sup. Ct. Rep. 998; *Dunlap* v. *United States,* 173 U. S. 65, 75, 43 L. ed. 616, 619, 19 Sup. Ct. Rep. 319.

It was clearly within the constitutional authority of Congress to make the operation of the act dependent upon the ascertainment and proclamation by the President of the fact that Cuba had made provision to carry into effect the treaty.

Marshall Field & Co. v. *Clark,* 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

Even if the approval of Congress and the action of the President were not strictly in accordance with the terms of the treaty, no one but Cuba could take exception thereto. The interpretation and enforcement of treaty stipulations of this character are matters for the determination of the political departments of the government, and the courts must respect their decision.

Foster v. *Nielson,* 2 Pet. 253, 7 L. ed. 415; *Cherokee Tobacco* (*207 Half Pound Papers of Smoking Tobacco* v. *United States*) 11 Wall. 616, 20 L. ed. 227; *Taylor* v. *Morton,* 2 Curt. 454, Fed. Cas. No. 13,799, 2 Black, 481, 17 L. ed. 277; *Head Money Cases* (*Edye* v. *Robertson*) 112 U. S. 580, 598. 28 L. ed. 798, 804, 5 Sup. Ct. Rep. 247; *Whitney* v. *Robertson,* 124 U. S. 190, 195, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456; *Botiller* v. *Dominguez,* 130 U. S. 238, 247, 32 L. ed. 926, 928, 9 Sup. Ct. Rep. 525; *Chinese Exclusion Case,* 130 U. S. 581, 600, 602, 32 L. ed. 1068, 1073, 1074, 9 Sup. Ct. Rep. 623; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 721, 37 L. ed. 905, 915, 13 Sup. Ct. Rep. 1016.

United States v. *Burr,* 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002, is controlling.

If, as this court has held, Congress may make the operation of a law depend upon the happening of a certain event (*Marshall Field & Co.* v. *Clark, supra*) by a parity of reasoning the treaty-making power may make the operation of a treaty depend upon a like contingency.

Furthermore, this court has recognized the fact that, while some treaties are self-executing, others may require legislation by Congress to make them effective.

Foster v. *Neilson, supra; United States* v. *Arredondo,* 6 Pet. 691, 8 L. ed. 547.

Mr. **John G. Johnson** argued the cause, and, with *Messrs. John E. Parsons* and *H. B. Closson,* filed a brief for appellee.

Messrs. Edward S. Hatch, J. Stuart Tompkins, and *Hatch & Clute,* filed a brief for importers having interests similar to those of appellee.

After stating the case as above, Mr. Justice **McKenna** delivered the opinion of the court:

The treaty as drafted and presented to the Senate provided for an exchange of ratifications at Washington as soon as might be before the 31st day of January, 1903, and should "go into effect on the tenth day after the exchange of ratifications." A sup-

plemental convention became necessary, and an exchange of ratifications was provided to be "as soon as possible and within two months from January 31, 1903." But subsequent to that date, to wit, March 19, 1903, the Senate added the amendment: "This convention shall not take effect until the same shall have been approved by the Congress." Between the treaty, therefore, and the amendment, there was an emphatic difference. The date at which the instrument should go into effect was changed. It cannot be said that the treaty provision related to time and the amendment to sanction merely, and adopted the time of the treaty. To do this would be to interpret the words of the treaty one way and the same words in the amendment another way. We start, then, with the proposition that not the treaty, but the act of Congress, was to fix the date that the treaty should take effect. What date Congress fixed is the question to be considered. It was certainly competent for Congress (with the consent [577]of Cuba) *to have given the treaty retrospective, immediate, or prospective operation. Which did Congress do? And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation "unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States* v. *Burr*, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002. On the other hand, it must be admitted that there are words in the act of Congress which, if not of themselves, yet, in connection with events, may be said to look to a retrospective operation. It is not, however, an unusual judicial problem to have to seek the meaning of a law expressed in words not doubtful of themselves, but made so by circumstances or the objects to which they come to be applied.

Both the treaty and the act of Congress concern tariff duties, and "the usual course in tariff legislation," we have said, "has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future date at which the statutes are to become operative." *United States* v. *Burr, supra.* And these remarks have application here. The treaty, it may be admitted, was intended as a beneficial concession to Cuba. But conditions in the United States were also to be considered, and we cannot assume that this would have been overlooked by Congress when legislating. It is true, as urged by appellant, that the act of December 17 deals entirely with importations from Cuba, but it is those which would have the most disturbing effect, and on account of which business in like products would have to be accommodated. These, as well as the considerations urged by the appellant, must be kept in mind in seeking the meaning of Congress, and we repeat that, under the Senate amendment, it is the meaning of Congress not the meaning of the convention independent of that of Congress, we are to ascertain. It was open to Cuba to reject the amendment; it was open to Cuba to reject the legislation. If she chose to accept both they became her contracts.

*Turning to the act of December 17 we find[578] it expressed in the simple future tense, and this must be given weight. *United States* v. *Goldenberg*, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3. So far as the text of the act itself is concerned all of its parts accord; all of its provisions are prospective but one. That pertained to the then present, the date of the act. It provided that all products which were imported free should continue to be admitted free. The provision is "all articles . . . which *are now* imported . . . free of duty *shall continue* to be so admitted. . . . " This accords with and reinforces the prospective provisions, and was apparently used with deliberate and provident intention, making the act provide for the present and future, excluding the past, certainly not expressing it. Passing from the text of the act, an element of confusion appears. Ratifications had been exchanged between the United States and Cuba on March 31, 1903. The text of the act provides "that whenever the President . . . *shall* receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the article of the convention . . . he is hereby authorized to issue his proclamation declaring that he has received such evidence, and *thereupon*, on the tenth day after exchange of ratifications of such convention, . . . *and so long as the said convention shall remain in force*, all articles of merchandise being the product . . . of the Republic of Cuba, which are now imported . . . free of duty shall continue to be so admitted free of duty, and all other articles . . . shall be admitted at a reduction of 20 per cent of the rates of duty thereon as provided by the tariff act of the United States approved July 24, 1897. . . . " The words of the act, therefore, refer manifestly to an event to occur, which seemingly had already occurred, and, upon such event, it is contended, the treaty, by its own terms and by the act of Congress took effect; to wit, "the exchange of ratifications" of the convention. To this the gov-

ernment replies that Congress, not being in session at the time, was ignorant that ratifications had been exchanged, and framed its legislation with the view that some further provision by Cuba was neces-
[579] sary. *If we may not accept the explanation of Congress's ignorance, it is not unreasonable to suppose that Congress considered it was still open to Cuba to accept or reject the treaty, and to make sure of her acceptance before the treaty should go into effect in the United States. This view satisfies completely the text of the act. We cannot suppose that, if Congress intended to give retrospective operation to the act, it would have used the words that expressed the contrary. The day at which the treaty should operate was important, and would necessarily be ever present in mind, and it was of easy expression. Future time and past time are directly opposite, and by no inadvertance or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other.

There is another important fact. The treaty was a reciprocal arrangement and intended to go into effect coincidently in the United States and Cuba. The two nations provided for this. On the day the President approved the act of Congress, he issued his proclamation declaring that the treaty should go into effect on the 27th day of December. On the 17th of December the President of Cuba also issued his proclamation, stating that Congress had approved the treaty in accordance with the requirements of article 11, and declaring that the treaty should take effect in Cuba on the day named in the proclamation of the President of the United States,—December 27, 1903. This coincident operation is of the very essence of the convention. It would indeed be anomalous if a treaty which provided the reciprocal concessions should be in operation in one nation eight months before it was in operation in the other. And this is not adequately answered as appellee answers it, by saying that the President of Cuba and the President of the United States were both mistaken as to the date of the operation of the treaty, and their mistake could not affect the rights of importers. Certainly not if a mistake could be conceded. But the action of the Presi-
[580] dents is proof against *the existence of mistakes. It shows the understanding of the Executives of the two countries, and affords confirmation of the view that Congress contemplated action subsequent to its legislation to put the treaty into effect.

The judgment of the Circuit Court is reversed and the case remanded, with directions to affirm the order of the Board of General Appraisers.

FRANKLIN SUGAR REFINING COMPANY, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 580–584.)

1. **Duties—on Cuban imports.—** Imports from Cuba were not entitled, under the treaty of December 11, 1902, to the 20 per cent reduction from the duties imposed by the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), until December 27, 1903,—the date proclaimed by the President of the United States and the President of the Cuban Republic for the commencement of the operation of the treaty.

2. **Duties—on withdrawals from bonded warehouses for consumption.—** Merchandise on which the duties have been paid, and for the removal of which permits have been issued, which have been delivered to the storekeeper, is withdrawn from bonded warehouses for consumption, within the meaning of the customs administrative act of June 10, 1890 (26 Stat. at L. 140, chap. 407), § 20, as amended by the act of December 15, 1902 (32 Stat. at L. 753, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 420), subjecting merchandise so withdrawn to the duties prescribed by law at the time of the withdrawal.

3. **Duties—on withdrawals from bonded warehouses for consumption.—** Imported merchandise is, by the express terms of the customs administrative act of June 10, 1890, § 20, as amended by the act of December 15, 1902, subjected to the rate of duty in force at the time of its withdrawal from a bonded warehouse for consumption, and not to the rate of duty in force at the time of the liquidation.

[No. 652.]

Argued April 27, 1906. Decided May 28, 1906.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment which affirmed the decision of the Board of General Appraisers, that goods imported from Cuba on September 29, 1903, were chargeable with full duties. *Affirmed.*

The facts are stated in the opinion.

Mr. **John G. Johnson** argued the cause, and, with *Messrs. John E. Parsons* and *H. B. Closson*, filed a brief for appellant.

Solicitor General **Hoyt** argued the cause, and, with *Attorney General Moody* and *Mr. William R. Harr*, filed a brief for appellee.

Mr. Justice **McKenna** delivered the opinion of the court:

This case was argued and submitted with No. 269.

The appellant imported and entered at the port of Philadelphia on September 29, 1903, certain sugars, the product of the Republic of Cuba. The collector imposed on all the sugars the full rate imposed by the tariff act of July 24, 1897. [30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626.] Permits for the removal of all the sugars for consumption from bonded warehouse were issued to appellant before December 17, 1903, and all removed for consumption before that date except 1,250 bags, which were removed December 28, and 3,279 bags and 67 bags of sweepings on December 29.

It is contended (1) that all of the sugars having been imported after the exchange of ratifications of the treaty between the United States and Cuba [33 Stat. at L. 2136], appellant was entitled to the reduction of 20 per cent of the rates of duty imposed by the act of July 24, 1897; (2) that appellant was entitled, in any event, to such reduction as to the sugar not actually removed from bonded warehouse until after December 27, 1903. The board of appraisers sustained the collector and the circuit court affirmed the order of the board.

As to the first contention this case is exactly like that of *United States* v. *American Sugar Ref. Co.* (just decided) 202 U. S. 563, *ante*, 1149, 26 Sup. Ct. Rep. 717. We decided that under the treaty between the
[582] United *States and Cuba and the act of Congress approved December 17, 1903 [33 Stat. at L. 3, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 393], there quoted, imports from Cuba were not entitled to the reduction of the duties imposed by the act of July 24, 1897, until December 27, 1903, the date proclaimed by the President of the United States and the President of Cuba for the commencement of the operation of the treaty.

The answer to the second contention depends upon § 20 of the customs administrative act, as amended by the act of December 15, 1902. 32 Stat. at L. 753, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 420. Section 20 provides as follows:

"That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal. *Provided*, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: *And provided further*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

The section needs no interpretation. It is clear that it subjects merchandise to the duties prescribed by law at the time it is withdrawn for consumption. *Mosle* v. *Bidwell*, 65 C. C. A. 533, 130 Fed. 334. And our inquiry then must be, When were the sugars in controversy withdrawn for consumption? If before December 27, 1903, they were dutiable under the act of July, 1897; if after December 27, they were entitled to 20 per cent reduction of the duties prescribed by that act.

Between September 29 and October 10 withdrawal entries were made of the entire cargo and duties at regular rates paid thereon. The delivery permits were lodged with the storekeeper at the same time. This put the sugars at the absolute disposition of the importers. It may be that the government had the custody of them, or rather the joint custody with the importer. Rev. Stat. § 2960, U. S. Comp. Stat. 1901, p. 1945. But it was a mere manual custody, not claiming any right over them or right to *detain them. Indeed, it may be[583] said that the payment of duties and the delivery of the permit to the storekeeper operated to give up the custody which the government had jointly with the importer before the payment of duties. It is, however, pointed out by appellant that, by § 2977, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1952), merchandise upon which duty has been paid may remain in the warehouse, "in custody of the officers of the customs, at the expense and risk of the owners of such merchandise, and, if exported directly from such custody to a foreign country, within three years, shall be entitled to return duties." Whether this section covers a case where a permit has been issued it is not necessary to decide. It is enough to say that the section is part of the plan for the payment of drawbacks. The merchandise is identified by remaining in the warehouse. Rev. Stat. § 2978, U. S. Comp. Stat. 1901, p. 1952. We think, therefore, that where duties are paid upon merchandise and permits issued for its removal which have been delivered to the storekeeper, it is withdrawn for consumption, and is subject to duties as of that time.

A contention is made, based on the date of ultimate liquidation of duties, which was not until after December, 1903. In case No. 269 the effect of liquidation was apparently urged to be to entitle the importer to the benefit of the treaty, which it was contended went into operation April 10, 1903, although the act giving the treaty effect

was not passed until after the importation of the sugars. In other words, it was said, "before the duties had been liquidated, so much of the statute as imposed more than 80 per cent of the regular duties upon these imports was repealed, and the repeal, by its very terms, took effect as of a date prior to the date of the importation." It was not necessary in No. 269 to notice the contention, as we decided the treaty did not go into effect until 27th December, 1903. In the case at bar the date of final liquidation is seemingly given greater force. It is contended that "there was no liquidation until after the convention was concededly in effect," and was therefore "required to be [584] made in accordance *with the tariff act as then in force." In other words, whether the treaty went into effect in April or in December was unimportant; being in effect under the act of Congress when liquidation was made, it determined the rate of duty. The proposition, if true, is decisive and makes all others in the case valueless. Appellant submits the proposition without other argument than its statement, and we may, therefore, reply to it briefly. It is plainly in contradiction of § 20 of the customs administrative act as amended. That section subjects merchandise to the rate of duty in force at the time of withdrawal for consumption, not the rate in force at the time of liquidation. See *United States* v. *Burr*, 159 U. S. 83, 84, 40 L. ed. 83, 84, 15 Sup. Ct. Rep. 1002.

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK upon the Relation of the NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Plff. in Err.*,

v.

NATHAN L. MILLER, as Comptroller of the State of New York. (Nos. 81, 82.)

SAME

v.

OTTO KELSEY, as Comptroller of the State of New York. (Nos. 586, 587, 588.)

(See S. C. Reporter's ed. 584–598.)

1. Constitutional law—due process of law in corporate taxation.—A domestic railway corporation is not deprived of its property without due process of law because no reduction is allowed from the capital stock, taken as the basis of the franchise tax imposed by N. Y. Laws 1896, chap. 908, § 182, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state.

2. Interstate commerce—state regulation—corporate taxation.— Interstate commerce is not unconstitutionally interfered with by the franchise tax imposed upon a domestic railway corporation by N. Y. Laws 1896, chap, 908, § 182, because no deduction is allowed from the capital stock, taken as the basis of the tax, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state.

[Nos. 81, 82, 586, 587, 588.]

Argued April 9, 1906. Decided May 28, 1906.

TWO WRITS OF ERROR to the Supreme Court of the State of New York to review judgments enforcing a franchise tax imposed on a domestic railway corporation, entered pursuant to the mandate of that court, which, on a second appeal, had affirmed a judgment of the Appellate Division of the Supreme Court for the Third Department, which had, on writs of certiorari, affirmed the determination of the state comptroller. *Affirmed.* Also—

THREE WRITS OF ERROR to the Court of Appeals of the State of New York to review judgments affirming judgments of the Appellate Division of the Supreme Court for the Third Department, which had affirmed the determination of the state comptroller in assessing such franchise tax. *Affirmed.*

See same case below for No. 81, Appellate Division, 89 App. Div. 127, 85 N. Y. Supp. 1088; in Court of Appeals, 177 N. Y. 584, 69 N. E. 1129. For No. 82, 177 N. Y. 584, 69 N. E. 1129. For Nos. 586–588 (N. Y.) 76 N. E. 1104.

The facts are stated in the opinion.

Mr. **Albert H. Harris** argued the cause, and, with *Messrs. Ira A. Place* and *Thomas Emery*, filed a brief for plaintiff in error:

The subject-matter taxed, as herein complained of, is the use and exercise of the franchise, privilege, and business of transportation of persons and commodities.

People ex rel. New York C. & H. R. R. Co. v. *Feitner*, 75 App. Div. 527, 78 N. Y. Supp. 308.

Ownership or possession of the corporate franchise to be or to do does not subject the owner or possessor to the tax.

People ex rel. Singer Mfg. Co. v. *Wemple*, 150 N. Y. 46, 44 N. E. 787; *People ex rel. Niagara River Hydraulic Co.* v. *Roberts*, 30 App. Div. 180, 51 N. Y. Supp. 771, Af-

NOTE.—*On taxation of corporate franchises in the United States*—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

firmed in 157 N. Y. 676, 51 N. E. 1093; *People ex rel. Brooklyn Rapid Transit Co.* v. *Morgan*, 57 App. Div. 335, 68 N. Y. Supp. 21, Affirmed in 168 N. Y. 672, 61 N. E. 1132; *People ex rel. Ft. George Realty Co.* v. *Miller*, 179 N. Y. 49, 71 N. E. 463.

The tax is not imposed upon the franchise *per se*, but upon the use thereof.

Exercise of the franchise is the foundation for imposition of the tax, and the average amount of capital stock employed is the basis of computation of the tax.

People ex rel. United Verde Copper Co. v. *Roberts*, 156 N. Y. 586, 51 N. E. 293; *People ex rel. Commercial Cable Co.* v. *Morgan*, 178 N. Y. 433, 67 L.R.A. 960, 70 N. E. 967; *People ex rel. New England Loan & T. Co.* v. *Roberts*, 25 App. Div. 16, 49 N. Y. Supp. 10, Affirmed in 156 N. Y. 688, 50 N. E. 1120; *People ex rel. Brooklyn Rapid Transit Co.* v. *Morgan*, 57 App. Div. 335, 68 N. Y. Supp. 21, Affirmed in 168 N. Y. 672, 61 N. E. 1132; *People ex rel. Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 69 N. E. 124.

The use and exercise of the franchise, privilege, or business of transportation thus taxed is that of carrying on commerce, either intrastate, interstate, or foreign.

Bank of Augusta v. *Earle*, 13 Pet. 519, 10 L. ed. 274; *Day* v. *Ogdensburgh & L. C. R. Co.* 107 N. Y. 129, 13 N. E. 765; *Re New York, L. & W. R. Co.* 35 Hun, 220; *Re Townsend*, 39 N. Y. 171.

It is necessary to the power of taxation upon the use and exercise of a franchise, privilege, or business:

1. That such use and exercise thereof be carried on within the territorial domain of the taxing sovereignty; and,

2. That the franchise, privilege, or business so there used and exercised be such as is within the organic prerogative of that sovereignty to tax the use of.

Delaware Railroad Tax, 18 Wall. 206, 232, 21 L. ed. 888, 896; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 436, 39 L. ed. 1043, 1044, 15 Sup. Ct. Rep. 896.

Transportation between respective points, one thereof within and the other without, or *via* routes in part within and in part without, a respective state, is interstate or foreign commerce.

New York ex rel. Pennsylvania R. Co. v. *Knight*, 192 U. S. 21, 26, 48 L. ed. 325, 327, 24 Sup. Ct. Rep. 202.

Refusal of observance of the rule of average for taxation on commerce employment is discrimination against such commerce.

People ex rel. New England Loan & T. Co. v. *Roberts*, 25 App. Div. 16, 49 N. Y. Supp. 10, Affirmed in 156 N. Y. 688, 50 N. E. 1120; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, *ante*, 150, 26 Sup. Ct. Rep. 36.

Taxation of, or upon the exercise of the privilege of, commerce conducted in another state, or computed upon the capital there so employed, whether such commerce be interstate, foreign, or intrastate, transcends the jurisdiction of the taxing state, and thus takes property without due process of law, and denies full faith and credit to the public acts of such other state.

It is requisite to due process of law that the tribunal have jurisdiction of the subject-matter of such process.

Philadelphia & S. Mail S. S. Co. v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *California* v. *Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Union Refrigerator Transit Co.* v. *Kentucky*, *supra*.

The state cannot, by conferring corporate charter powers to transact business (1), outside of its territorial domain, or (2), of character outside the sphere of its governance, draw to itself the power of taxation upon such exercise of the charter powers conferred by it.

People ex rel. Pennsylvania R. Co. v. *Wemple*, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720; *People ex rel. Chicago Junction R. & Union Stockyards Co.* v. *Roberts*, 154 N. Y. 1, 47 N. E. 974.

The situs of exercise of the franchise pertaining to transportation upon and over

any railroad is the situs of the railroad, and of the franchise relating thereto.

Car movements, or the thereby exercise of franchise, cannot have an imputed situs.

People ex rel. Manhattan R. Co. v. *Barker*, 152 N. Y. 417, 46 N. E. 875; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, *supra*.

Taxation of exercise of franchise to do can only be imposed by the sovereignty in whose domain the work is done.

Adams Exp. Co. v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Morgan* v. *Parham*, 16 Wall. 471, 478, 21 L. ed. 303, 305; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, 209, 29 L. ed. 158, 163, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 344, 30 L. ed. 1200, 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 153 U. S. 628, 646, 38 L. ed. 846, 852, 14 Sup. Ct. Rep. 952; *Leloup* v. *Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380: *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 695, 696, 700, 39 L. ed. 311, 315, 317, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

Local commerce is subject to local tax by the state wherein it is conducted.

New York ex rel. Pennsylvania R. Co. v. *Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

Determination as to what tax the exercise of the occupation, privilege, or business of intrastate commerce may be subject unto, involves (1), giving full faith and credit to the public acts of the state whose local commerce it is, and (2), acceptance thereof as thus accredited, as the sole basis of such determination.

Wabash, St. L. & P. R. Co. v. *Illinois*, 118 U. S. 557, 565, 30 L. ed. 244, 247, 1 Inters. Com. Rep. 1, 7 Sup. Ct. Rep. 4.

The effect of the statute (tax law, § 182), as adjudged by the New York courts, is to tax the corporate use and exercise in other states of the occupation, privilege, and business of the local commerce of those states.

Louisville & J. Ferry Co. v. *Kentucky*, 188 U. S. 385, 397, 398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 352, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co.* v. *Kentucky*, *supra*.

Mr. **Julius M. Mayer** argued the cause, and, with *Mr. Horace McGuire*, filed a brief for defendant in error:

The policy of the courts has been not to disturb the findings of the assessing officers. No system of taxation can be perfect, and the courts have realized the practical difficulties with which assessing officers are so frequently confronted. The reasons which have led to a conclusion or the methods of computation have not been inquired into by appellate courts, unless that method offends some provision of the statute under consideration or of the state or Federal Constitutions.

Coulter v. *Louisville & N. R. Co.* 196 U. S. 599–610, 49 L. ed. 615–618, 25 Sup. Ct. Rep. 342; *People ex rel. Metropolitan Street R. Co.* v. *New York State Tax Comrs.* 199 U. S. 1, *ante*, 65, 25 Sup. Ct. Rep. 705.

As the relator did not pay 6 per cent upon its stock, it therefore became necessary for the comptroller to ascertain the value of the corporate property employed within the state, simply as a basis of determining the per cent of tax to be placed upon its franchise.

People ex rel. Wall & H. Street Realty Co. v. *Miller*, 181 N. Y. 328, 73 N. E. 1102; *People ex rel. Nassau Co.* v. *Miller*, 182 N. Y. 521, 74 N. E. 1123; *People ex rel. North American Co.* v. *Miller*, 182 N. Y. 521, 74 N. E. 1124; *People ex rel. Fourteenth Street Realty Co.* v. *Kelsey*, 110 App. Div. 797, 97 N. Y. Supp. 197, Affirmed in 184 N. Y. 56, 77 N. Y. Supp. 1194; *People ex rel. Hubert Apartment Asso.* v. *Kelsey*, 110 App. Div. 617, 96 N. Y. Supp. 745, Affirmed in 184 N. Y. 57, 77 N. Y. Supp. 1194.

Even if the legislature of the state of New York determined by § 182 of the tax law to tax the freight cars of the relator when temporarily outside of the state of New York, its determination to do so and to determine the situs of that personal property was the exercise of a legislative function with which the Federal courts will not interfere.

Pullman's Palace Car Co. v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876: *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663.

The mere fact that some portion of the property of a domestic corporation is employed in interstate or foreign commerce does not preclude the state from taxing such property within its borders, and, by proper legislative enactment, to determine the situs of such property, provided, of course, that the rights and powers of the national government are not interfered with.

Atlantic & P. Teleg. Co. v. *Philadelphia*,

190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; *People ex rel. Pennsylvania R. Co.* v. *Wemple*, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720.

There being in the cases at bar no evidence before the comptroller upon which it could be found what the value was of the rolling stock of the relator which was claimed to be continuously employed without the state, his finding thereon is correct and was properly approved by the appellate division, and also by the court of appeals of the state of New York as a finding of fact upon the evidence presented to the comptroller.

Lewis v. *Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424.

The ruling of the comptroller in the cases at bar on the question of the evidence before him presents no Federal question. This court will not interfere to review findings of fact or the conclusions of assessing officers as to the value of property sought to be assessed.

Kelly v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.

A foreign corporation seeks to transact its business within the state of New York, as a body corporate, and that right is given to the foreign corporation, and the basis of the taxation of the foreign corporation is the actual or tangible property which it, the foreign corporation, uses continuously within the borders of the state of New York.

New York ex rel. Pennsylvania R. Co. v. *Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there; but the facts show that it is not permanently located out of the state. From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered. These vessels, if they may be so called, were not registered, hence their situs for taxation is the domicil of the owner. This rule must prevail in the absence of anything to show that they are so permanently located in any state as to be liable to taxation under the laws of that state.

Com. v. *American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

Mr. Justice **Holmes** delivered the opinion of the court:

These cases arise upon writs of certiorari, issued under the state law and addressed to the state comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903, and 1904, respectively. The tax was levied under New York Laws of 1896, chap. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.—Every corporation . . . incorporated . . . under . . . law in this state, shall pay to the state treasurer annually, an annual tax, to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount," at a certain rate, if the dividends amount to 6 per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than 6 per centum on the par value of the capital stock [as was the case with the relator], the tax shall be at the rate of 1½ mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, etc., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state."

The relator is a New York corporation, owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing, and rating, and sending its cars to points without as well as within the state, and over other lines as well as its own. The cars are often out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they *return to [594] the relator or the state. In short, by the familiar course of railroad business a considerable portion of the relator's cars constantly is out of the state, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the state. This contention the comptroller disallowed.

The writ of certiorari in the earliest case, No. 81, with the return setting forth the proceedings of the comptroller, Knight, and the evidence given before him, was heard by the appellate division of the supreme court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169, 77 N. Y. Supp. 401. On appeal, the court of appeals ordered the proceedings to be remitted to the comptroller, to the end that

further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the state, with directions that, if it should be found that such was the fact, the amount of the rolling stock so used should be deducted. 173 N. Y. 255, 65 N. E. 1102. On rehearing of No. 81, and, with it, No. 82, before the comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the state during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But, in all of them, evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the state, and also evidence of the car mileage outside and inside of the state, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the state during the whole tax year. The comptroller refused to make any reduction of the tax, and, the case being taken up again, his refusal was affirmed by the appellate division of the supreme court and by the court of appeals on the authority of the former decision. 89 App. Div. 127, 85 N. Y. Supp. 1088, 177 N. Y. 584, 69
[595] N. E. 1129. *The later cases took substantially the same course. The relator saved the questions whether the statute, as construed, was not contrary to article 1, § 8, of the Constitution of the United States, as to commerce among the states; article 1, § 10, against impairing the obligation of contracts; article 4, § 1, as to giving full faith and credit to the public acts of other states; and the 14th Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the court of appeals was wrong. Of course, if the statute, as construed, is valid under the Constitution, we are bound by the construction given to it by the state court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the state during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the state during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the state. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the state all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But, as it cannot be doubted, in view of the well-known course of railroad business, that some considerable proportion of the relator's cars always is absent from the state, it would be unsatisfactory to turn the *case[596] off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the state cannot be taxed by New York. The car mileage within the state and that upon other lines without the state affords a basis of apportionment of the average total of cars continuously employed by other corporations without the state, and the relator's road mileage within and without the state affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the state. To tax on the total value within and without is beyond the jurisdiction of the state, a taking of property without due process of law, and an unconstitutional interference with commerce among the states.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts, it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 353, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669. This seems to be regarded as such a tax by the court of appeals in this case. See *People ex rel. Commercial Cable Co.* v. *Morgan*, 178 N. Y. 433, 439, 67 L. R. A. 960, 70 N. E. 967. If it is a tax on any franchise which the state of New York gave, and the same state could take away, it stands at least no worse. The re-

lator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the state court regards it.

Suppose, then, that the state of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently [597] *out of the state. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211, *ante*, 150, 152, 156, 26 Sup. Ct. Rep. 36; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 47 L. ed. 519, 23 Sup. Ct. Rep. 468. But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & L. Tie Co.* v. *Kentucky*, 202 U. S. 409, *ante*, 1082, 26 Sup. Ct. Rep. 679. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209, *ante*, 150, 155, 26 Sup. Ct. Rep. 36.

It was suggested that this case is but the complement of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, and that, as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the state bore to the whole number of miles over which its cars were run, so here, in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But, in that case, it was found that the "cars used in this state have, during all the time for which tax is charged, been running into, through, and out of the state." The same cars were continuously receiving the protection of the state, and, therefore, it was just that the state should tax a proportion of them. Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied, was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the *varying orders of particular shippers [598] and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.

STATE OF MISSOURI, *Plaintiff*,
v.
STATE OF ILLINOIS and the Sanitary District of Chicago.

(See S. C. Reporter's ed. 598–600.)

1. **Costs—in actions between states.**— Costs are properly allowed to defendants on the dismissal, by the Supreme Court of the United States, of the bill filed on behalf of the state of Missouri against the state of Illinois and the sanitary district of Chicago, to restrain the discharge of the sewage of Chicago through an artificial canal into the Mississippi river.

2. **Costs—solicitor's fees—depositions.**— Testimony given before an examiner may be treated as a "deposition" within the meaning of U. S. Rev. Stat. § 824, U. S. Comp. Stat. 1901, p. 632, providing for solicitor's fees for each deposition taken and admitted in evidence.

[No. 4, Original.]

Submitted May 14, 1906. Decided May 28, 1906.

MOTION for the allowance and taxation of costs on the dismissal of the bill filed on behalf of the state of Missouri against the state of Illinois and the sanitary district of Chicago, to restrain the discharge of the sewage of Chicago through an artificial canal into the Mississippi river. *Allowed.*

The facts are stated in the opinion.

Mr. **Erasmus C. Lindley,** for the motion:

The general rule in equity is that, when the final and sole decree on the merits is for one party, full costs should usually follow for that party.

Hunter v. *Marlboro*, 2 Woodb. & M. 168; Fed Cas. No. 6,908; *Du Bois* v. *Kirk*, 158 U. S. 58, 39 L. ed. 895, 15 Sup. Ct. Rep. 729; 2 Dan. Ch. Pl. & Pr. *1381; Adams, Eq. **391, 392; *United States* v. *Southern P. R. Co.* 56 Fed. 865; *Coburn* v. *Schroeder*, 19 Blatchf. 493, 8 Fed. 521.

The motion for the taxation of costs is properly made any time after the final decree and before the expiration of the term at which the decree or judgment is rendered.

Sizer v. *Many*, 16 How. 98, 14 L. ed. 861; *Coburn* v. *Schroeder*, *supra*.

A solicitor's fee and a fee of $2.50 for taking each deposition are allowable under the statute.

Troy Iron & Nail Factory v. *Corning*, 7 Blatchf. 16, Fed. Cas. No. 14,197; *Jerman* v. *Stewart*, 12 Fed. 271; *Green* v. *French*, 5 N. J. L. J. 228; *The Sallie P. Linderman*, 22 Fed. 557.

Messrs. **Herbert S. Hadley, Charles W. Bates,** and **Sam B. Jeffries,** opposed:

In original cases involving disputed boundary lines between states it has always been the rule of this court either to require the states litigant to bear their respective costs, or to equalize the same by requiring each state to pay half thereof.

Indiana v. *Kentucky*, 167 U. S. 274, 42 L. ed. 166, 17 Sup. Ct. Rep. 999, 163 U. S. 520, 41 L. ed. 250, 16 Sup. Ct. Rep. 1162; *Missouri* v. *Iowa*, 165 U. S. 118, 144, 41 L. ed. 655, 664, 17 Sup. Ct. Rep. 290, 160 U. S. 688, 40 L. ed. 583, 16 Sup. Ct. Rep. 433.

Under the common law in cases of this character, where sovereign rights were involved, and according to the English rule as it seems to have been adopted by this court in the case of *Pennsylvania* v. *Wheeling & B. Bridge Co.* 18 How. 460, 15 L. ed. 449, it is said to be beneath the dignity of a sovereign to demand costs, and that, therefore, when it is successful in a suit its counsel will waive all claim for costs.

Foster, Fed. Pr. 3d ed. § 327.

It has been said that as the King, by reason of his prerogative, does not pay costs to his subjects, so it is beneath his dignity to receive them.

1 Dan. Ch. Pl. & Pr. p. 13.

The Supreme Court of the United States is the arbiter of controversies between states, as in questions of boundaries, and its rules, practice, and proceedings will be molded to bring them to final hearing on their real merits.

Florida v. *Georgia*, 17 How. 478, 15 L. ed. 181; *Missouri* v. *Iowa*, 7 How. 660, 12 L. ed. 861; *Alabama* v. *Georgia*, 23 How. 505, 16 L. ed. 556; *Virginia* v. *West Virginia*, 11 Wall. 39, 20 L. ed. 67; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

Testimony taken before a special examiner is not in the nature of depositions taken at different places where a party may be compelled to go.

Strauss v. *Meyer*, 22 Fed. 467.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a motion for the allowance and taxation of costs in the case reported in 200 U. S. 496, *ante*, 572, 26 Sup. Ct. Rep. 268. The costs asked are as follows:

$5,650	paid to the special commissioner.
$3,776.37	for taking down and transcribing the testimony of defendant's witnesses, etc.
$720	*Solicitors' fees, *viz.*, $20 for attendance at final hearing and $2.50 for each deposition taken and admitted in evidence, in accordance with Rev. Stat. § 824, U. S. Comp. Stat. 1901, p. 632.
$10,146.37,	total.

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The plaintiff objected to the allowance, and the clerk referred the matter to this court.

The only question of detail concerns the last item. The main objection is to the allowance of any costs at all. The power of the court to allow costs is not disputed. *Pennsylvania* v. *Wheeling & B. Bridge Co.* 18 How. 460, 15 L. ed. 449. The former decree in this case allowed them, and, in the stipulation for the appointment of a that the costs should be "taxed by the court on the final disposal of the case, to be paid in such manner as the court may, at that time, determine." But it is said that it is inconsistent with the dignity of a sovereign state to ask for costs; that, in boundary cases, costs have been divided, and that the suit was not for a pecuniary interest, but only the performance of the duty of a sovereign to its citizens, for which no costs should be imposed.

So far as the dignity of the state is concerned, that is its own affair. The United States has not been above taking costs. *United States* v. *Sanborn*, 135 U. S. 271, 34 L. ed. 112, 10 Sup. Ct. Rep. 812. As to the supposed rule in boundary cases, it is not absolute. But, in many cases of that kind, both parties are equally interested to have the boundary settled, and, whichever state begins the suit, both equally are actors. special commissioner, the parties agreed Thus counter relief was asked by the defendants in *Nebraska* v. *Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396, and *Missouri* v. *Iowa*, 160 U. S. 688, 40 L. ed. 583, 16 Sup. Ct. Rep. 433. As to the nature of this suit, the plaintiff alleged serious pecuniary damage to itself by the deposit of great quantities of filth upon the portion of the bed of the Mississippi alleged to belong to it, and, in short, framed its bill like any ordinary bill by a private person to restrain a nuisance. The chief difference was in the size of the nuisance alleged. There is no indication that the defendants desired or needed the determination of this court, as states well might when *their jurisdiction was in doubt. So far as this point is concerned, there is no reason why the

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plaintiff should not suffer the usual consequence of failure to establish its case.

The only item specially discussed is the charge of $2.50 for each witness examined before the examiner, on the footing of "depositions" mentioned in Rev. Stat. § 824. There seems to have been some difference of opinion in the lower courts as to whether testimony given before an examiner could be treated as a deposition. See *Strauss* v. *Meyer*, 22 Fed. 467; 1 Foster, Fed. Pr. 3d ed. 727, § 330. In favor of so treating it are *Ferguson* v. *Dent*, 46 Fed. 88; *Hake* v. *Brown*, 44 Fed. 734; *Ingham* v. *Pierce*, 37 Fed. 647; *The Sallie P. Linderman*, 22 Fed. 557; *Stimpson* v. *Brooks*, 3 Blatchf. 456, Fed. Cas. No. 13,454. See also *St. Matthew's Sav. Bank* v. *Fidelity & C. Co.* 105 Fed. 161, 162, 163. The words of the statute are broad enough to embrace the testimony, unless they are taken very strictly, and the trouble to the parties in having to visit different places was similar to that caused by the taking of depositions adverted to by Judge Treat in *Strauss* v. *Meyer*. The case is quite distinct from that of testimony taken in court and reduced to writing by a reporter. We are of opinion that the item may be allowed.

Motion for costs allowed.

ALLAN L. McDERMOTT, Receiver of the City & Suburban Railway of Washington, *Plff. in Err.*,

v.

CHARLES E. SEVERE, by His Next Friend, William B. Severe.

(See S. C. Reporter's ed. 600–612.)

1. Trial—question for jury—negligence of street railway motorman.—Whether a street railway motorman was negligent in failing to get his car under such control, after seeing several young boys on the track at a public crossing where children were in the habit of playing, as would have enabled him to prevent an injury to one of the boys whose foot was caught, is a question for the jury, although he may have sounded the gong when far enough away to give ample warning, and, as soon as he saw that the boy could not or would not leave the track, may have done all in his power to stop the car before the injury.

2. Appeal—sufficiency of exception to instruction.—A general exception to a charge covering a number of the elements of damages in a negligence suit does not cover the specific objection that the language of the court permitting a recovery for a pecuniary loss directly resulting from the injury would allow the infant plaintiff to recover compensation for his time before as well as after he had reached his majority, although, during infancy, his father is entitled to recover any wages he may earn.

3. Damages — mental suffering.—Mental suffering which is a direct consequence of a physical injury may be considered by the jury in assessing the damages for such injury.

4. Appeal—instruction as to damages.—Charging the jury in a negligence case that damages could not be considered in excess of the sum claimed in the declaration cannot prejudice the defendant, where the court was careful to say that the sum claimed should not be taken as a criterion to act upon, but only as a limit, beyond which the jury could not go.

[No. 244.]

Argued April 20, 23, 1906. Decided May 28, 1906.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirms a judgment of the Supreme Court of that District in favor of plaintiff in an action to recover damages for personal injuries alleged to have been caused by negligence. *Affirmed.*

See same case below, 25 App. D. C. 276.

The facts are stated in the opinion.

Messrs. **George P. Hoover** and **Charles A. Douglas** argued the cause and filed a brief for plaintiff in error:

Where a person is discovered lawfully or unlawfully on the track in front of an approaching train, the motorman or engineer may properly presume that the party will leave the track in time to avoid injury, unless or until he discovers something to indicate that the person cannot or will not do so, and if he uses all available means to stop the train as soon as he makes such discovery, he is not guilty of negligence. This rule applies in cases of infants old enough to have appreciation of danger.

Richmond & D. R. Co. v. *Didzoneit*, 1 App. D. C. 482; *Cullen* v. *Baltimore & P.*

NOTE.—*On the duty imposed upon street railway companies to avoid injuring children on the track*—see note to Wallace v. City & S. R. Co. 25 L.R.A. 663.

On the province of the court and jury in determining the question of negligence—see notes to Roux v. Blodgett & D. Lumber Co. 13 L.R.A. 728; Emry v. Raleigh & G. R. Co. 15 L.R.A. 332; Fitch v. Creighton, 16 L. ed. U. S. 596; and Northern P. R. Co. v. Egeland, 41 L. ed. U. S. 82.

On the sufficiency of exceptions on appeal—see note to State v. Hope, 8 L.R.A. 608.

On mental suffering as an element of damages in actions for personal injuries—see notes to Western U. Teleg. Co. v. Rogers, 13 L.R.A. 859; Chicago v. McLean, 8 L.R.A. 765; and Chicago, R. I. & P. R. Co. v. Caulfield, 11 C. C. A. 556.

R. Co. 8 App. D. C. 69; *Stabenau* v. *Atlantic Ave. R. Co.* 155 N. Y. 511, 63 Am. St. Rep. 698, 50 N. E. 277; *Fenton* v. *Second Ave. R. Co.* 126 N. Y. 625, 26 N. E. 967; *Chrystal* v. *Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380; *Philadelphia & R. R. Co.* v. *Hummell,* 44 Pa. 379, 84 Am. Dec. 457; *Foley* v. *New York C. & H. R. R. Co.* 78 Hun, 248, 28 N. Y. Supp. 816; *Alabama G. S. R. Co.* v. *Burgess,* 114 Ala. 587, 22 So. 169; *Pennsylvania R. Co.* v. *Morgan,* 82 Pa. 134; *Norwood* v. *Raleigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4; *High* v. *Carolina C. R. Co.* 112 N. C. 385, 17 S. E. 79; *Baltimore & O. R. Co.* v. *State,* 69 Md. 558, 16 Atl. 212; Nellis, Street Railways, p. 302; *Frost* v. *Milwaukee & N. R. Co.* 96 Mich. 470, 56 N. W. 19; Elliott, Railroads, § 1259; *Bishop* v. *Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386; *Alabama G. S. R. Co.* v. *Moorer,* 3 Am. Neg. Rep. p. 320, note, 116 Ala. 642, 22 So. 900.

Mental pain, not directly or necessarily connected with the physical pain, is not a proper element to be considered by the jury in assessing damages.

Bovee v. *Danville,* 53 Vt. 183; *Chicago & G. T. R. Co.* v. *Spurney,* 69 Ill. App. 549; *Giffen* v. *Lewiston,* 6 Idaho, 231, 55 Pac. 545; *Morse* v. *Duncan,* 14 Fed. 396; *Chicago, R. I. & P. R. Co.* v. *Caulfield,* 11 C. C. A. 552, 27 U. S. App. 358, 63 Fed. 396.

Nothing could have been more speculative than to let the jury guess whether the plaintiff's earning power when he becomes an adult will be greater or less than if he had not lost his foot. This is plainly in violation of the rule against the allowance of remote and speculative damages.

Staal v. *Grand Street & N. R. Co.* 107 N. Y. 625, 13 N. E. 624; *Strohm* v. *New York, L. E. & W. R. Co.* 96 N. Y. 305; *Leeds* v. *Metropolitan Gaslight Co.* 90 N. Y. 28; *Alabama Mineral R. Co.* v. *Marcus,* 115 Ala. 389, 22 So. 135; *Denver* v. *Sherret,* 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226.

Even if the loss of earning capacity were a proper element of damages, the court erred in granting the plaintiff's second instruction, because the language of it is such that the jury were permitted to enhance the damages by the loss of earning capacity during the minority of the plaintiff, which is not a proper element of damage in this case. The loss of earnings during minority could only be recovered by the father.

Texas & P. R. Co. v. *Morin,* 66 Tex. 225, 18 S. W. 503; *Gulf, C. & S. F. R. Co.* v. *Evansich,* 63 Tex. 54; *Houston & T. C. R. Co.* v. *Boozer,* 70 Tex. 530, 8 Am. St. Rep. 615, 8 S. W. 119; *Peppercorn* v. *Black River Falls,* 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79; *Forsyth* v. *Central Mfg. Co.* 103 Tenn. 498, 53 S. W. 731; *Western & A. R. Co.* v. *Young,* 81 Ga. 410, 12 Am. St. Rep. 320, 7 S. E. 912; *Rosenkranz* v. *Lindell R. Co.* 108 Mo. 16, 32 Am. St. Rep. 588, 18 S. W. 890; *Schmitz* v. *St. Louis, I. M. & S. R. Co.* 119 Mo. 277, 23 L.R.A. 250, 24 S. W. 472; *Ft. Worth & D. C. R. Co.* v. *Robertson* (Tex.) 16 S. W. 1093; *Gulf, C. & S. F. R. Co.* v. *Grisom,* 36 Tex. Civ. App. 630, 82 S. W. 671.

It was also error to instruct the jury to the effect that they might render a verdict for the full amount of $25,000, claimed in the declaration. That sum was clearly excessive, and the court should not have intimated to the jury that it would be proper for them to award that amount, and the qualification attempted to be made of this in the charge did not cure the error.

Gilbertson v. *Forty-second Street, M. & St. N. Ave. R. Co.* 14 App. Div. 294, 43 N. Y. Supp. 782.

The plaintiff in error was entitled to have the court state the law to the jury on the subject of damages in plain and simple language, intelligible to the ordinary mind and free from doubt.

District of Columbia v. *Holton,* 15 D. C. App. 389.

If an exception is specially taken to the granting of each prayer, it will be sufficient.

Moore v. *Metropolitan R. Co.* 2 Mackey, 449; *Edgington* v. *United States,* 164 U. S. 364, 41 L. ed. 470, 17 Sup. Ct. Rep. 72; *Brown* v. *United States,* 164 U. S. 224, 41 L. ed. 411, 17 Sup. Ct. Rep. 33.

Messrs. **A. S. Worthington** and **William Meyer Lewin** argued the cause and filed a brief for defendant in error:

Infants under seven years of age cannot be guilty of contributory negligence; a much higher grade of watchfulness and care must be exercised to avoid injuring young children than would constitute ordinary care toward adults; and what would be ordinary care toward an adult may be culpable negligence toward a child.

7 Am. & Eng. Enc. Law, 2d ed. pp. 405–408; *Holden* v. *Missouri R. Co.* 177 Mo. 456, 76 S. W. 973; *Welsh* v. *Jackson County Horse R. Co.* 81 Mo. 466; *Danville R. & Electric Co.* v. *Hodnett,* 101 Va. 361, 43 S. E. 606; Booth, Street Railways, § 10; *Baltimore City Pass. R. Co.* v. *Cooney,* 87 Md. 261, 39 Atl. 859.

Each of the following cases is precisely in point:

Missouri, K. & T. R. Co. v. *Hammer,* 34 Tex. Civ. App. 354, 78 S. W. 708; *Louisville & N. R. Co.* v. *Vanarsdell,* 25 Ky. L. Rep. 1432, 77 S. W. 1103; *Wallace* v. *City & Suburban R. Co.* 26 Or. 174, 25 L.R.A. 663, 37 Pac. 477; *Indianapolis Street R. Co.*

v. *Bordenchecker*, 33 Ind. App. 138, 70 N. E. 995; *Indianapolis Street R. Co.* v. *Schomberg* (Ind. App.) 71 N. E. 237; *Livingston* v. *Wabash R. Co.* 170 Mo. 452, 71 S. W. 136; *Strutzel* v. *St. Paul City R. Co.* 47 Minn. 543, 50 N. W. 690; *Gray* v. *St. Paul City R. Co.* 87 Minn. 280, 91 N. W. 1106; *Forrestal* v. *Milwaukee Electric R. & Light Co.* 119 Wis. 495, 97 N. W. 182.

Exceptions growing out of the refusal of the court to sustain the general objection to the charge should be overruled.

Langdon v. *Evans*, 3 Mackey, 1; *Baltimore & P. R. Co.* v. *Mackey*, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; *Texas & P. R. Co.* v. *Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703.

Where a question of law is involved, and neither the plaintiff nor the defendant asks for any instructions in regard to it, and the court says nothing about it, the jury must be presumed to know the law, and to render their verdict accordingly.

Texas & P. R. Co. v. *Humble*, 181 U. S. 57, 67, 45 L. ed. 747, 752, 21 Sup. Ct. Rep. 526.

It is not the law that a minor may not claim and recover his earnings. The law gives that privilege in the first instance to the father, but it is a privilege only, and the father may waive it. He does waive it when he brings a suit in the child's name by himself as next friend, and in that way, as well as by his presence at the trial and giving testimony in the case, assists the child to recover the earnings to which he, the father, would be entitled if he should see fit to claim them.

Baker v. *Flint & P. M. R. Co.* 91 Mich. 298, 16 L.R.A. 154, 30 Am. St. Rep. 471, 51 N. W. 897; *Chesapeake & O. R. Co.* v. *Davis*, 22 Ky. L. Rep. 1156, 60 S. W. 14; *Abeles* v. *Bransfield*, 19 Kan. 16.

A child may recover for loss of earnings, and no evidence on the subject is required.

Schmitz v. *St. Louis, I. M. & S. R. Co.* 119 Mo. 256, 23 L.R.A. 250, 24 S. W. 472; *Texas & P. R. Co.* v. *O'Donnell*, 58 Tex. 27; *Rosenkranz* v. *Lindell R. Co.* 108 Mo. 9, 32 Am. St. Rep. 588, 18 S. W. 890.

Since mental suffering in general is as proper a subject of compensation in personal-injury cases, as physical suffering, it was the duty of the defendant's counsel, if they conceived that the jury might be misled by the charge, to ask for a definite instruction on that subject.

Texas & P. R. Co. v. *Humble*, 181 U. S. 57, 61, 45 L. ed. 747, 749, 21 Sup. Ct. Rep. 526.

The weight of authority is distinctly in favor of allowing damages in personal-injury cases for injuries to the feelings.

8 Am. & Eng. Enc. Law, 2d ed. p. 664, note 1; *Heddles* v. *Chicago & N. W. R. Co.* 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115; *Atlanta & R. Air Line R. Co.* v. *Wood*, 48 Ga. 565; *Gray* v. *Washington Water Power Co.* 30 Wash. 665, 71 Pac. 206; *Chicago & M. Electric R. Co.* v. *Krempel*, 103 Ill. App. 1.

Besides compensation for physical pain in actions for damages for personal injuries, the plaintiff is entitled to recover for mental suffering, past and future.

8 Am. & Eng. Enc. Law, 2d ed. pp. 658, 659, note 2, 660, note 1; *Connon* v. *Gilmer*, 131 U. S. 22, 26, 27, 33 L. ed. 110, 112, 113, 9 Sup. Ct. Rep. 696; *The City of Panama* (*The City of Panama* v. *Phelps*) 101 U. S. 453, 464, 25 L. ed. 1061, 1065; *District of Columbia* v. *Moulton*, 15 App. D. C. 363; *Larmon* v. *District of Columbia*, 5 Mackey, 330; *Nichols* v. *Brabazon*, 94 Wis. 549, 69 N. W. 342; *Fairchild* v. *California Stage Co.* 13 Cal. 599; *Maryland Steel Co.* v. *Marney*, 88 Md. 482, 42 L.R.A. 842, 71 Am. St. Rep. 441, 42 Atl. 60; *Louisville, C. & L. R. Co.* v. *Case*, 72 Ky. 736; *Louisville & N. R. Co.* v. *Logsdon*, 114 Ky. 746, 71 S. W. 905; *Baker* v. *Independence*, 93 Mo. App. 169; *Batten* v. *St. Louis Transit Co.* 102 Mo. App. 285, 76 S. W. 727; *Barnes* v. *Western U. Teleg. Co.* 27 Nev. 438, 65 L.R.A. 666, 103 Am. St. Rep. 776, 76 Pac. 931; *Davis* v. *Tacoma R. & Power Co.* 35 Wash. 203, 66 L.R.A. 802, 77 Pac. 209; *Butts* v. *National Exch. Bank*, 99 Mo. App. 168, 72 S. W. 1083; *Godeau* v. *Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Ashley* v. *Sioux City* (Iowa) 93 N. W. 303.

Instructing the jury not to exceed the amount claimed in declaration was not error.

Washington & G. R. Co. v. *Hickey*, 5 App. D. C. 436; *Texas & P. R. Co.* v. *Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Texas C. R. Co.* v. *Stuart*, 1 Tex. Civ. App. 645, 20 S. W. 962; *Texas C. R. Co.* v. *Burnett*, 80 Tex. 536, 16 S. W. 320; *East St. Louis Connecting R. Co.* v. *O'Hara*, 150 Ill. 580, 37 N. E. 917.

Plaintiff is entitled to compensation for the mental suffering growing out of the reflection that he is a cripple, and will always be a cripple.

1 Sedgw. Damages, 8th ed. § 47; *Heddles* v. *Chicago & N. W. R. Co.* 77 Wis. 230, 20 Am. St. Rep. 106, 46 N. W. 115; *Power* v. *Harlow*, 57 Mich. 119, 23 N. W. 606; *Nichols* v. *Brabazon*, *supra*; *Campbell* v. *Pullman Palace Car Co.* 42 Fed. 484; *Woodward* v. *Ragland*, 5 App. D. C. 220; *The Oriflamme*, 3 Sawy. 404, Fed. Cas. No. 10,572; *Rosenkranz* v. *Lindell R. Co.* 108 Mo. 9, 32 Am. St. Rep. 588, 18 S. W. 890;

American Strawboard Co. v. *Foust*, 12 Ind. App. 421, 39 N. E. 891; *Kendall* v. *Albia*, 73 Iowa, 241, 34 N. W. 833; *St. Louis S. W. R. Co.* v. *Dobbins*, 60 Ark. 485, 30 S. W. 887, 31 S. W. 147; *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* 100 Iowa, 457, 62 Am. St. Rep. 582, 69 N. W. 743; *Western & A. R. Co.* v. *Young*, 81 Ga. 412, 12 Am. St. Rep. 320, 7 S. E. 912; *Stewart* v. *Maddox*, 63 Ind. 51; *Cameron* v. *Bryan*, 89 Iowa, 222, 56 N. W. 434; *Schmitz* v. *St. Louis, I. M. & S. R. Co.* 119 Mo. 269, 23 L.R.A. 250, 24 S. W. 472; *Memphis & C. R. Co.* v. *Whitfield*, 44 Miss. 496, 7 Am. Rep. 699; *Matteson* v. *New York C. R. Co.* 62 Barb. 379; *Atlanta & R. Air Line R. Co.* v. *Wood*, 48 Ga. 569; *Alexander* v. *Humber*, 8 Ky. L. Rep. 619; *Gray* v. *Washington Water Power Co.* 30 Wash. 665, 71 Pac. 206; 8 Am. & Eng. Enc. Law, 2d ed. p. 664; *Denver & R. G. R. Co.* v. *Harris*, 122 U. S. 597–608, 30 L. ed. 1146–1148, 7 Sup. Ct. Rep. 1286; *Washington & G. R. Co.* v. *Harmon* (*Washington & G. R. Co.* v. *Tobriner*) 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; *Ballou* v. *Farnum*, 11 Allen, 77.

Mr. **Charles L. Frailey** also argued the cause for defendant in error.

[602] *Mr. Justice **Day** delivered the opinion of the court:

This is an action to recover damages because of an injury received by Charles E. Severe, an infant, who was run over at a plank crossing of the railway company, the railroad then being in charge of the defendant, operating the same as receiver.

The plaintiff below recovered judgment in the supreme court of the District, which was affirmed in the court of appeals.

At the place of the accident there was a plank crossing, the planks laid between and on either side of the rails, at a point where a street was opened to the westward, and, on the other side of the track, a footpath, but no thoroughfare for vehicles. The crossing was one of the regular stopping places of the cars of the street railway near Riverdale, Maryland. The words "Cars stop here" were on both sides of the telegraph pole at the crossing. At the time of the injury plaintiff was six years and ten months old. His youngest brother, Raymond, was a little over five years of age, and with them another brother, Edward, about nine years old. The injured boy, at the time he was hurt, had his foot caught in a space between the rail and the edge of the plank on the inside. There was testimony tending to show that this opening was 2 to 2 11-16 inches wide. The accident happened between 2 and 3 o'clock in the afternoon of August 31, 1902. The testimony discloses that the boys had expected to meet their parents, returning from a visit, about 2 o'clock that afternoon, and went to the crossing for that purpose. Edward, the oldest boy, went to his father's house nearby to get a drink of water; while he was gone the youngest boy, Raymond, got his foot caught in the space between the west rail and the plank next the inside of the rail. Plaintiff came to the assistance of his little brother, whose foot he helped to extricate, and was himself caught in the space between the plank and the rail. Raymond ran to the house to notify Edward that *the plaintiff's foot was [603] caught. Together the two boys ran back towards the crossing and shortly thereafter the plaintiff was struck and so severely injured that it became necessary to amputate his leg below the knee.

In the view we take of this case we do not consider it necessary to state in detail the testimony as to the construction of the crossing and the alleged negligence in leaving the space in which the boy's foot was caught. Under the pleadings and the testimony the jury was directed to return a special verdict upon three propositions: 1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing? 2. Was the defendant guilty of negligence in the improper management of the car? 3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank? The jury answered the first and second questions in the affirmative; being unable to agree on the third, the plaintiff consented that it might also be answered in the affirmative.

In view of these special findings, if the issue concerning either of the first two of them was properly submitted to the jury upon sufficient evidence and found against the company, the judgment of the court of appeals must be affirmed.

In delivering the opinion of the court of appeals, Mr. Chief Justice Shepard says:

"It is conceded, by reason of the special findings of the jury, that the defendant was guilty of negligence, not only in the construction and maintenance of the crossing, but also in the management and control of the car; that error in the instructions upon both points must be shown in order to obtain a reversal of the judgment, because either finding alone is sufficient support therefore." [25 App. D. C. 282.]

It is insisted in argument here that the court ought to have taken the case from the jury because of the insufficiency of the evidence to sustain a verdict. In the view we take of the case as made and submitted concerning the conduct of the motorman at the time of the accident and the instruc-

[604] tions given to *the jury in that connection, we do not deem it necessary to consider the correctness of the charge submitting the question as to the negligent construction of this crossing. We think the testimony was ample to carry the case to the jury upon the question of the negligent conduct of the motorman at the time of the injury, and that this issue was properly left to the jury under instructions which afford no ground for reversal.

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, and to be settled by the jury under proper instructions. *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; *Northern P. R. Co.* v. *Everett*, 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474.

In addition to the facts to which we have adverted upon the branch of the case which we deem it necessary to consider, the testimony tended to show that there was nothing to prevent the motorman from seeing the crossing for a distance more than sufficient to have avoided the injury by controlling or stopping his car; that the boy Edward waved his hat and "hollered" for the motorman "to stop," when the car was 50 or 60 feet away. A passenger who was on the car testified that, his attention being called by the motorman ringing his bell, he saw a larger boy than the one on the track, waving his hand. Another passenger testified that, when from 60 to 100 yards from the place, he saw three boys, apparently standing on the platform or crossing. Plaintiff says that just before he was hurt he saw his brother waving his hat and "hollering" to the motorman, and that he too waved his hand at the motorman. Witnesses testified that the car, when stopped, came up with a sudden jolt. There was also testimony tending to show that boys were in the habit of playing at this crossing and running back and forth over it.

[605] The motorman testified that he was in charge of the car and *was on the Washington-bound track at the time; that he saw the boys when he was about 3 or 400 feet away; when he first saw them there were three boys on the track, running and jumping backwards and forwards on the crossing. He sounded his gong when he approached, about 150 feet away, and repeatedly thereafter until he reached the boy; when he first saw that the boy was not going to get off the track he was about 30 or 35 feet away from him; that he then put on the brakes, reversed the power, and did everything possible to stop the car. He had often seen the plaintiff on the track at that place and on the crossing at Riverdale, Maryland; that he had seen him remaining on the track until the car got close to him, when he would jump off the track, clap his hands, and laugh; had seen the plaintiff and other boys do the same thing; the first thing that indicated to him that the boy would not get off the track was when he saw that his foot was caught; that at that time he was from 30 to 35 feet from him; that he did not see the boys wave their hands or hats or making any motions to him or did not hear them calling to him. There was testimony tending to show, on the part of the plaintiff below, that he was not in the habit of playing at this crossing, and that he and his brothers had not been there before in the manner stated by the motorman. The motorman testified further that he saw the boy on the track when he was about 3 or 400 feet away.

We are of opinion that, in the attitude of the case on this subject, it was not error to leave to the jury, under proper instructions, to find whether or not there was negligence in managing the car just before the accident occurred. Upon this part of the case the instructions requested were as follows:

"If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to *commence to stop the car [606] until such time as he discovered that the plaintiff had his foot caught between the rail and the plank; and if they shall further find that, as soon as the motorman made such discovery, he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant.

"If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them; and if they shall further find that, as soon as the motorman saw that the plaintiff would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they should find for the defendant; and, in determining whether the motorman should have commenced to stop the car be-

fore he did, they may consider the fact, if they find it to be a fact from the evidence, that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from anyone before he commenced to stop the car."

Upon this subject the court said to the jury:

"On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger, you will have to consider all the testimony; not only that of the plaintiff, but of the defendant; and try to reconcile it so far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from the track, and out of danger when he got there? Or was it requisite for him, as a prudent and reasonable man to have his car under control, so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question, you are to consider what had been the habit of children about [607] playing *at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age, and the law does not give him discretion. Adults have to look out for children of that kind. But, at the same time, he may have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and, according to the motorman's own statement, the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them without getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught, he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught, and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances,—considering the formation of this plank crossing, of this track, and of this platform, and considering the fact, as the motorman says it was a fact, that children were frequently there, running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving, or before he saw that the boy's foot was caught? Of course, after he saw that the boy's foot was caught, it must be his duty to stop just as soon as he can, in order to prevent the accident. I have no doubt he did that. But, whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the *evidence tending to [608] show that the place where the accident occurred was a public crossing, and that it was frequented, and that it was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons.

"It is a question for the jury whether the motorman should have commenced to stop the car sooner than he did, and, in determining that question, they should take into consideration the fact, if they find it to be a fact, that the plaintiff and other boys were in the habit, at the point in question, of standing on the track until the car was very near them and then jumping off.

"In determining the question of how far the car was from the platform when the boys waved their hands, they must be governed by the evidence, and not by speculation."

The substance of the requests of the defendant on this part of the case was that the motorman, having sounded his gong far enough away to give warning to the boys in time to get off the track before the car reached them, did all his duty required, provided that, as soon as he saw that the boy could not or would not leave the track, he did all in his power to stop the car before the injury. On the other hand, the court left it to the jury to say whether, under the circumstances shown, the motorman was or was not guilty of negligence in failing to get his car under control, so that, in the event of probable injury, he could quickly and promptly stop it.

We think the court did not err in its charge in this respect, and that the motorman had no right to assume that boys of tender age, such as the plaintiff, might not be caught upon the crossing, notwithstanding his signals, which would have been adequate to warn one of mature years of approaching danger. Plaintiff was not a wrongdoer. He had gone upon the track with a view of rescuing his brother, and was himself caught and was unable to extricate

his foot from the space between the rail and the plank. It is not contended that he was guilty of any contributory negligence. He [609] was a child of tender years; *the testimony is undisputed that children were in the habit of playing at and near this crossing; that they were, at the time of the injury, in full view of the motorman at least 400 feet away, at which distance he admiles per hour, made no effort to get his ent that one of the boys was right upon the track. The jury may have found from the testimony, and the court could not have disturbed that conclusion, that the motorman acted upon the assumption that the boys would get off the track, and, though running at a speed of 8 to 10 miles per hour, made no effort to get his car under control or to stop it, until he saw the boy's foot was caught, when it was too late to do otherwise than run over him. The car, running with electric power, could have been controlled and taken well in hand so as to be readily stopped at the crossing.

This court in *Union P. R. Co.* v. *McDonald*, 152 U. S. 262, 277, 38 L. ed. 434, 441, 14 Sup. Ct. Rep. 619, 625, quoted approvingly from Judge Cooley in a Michigan case: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them, must calculate upon this and take precautions accordingly." This view is supported by other well-considered cases. *Powers* v. *Harlow*, 53 Mich. 507, 514, 51 Am. Rep. 154, 19 N. W. 257; *Camden Interstate R. Co.* v. *Broom*, 139 Fed. 595; *Forrestal* v. *Milwaukee Electric R. & Light Co.* 119 Wis. 495, 97 N. W. 182; *Strutzel* v. *St. Paul City R. Co.* 47 Minn. 543, 50 N. W. 690; *Gray* v. *St. Paul City R. Co.* 87 Minn. 280, 91 N. W. 1106.

This is not a case of a sudden and unexpected coming of children upon a track. The jury may have found that, if the motorman had acted prudently in view of the signals and warnings to stop, which the testimony tends to show were given, and the full view he had of the boys at the time of the accident, checked the car and kept it under control, the injury might have been avoided.

We think, upon principle and authority, the court properly left to the jury to find whether the motorman exercised that reasonable care to avoid injury to the boy [610] which the circumstances *of the occasion required. And to have given an instruction as requested by the plaintiff in error, which limited the duty of the motorman to sounding an alarm in time for the boy to get off the track, and to act upon the presumption that he would do so until he found it was impossible for the plaintiff to remove his foot, would have been an unwarranted charge.

It is further urged that the court erred in instructing the jury upon the question of damages. Upon this point the court said:

"The jury are instructed that, if they find a verdict for the plaintiff, they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as, in their judgment, will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss, as the direct result of the injury, which the jury may find from the evidence that he is reasonably likely to sustain hereinafter in consequence of his being deprived of one of his legs."

The court's attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous. *Bal- [611] *timore & P. R. Co.* v. *Mackey*, 157 U. S. 72, 86, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491.

It is now objected that to permit a recovery for a pecuniary loss, as covered in the instructions, would allow the infant plaintiff to recover compensation for his time before as well as after he has reached his majority; and that, during infancy, his father is entitled to recover any wages he might earn. If the defendant wished the charge modified in this respect, he should have called the attention of the court directly to this feature. The charge in this respect was general, permitting a recovery for a pecuniary loss directly resulting from the injury. It would be very unfair to the trial court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal.

Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: "The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg." Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect, had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury.

An instruction of this character was sustained in *Washington & G. R. Co.* v. *Harmon*, 147 U. S. 584, 37 L. ed. 289, 13 Sup. Ct. Rep. 557. That there might be more or less continuous mental suffering directly resulting from a maiming of the plaintiff's person in an injury of this character was probable, and, where the jury was limited to that which necessarily resulted from the injury, we think there can be no valid objection or just ground of complaint. Of a charge of this character, in *Kennon* v. *Gilmer*, 131 U. S. 22, 26, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696, Mr. Justice Gray, speaking for this court, said: *"But the in- [612]
struction given only authorized them, in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration 'his bodily and mental pain and suffering, both taken together' ('but not his mental pain alone'), and such as 'inevitably and necessarily resulted from the original injury.' The action is for an injury to the person of an intelligent being, and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases." We find no error in the charge in this respect.

As to the alleged error in charging the jury that damages could not be recovered in excess of the sum claimed in the declaration, the court was careful to say to the jury that the sum claimed should not be taken as a criterion to act upon, but that it was only a limit, beyond which they could not go. We cannot see how the plaintiff in error was prejudiced by this instruction.

The judgment of the Court of Appeals is affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

WISHKAH BOOM COMPANY, *Appellant*, *v.* UNITED STATES. [No. 253.]

(See S. C. Reporter's ed. 613.)

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 68 C. C. A. 592, 136 Fed. 42.

Mr. Austin E. Griffiths for appellant.

Assistant to the Attorney General Purdy for appellee.

May 14, 1906. *Dismissed* for the want of jurisdiction. *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Schlosser* v. *Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *United States* v. *Krall*, 174 U. S. 385, 43 L. ed. 1017, 19 Sup. Ct. Rep. 712; *McLish* v. *Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; act Aug. 13, 1888 (25 Stat. at L. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508); *United States* v. *Sayward*, 160 U. S. 493, 498, 40 L. ed. 508, 509, 16 Sup. Ct. Rep. 371.

W. E. TRENCHARD *et al.*, *Appellants*, *v.* F. KELL *et al.* [No. 631.]

(See S. C. Reporter's ed. 613.)

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Messrs. Williamson W. Fuller and *Herbert Noble* for appellants.

Messrs. F. H. Busbee and *Robert M. Hughes* for appellees.

May 14, 1906. *Dismissed* for the want of jurisdiction. *Maynard* v. *Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Colvin* v. *Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185; *United States* v. *Rider*, 163 U. S. 132, 139, 41 L. ed. 101, 104, 16 Sup. Ct. Rep. 983; *Chamberlin* v. *Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 32, and cases cited.

INTERSTATE COMMERCE COMMISSION, *Appellant*, *v.* LAKE SHORE & MICHIGAN CENTRAL RAILWAY COMPANY *et al.* [No. 216.]

(See S. C. Reporter's ed. 613.)

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

See same case below, 134 Fed. 942.

The Attorney General, Mr. John G. Carlisle, and *Mr. L. A. Shaver* for appellant.

Messrs. Adelbert Moot, George C. Greene, George W. Wall, George F. Brownell, Frederick W. Stevens, and *Edward J. Rich* for appellees.

May 21, 1906. Decree *affirmed* with costs by a divided court. Mr. Justice **Holmes** took no part in the consideration of this case.

TOMAS C. GUTIERREZ *et al.*, *Appellants*, *v.* TERRITORY OF NEW MEXICO *ex rel.* THOMAS J. CURRAN *et al.* [No. 249.]

(See S. C. Reporter's ed. 614.)

Appeal from the Supreme Court of the Territory of New Mexico.

See same case below, on first appeal (N. M.) 78 Pac. 139; on second appeal, 79 Pac. 299.

Mr. Wm. B. Childers for appellants.

Mr. Frank W. Clancy for appellees.

May 21, 1906. *Dismissed* for want of jurisdiction, on the authority of *Albright* v. *New Mexico*, 200 U. S. 9, *ante*, 346, 26 Sup. Ct. Rep. 210.

S. W. TYSON *et al.*, *Petitioners*, *v.* FRANK E. CREELMAN. [No. 673.]

(See S. C. Reporter's ed. 615.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Wm. A. Gunter for petitioners.

Mr. Robert E. Steiner for respondent.

April 23, 1906. *Denied.*

FRANCISCO DONES, *Appellant*, *v.* JOSÉ URRUTIA, Warden of the Penitentiary of Porto Rico. [No. 685.]

(See S. C. Reporter's ed. 614.)

Appeal from the Supreme Court of Porto Rico.

Messrs. Frederic D. McKenney and *J. Spalding Flannery* for appellant.

The Attorney General and the *Solicitor General* for appellee.

May 28, 1906. Final order *affirmed* with costs. Act April 12, 1900 (31 Stat. at L. 77, chap. 191, §§ 15, 33, 34, 35); *Ortega* v. *Lara*, 202 U. S. 339, *ante*, 1055, 26 Sup. Ct. Rep. 707; *Perez* v. *Fernandez*, 202 U. S. 80, *ante*, 942, 26 Sup. Ct. Rep. 561; Porto Rican Laws & Code of Civ. Proc. 1904, pp. 103, 104, 110; *Ex parte Ward*, 173 U. S. 454, 43 L. ed. 765, 19 Sup. Ct. Rep. 459; *United States* v. *Bellingham Bay Boom Co.* 176 U. S. 214, 44 L. ed 440, 20 Sup. Ct. Rep. 343.

RE JAMES HAMILTON LEWIS, *Petitioner*. [No. —, Original.]

(See S. C. Reporter's ed. 614.)

Motion for Leave to File a Petition for a Writ of Certiorari.

Mr. Holmes Conrad for petitioner.

No opposition.

May 28, 1906. *Denied. Jones* v. *Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; *Security Mut. L. Ins. Co.* v. *Prewitt*, 200 U. S. 446, *ante*, 545, 26 Sup. Ct. Rep. 314; *Mills* v. *Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *Bessette* v. *W. B. Conkey Co.* 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665.

JOHN B. ELLISON *et al.*, *Petitioners*, *v.* UNITED STATES. [No. 653.]

(See S. C. Reporter's ed. 615.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 142 Fed. 732.

Mr. Edward S. Hatch for petitioners.

The Attorney General and the *Solicitor General* for respondent.

April 23, 1906. *Denied.*

J. W. FARRIOR, *Petitioner*, *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. [No. 680.]

(See S. C. Reporter's ed. 615.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Wm. L. Martin and *Wm. A. Gunter* for petitioner.

Messrs. Horace Stringfellow and *Robert E. Steiner* for respondent.

April 23, 1906. *Denied.*

JOHN B. MAYER *et al.*, *Petitioners*, *v.* MARGARET H. MANDEVILLE. [No. 683.]

(See S. C. Reporter's ed. 615.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. A. B. Repetto for petitioners.

Mr. Russell Duane for respondent.

April 23, 1906. *Denied.*

JOHN NORGATE, *Petitioner*, *v.* DENVER & RIO GRANDE RAILROAD COMPANY. [No. 684.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 141 Fed. 247.

Mr. Edward T. Fenwick for petitioner.

Messrs. Joel F. Vaile and *Henry A. Dubbs* for respondent.

April 23, 1906. *Denied.*

C. SCHMITZ, doing business as Kurtz, Stuboeck & Co., *Petitioner*, *v.* UNITED STATES. [No. 686.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Albert H. Washburn for petitioner.

The Attorney General and the *Solicitor General* for respondent.

April 23, 1906. *Denied.*

FIELDS S. PENDLETON, *Petitioner*, *v.* CENTRAL RAILROAD OF NEW JERSEY. [No. 688.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 143 Fed. 942.

Mr. E. E. Blodgett for petitioner.

Messrs. James J. Macklin, LaRoy S. Gove, and *Edward S. Dodge* for respondent.

April 23, 1906. *Denied.*

PHILADELPHIA & READING RAILWAY COMPANY, Lessee, etc., *Petitioners*, *v.* BENJAMIN D. WELCH, Master, etc. *et al.* [No. 675.]

(See S. C. Reporter's ed. 616.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 143 Fed. 468.

Mr. John G. Lamb for petitioners.

No opposition.

April 30, 1906. *Denied.*

OLIN J. GARLOCK *et al., Petitioners, v.* JAMES BENNETT FORSYTH. [No. 679.]
(See S. C. Reporter's ed. 617.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
See same case below, 142 Fed. 461.
Mr. W. K. Richardson for petitioners.
Mr. Elmer P. Howe for respondent.
April 30, 1906. *Denied.*

SEMET-SOLVAY COMPANY, *Petitioner, v.* JOHN F. WILCOX. [No. 681.]
(See S. C. Reporter's ed. 617.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
See same case below, 143 Fed. 839.
Messrs. S. H. Holding and *W. S. Dalzell* for petitioner.
No opposition.
April 30, 1906. *Denied.*

CHARLES KELLY, *Petitioner, v.* AMERICAN BARK "KENILWORTH," etc. [No. 682.]
(See S. C. Reporter's ed. 617.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
See same case below, 144 Fed. 376.
Mr. J. H. Brinton for petitioner.
No opposition.
April 30, 1906. *Denied.*

ALICE E. VAN EPPS as Administratrix, etc., *Petitioner, v.* UNITED BOX BOARD & PAPER COMPANY. [No. 692.]
(See S. C. Reporter's ed. 617.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
See same case below, 143 Fed. 869.
Mr. Edwin H. Risley for petitioner.
Messrs. Francis T. Chambers and *John C. Pennie* for respondent.
April 30, 1906. *Denied.*

GOAT & SHEEP SKIN IMPORT CO. *Petitioner, v.* UNITED STATES. [No. 704.]
(See S. C. Reporter's ed. 618.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Mr. Edward S. Hatch for petitioner.
The Attorney General and the *Solicitor General* for respondent.
April 30, 1906. ***Granted.***

CARTER, WEBSTER, & COMPANY, *Petitioner, v.* UNITED STATES. [No. 699.]
(See S. C. Reporter's ed. 617.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
See same case below, 143 Fed. 256.
Mr. Edward S. Hatch for petitioner.
The Attorney General and the *Solicitor General* for respondent.
April 30, 1906. *Denied.*

AMANDA S. WHITFIELD *et al., Petitioners, v.* ÆTNA LIFE INS. CO. [No. 701.]
(See S. C. Reporter's ed. 618.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Messrs. Frank Hagerman and *H. S. Hadley* for petitioners.
No brief in opposition.
April 30, 1906. *Granted.*

OXFORD & COAST LINE RAILROAD COMPANY, *Petitioner, v.* UNION BANK OF RICHMOND, VIRGINIA. [Nos. 705, 706.]
(See S. C. Reporter's ed. 618.)
Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
See same case below, 143 Fed. 193.
Mr. Thomas B. Womack for petitioner.
No opposition.
April 30, 1906. *Denied.*

WILLIAM E. BARBER, Claimant, etc., *Petitioner, v.* BERNARD GUINAN. [No. 710.]
(See S. C. Reporter's ed. 618.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Messrs. James J. Macklin and *LaRoy S. Gove* for petitioner.
No opposition.
April 30, 1906. *Denied.*

WILLIAM E. BARBER, Claimant, etc., *Petitioner, v.* MICHAEL F. KILFOYLE. [No. 711.]
(See S. C. Reporter's ed. 618.)
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Messrs. James J. Macklin and *LaRoy S. Gove* for petitioner.
No opposition.
April 30, 1906. ***Denied.***

HENRY E. FRANKENBERG CO., *Petitioner*, *v.* UNITED STATES. [No. 698.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Frederick W. Brooks for petitioner.

The Attorney General and the *Solicitor General* for respondent.

April 30, 1906. *Granted.*

UNITED STATES, *Petitioner*, *v.* G. FALK & BROTHER. [No. 702.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General and the *Solicitor General* for petitioner.

Messrs. Edward S. Hatch and *J. S. Tompkins* for respondents.

April 30, 1906. *Granted.*

GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE, *Petitioner*, *v.* CHRISTIAN DANCEL *et al.*, Administrators, etc. [No. 643.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 144 Fed. 679.

Messrs. Edwards H. Childs and *L. D. Brandeis* for petitioner.

Messrs. J. Philip Berg and *Roger Foster* for respondents.

May 14, 1906. *Denied.*

METROPOLITAN LIFE INSURANCE COMPANY, *Petitioner*, *v.* CAMILLA B. TALBOTT, Administratrix, etc. [No. 700.]

(See S. C. Reporter's ed. 619.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 142 Fed. 694.

Mr. Maurice E. Locke for petitioner.

No opposition.

May 14, 1906. *Denied.*

ALBERT H. BROWN *et al.*, *Petitioners*, *v.* UNITED STATES. [No. 716.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 143 Fed. 60.

Mr. W. F. Riggs for petitioners.

The Attorney General and the *Solicitor General* for respondent.

May 14, 1906. *Denied.*

CHARLES M. NEWTON, Receiver, etc., *et al.*, *Petitioners*, *v.* CHOCTAW & MEMPHIS RAILROAD COMPANY *et al.* [No. 723.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 Fed. 225.

Messrs. U. M. Rose, John McClure, G. B. Rose, and *W. E. Hemingway* for petitioners.

Messrs. W. F. Evans, John M. Moore, and *M. A. Low*, for respondents.

May 14, 1906. *Denied.*

LOUIS A. CELLA *et al.*, *Petitioners*, *v.* JAMES BROWN *et al.* [No. 725.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 144 Fed. 742.

Messrs. Henry W. Bond and *Wm. C. Marshall* for petitioners.

No opposition.

May 14, 1906. *Denied.*

MRS. MARY JONES, *Petitioner*, *v.* SOUTHERN PACIFIC COMPANY. [No. 726.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 144 Fed. 973.

Messrs. E. Howard McCaleb and *E. Howard McCaleb, Jr.*, for petitioner.

No opposition.

May 14, 1906. *Denied.*

CHENIERE LAND & LUMBER COMPANY, *Petitioner*, *v.* SUGAR BROTHERS COMPANY, LIMITED, *et al.* [No. 728.]

(See S. C. Reporter's ed. 620.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Allan Sholars for petitioner.

No opposition.

May 14, 1906. *Denied.*

WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, *Petitioner*, *v.* MORGAN CITY IMPROVEMENT COMPANY, LIMITED. [No. 733.]

(See S. C. Reporter's ed. 621.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Lamar C. Quintero for petitioner.

No opposition.

May 14, 1906. *Denied.*

HENRY B. F. MACFARLAND *et al.*, etc., *Petitioners, v.* LE ROY D. WALTER *et al.* [No. 727.]

(See S. C. Reporter's ed. 621.)

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 27 App. D. C. 182; on rehearing, 27 App. D. C. 187.

Mr. Edward H. Thomas for petitioners.

No opposition.

May 21, 1906. *Denied.*

HENRY P. DODGE *et al., Petitioners, v.* WOODVILLE WHITE LIME COMPANY. [No. 736.]

(See S. C. Reporter's ed. 621.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Wm. W. Dodge for petitioners.

No opposition.

May 21, 1906. *Denied.*

GREAT WESTERN NATURAL GAS & OIL COMPANY *et al., Petitioners, v.* LEO OPPENHEIMER, Receiver, etc. [No. 740.]

(See S. C. Reporter's ed. 621.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 139 Fed. 546.

Mr. Wm. H. Button for petitioners.

Mr. Abram I. Elkus for respondent.

May 21, 1906. *Denied.*

WILLIAM A. FORCE, *Petitioner, v.* SAWYER-BOSS MANUFACTURING COMPANY *et al.* [No. 742.]

(See S. C. Reporter's ed. 621.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 143 Fed. 894.

Messrs. Wm. E. Warland and *Henry Schreiter* for petitioner.

Mr. H. Albertus West for respondents.

May 21, 1906. *Denied.*

ERIE RAILROAD COMPANY, Claimant, etc., *Petitioner, v.* PENNSYLVANIA RAILROAD COMPANY *et al.* [No. 749.]

(See S. C. Reporter's ed. 622.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Herbert Green for petitioner.

Messrs. Chas. S. Haight and *Henry Galbraith Ward* for respondents.

May 21, 1906. *Denied.*

MARY V. CORTELYOU *et al., Petitioners, v.* CHARLES ENEU JOHNSON & Co. [No. 750.]

(See S. C. Reporter's ed. 622.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Edmund Wetmore for petitioners.

Mr. Francis T. Chambers for respondents.

May 21, 1906. *Granted.*

GEORGE DESLIONS *et al., Petitioners, v.* LA COMPAGNIE GENERALE TRANSATLANTIQUE, ETC. [No. 751.]

(See S. C. Reporter's ed. 622.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Robert D. Benedict, A. Gordon Murray, and *Joseph H. Choate* for petitioners.

Mr. Edward K. Jones for respondent.

May 21, 1906. *Granted.*

DENE STEAMSHIPPING COMPANY, LIMITED, *Petitioner, v.* TWEEDIE TRADING COMPANY. [No. 752.]

(See S. C. Reporter's ed. 622.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 143 Fed. 854.

Messrs. J. Parker Kirlin and *Chas. R. Hickox* for petitioner.

Mr. Chas S. Haight for respondent.

May 21, 1906. *Denied.*

IRONCLAD MANUFACTURING COMPANY, *Petitioner, v.* ORANGE COUNTY MILK ASSOCIATION [No. 753]; IRONCLAD MANUFACTURING COMPANY, *Petitioner, v.* DAIRYMEN'S MANUFACTURING COMPANY [No. 754].

(See S. C. Reporter's ed. 623.)

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 143 Fed. 512.

Mr. Andrew Foulds, Jr., for petitioner.

Messrs. Henry D. Williams and *Richard L. Sweezy* for respondents.

May 21, 1906. *Denied.*

MARCUS K. BITTERMAN *et al., Petitioners, v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. [No. 755.]

(See S. C. Reporter's ed. 623.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Louis Marshall, H. L. Lazarus, and *M. Rosenthal* for petitioners.

Messrs. George Denegre and *Joseph Paxton Blair* for respondent

May 21, 1906. *Granted.*

WILLIAM T. WAGGONER *et al., Petitioners, v.* BANK OF AMERICA *et al.* [No. 606.]

(See S. C. Reporter's ed. 623.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 143 Fed. 53.

Mr. W. O. Davis for petitioners.

Mr. Ben M. Terrell for respondents.

May 28, 1906. *Denied.*

DRAKE & STRATTON COMPANY, LIMITED, *Plaintiff in Error, v.* JOHN MANWARING. [No. 231.]

(See S. C. Reporter's ed. 624.)

In Error to the Supreme Court of the State of Minnesota.

See same case below, 93 Minn. 497, 102 N. W. 1134.

Mr. Thomas J. Davis for plaintiff in error.

Mr. Roger S. Powell for defendant in error.

April 18, 1906. *Dismissed,* per stipulation.

MARY JOSEPHINE SCANNELL *et al., Plaintiffs in Error, v.* COTE BLANCHE COMPANY *et al.* [No. 243.]

(See S. C. Reporter's ed. 624.)

In Error to the Supreme Court of the State of Louisiana.

See same case below, 114 La. 385, 38 So. 279.

Mr. Branch K. Miller for plaintiffs in error.

Messrs. Alex. Porter Morse, M. J. Foster, and *C. R. Beattie* for defendants in error.

April 18, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

OZAN LUMBER CO., *Petitioner, v.* UNION COUNTY NATIONAL BANK. [No. 761.]

(See S. C. Reporter's ed. 623.)

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. U. M. Rose and *T. C. McRae* for petitioner.

Mr. Morris M. Cohn for respondent.

May 28, 1906. *Granted.*

GEORGETOWN & TENNALLYTOWN RAILWAY COMPANY OF THE DISTRICT OF COLUMBIA, *Plaintiff in Error, v.* ELIZABETH B. SMITH, Administratrix, etc. [No. 257.]

(See S. C. Reporter's ed. 624.)

In Error to the Court of Appeals of the District of Columbia.

See same case below, 25 App. D. C. 259.

Mr. J. J. Darlington for plaintiff in error.

No appearance for defendant in error.

April 23, 1906. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

FRANCISCO RIVERA alias PANCHETO, *Appellant, v.* JOSÉ URBUTIA, Warden, etc. [No. 768.]

(See S. C. Reporter's ed. 624.)

Appeal from the Supreme Court of Porto Rico.

The Attorney General and the *Solicitor General* for appellee.

May 28, 1906. Docketed and *dismissed* with costs, on motion of *Mr. Solicitor General Hoyt* for the appellee.

WABASH RAILROAD COMPANY, *Plaintiff in Error, v.* JAMES HENDRIX [No. 94.]

WABASH RAILROAD COMPANY, *Plaintiff in Error, v.* S. M. RICE. [No. 95.]

In Error to the St. Louis Court of Appeals, State of Missouri.

Mr. W. H. Blodgett for plaintiff in error.

No appearance for defendants in error.

October 10, 1905. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

BAINBRIDGE W. BURDICK, *Petitioner, v.* WILLIAM DILLON *et al.* [No. 647.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Selden Bacon for petitioner.

Mr. Henry V. Cunningham in opposition.

April 30, 1906. *Denied.*

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ORDER.

Ordered: That general order in bankruptcy No. 35 be amended by adding the following sentence to subdivision 4: He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

December, 11, 1905.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ORDER.

It is ordered by the court that paragraph 4 of rule 9 be, and the same is hereby, amended so as to read as follows: 4. In all cases where the period of thirty days is mentioned in rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, and to one hundred and twenty days from the Philippine Islands.

January 29, 1906.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ORDER.

The Reporter having represented that owing to the number of decisions at the present term it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year pursuant to section 681 of the Revised Statutes.

March 5, 1906.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided and all the other business of the term not disposed of be, and the same are hereby, continued until the next term.

May 28, 1906.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ORDER.

It is ordered that the following correspondence be spread upon the record:

Supreme Court of the United States,
May 28, 1906.

Dear Brother Brown:—

We cannot allow your active participation in the work of the court to terminate with the adjournment of to-day without the expression of our sincere regret.

You came here with high reputation, justly deserved by a distinguished career of many years as a district judge of the United States, to which you have added in the fruits of over fifteen years of eminent judicial labors in this place.

Of those who were on this bench when you took your seat, Bradley, and Lamar, and Blatchford, and Field, and Gray have passed on, and you have witnessed the coming and the going of Shiras and Jackson, one of whom happily survives.

In a certain sense, what shadows we are, and what shadows we pursue, but not in every sense; for what has been worthily accomplished will still live, and the memory of the just judge will not perish.

We assure you that those of us who have been longest with you, as well as those of a briefer association, alike concur in that affectionate regard and that deep respect which your amiable disposition and the great assistance in the administration of justice which your experience, learning, and ability have enabled you to render, have inspired.

We hope that the light which has come to pass at the evening-time of a well-spent life may long shine upon you, and that our fraternal intercourse may be continued for many years.

Very cordially yours,
Melville W. Fuller,
John M. Harlan,
David J. Brewer,
E. D. White,
R. W. Peckham,
Joseph McKenna,
Oliver Wendall Holmes,
William R. Day.

Supreme Court of the United States,
Washington, D. C., May 28, 1906.

My Dear Brethren:—

I thank you for your graceful and generous expressions of esteem. One of the most delightful experiences of my life has been the cultivation of the friendly companionships of the last fifteen years, which I would gladly continue, were it not that impaired eyesight and the inertia which comes with three score and ten admonish me that my duty to the country, to you, and to myself demands a relinquishment of the burden I have borne for thirty-one years, half of which have been spent in your company. While my resignation necessitates a severance of our official relations, I hope these relations may continue socially so long as our lives are spared to us.

I rejoice that I am leaving the court at a time when it has never stood higher in the estimation of the people, nor when more important cases have been, and still are being, presented for its consideration. The antagonisms, sometimes almost fierce, which were developed during the earliest decades of its history, and at one time threatened to impair its usefulness, are happily forgotten; and the now universal acquiescence in its decisions, though sometimes reached by a bare majority of its members, is a magnificent tribute to that respect for the law inherent in the Anglo-Saxon race, and contains within itself the strongest assurance of the stability of our institutions. The services rendered by the Supreme Court in this connection have been of incalculable value.

Again thanking you for your kindly interest in my welfare, I remain, with profound respect,

Most sincerely yours,
Henry B. Brown.

APPENDIX VI.

Supreme Court of the United States.

ORDER.

Chief Justice's Chambers.

By reason of a vacancy occurring on the final adjournment of the October Term, A. D. 1905, a new allotment having become necessary in vacation:

It is Ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice;
For the Second Circuit, Rufus W. Peckham, Associate Justice;
For the Third Circuit, Edward D. White, Associate Justice;
For the Fourth Circuit, Melville W. Fuller, Chief Justice;
For the Fifth Circuit, Edward D. White, Associate Justice;
For the Sixth Circuit, John M. Harlan, Associate Justice;
For the Seventh Circuit, William R. Day, Associate Justice;
For the Eighth Circuit, David J. Brewer, Associate Justice;
For the Ninth Circuit, Joseph McKenna, Associate Justice.

Melville W. Fuller,
Chief Justice.

May 29, 1906.

Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room

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